

Appendix I

API Legal Concerns with EPA Proposed Rule: Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, and Response to the Remand of the 2016 Standards; Supplemental Notice of Proposed Rulemaking. 84 FR 57677 (October 28, 2019)
EPA-HQ-OAR-2019-0136

I. Legal Argument Overview

The Supplemental Proposal would radically change EPA’s approach to setting annual Renewable Volume Obligations (“RVOs”) under the Renewable Fuel Standard (“RFS”) program, by reallocating the obligations of exempt small refineries to other obligated parties. This drastic shift in course would be both contrary to the statute and arbitrary and capricious.

First, the Clean Air Act (“CAA”) does not permit reallocation. The Act directs EPA to establish a single volume percentage standard, and authorizes only a single adjustment to that standard relative to small refinery exemptions: a *reduction* “to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt.”¹ The statute also contains several other provisions addressing small refineries, allowing them to generate credits in certain circumstances and providing that small refineries that waive their exemption are to be assigned RVOs. These provisions make clear that Congress knew how to grant EPA authority to alter the RVOs, and how to allow for changes in the program in light of small refinery exemptions, but nevertheless declined to grant EPA authority to reallocate small refinery exempt volumes.

Second, EPA has long interpreted the statute as prohibiting reallocation. An EPA about-face would be arbitrary and capricious because EPA’s explanation for its change in course is threadbare and factually inaccurate. EPA argues that, for the first time, small refinery exempt volumes constitute a significant portion of the transportation fuel supply. But in 2011 and 2012, EPA extended small refinery exemptions to 24 small refineries, a number not exceeded until 2017,

¹ 42 U.S.C. § 7545(o)(3)(B)(ii)(II), (3)(C).

yet repeatedly confirmed that reallocation was not necessary or appropriate. EPA had also granted many small refinery exemptions when it declined to change course in setting the RVOs for 2018. EPA does not attempt to distinguish these situations in its proposal, nor does it provide any other adequate rationale for a change in course.

Third, reallocation is arbitrary and capricious because it is based on an unstable and unpredictable EPA policy regarding small refinery exemptions. EPA proposes to reallocate volumes in *future* years based on how it believes its *current* small refinery exemption policy would have applied in *past* years. Perhaps such an approach might be defensible if EPA's small refinery exemption policy remained consistent through the years. But it has been subject to wild swings in recent years. EPA granted only 7 exemptions covering 290 million Renewable Identification Numbers ("RINs") in 2015, expanded dramatically to 35 exemptions covering 1,820 million RINs in 2017, then declined to 31 exemptions covering 1,430 million RINs in 2018. While the full basis for these shifts has not been made public, EPA has publicly acknowledged multiple changed legal interpretations. To make matters worse, none of these reversals are found in binding regulations, but instead appear in ad-hoc, one-off decisions issued by EPA (again, without notice and comment or any other form of public participation). EPA's shifting and unstable small refinery exemption policy makes any attempt to project small refinery exempt volumes in future years speculative and unreliable.

Fourth, reallocation would violate basic principles of due process, as well as the Clean Air Act and the Administrative Procedure Act ("APA"). EPA issues its small refinery exemption decisions without providing third parties *any* notice or opportunity to participate. Indeed, EPA does not publicly release its exemption decisions or rationales, but instead simply reports the aggregate number of small refineries that receive exemptions and their associated volumes.

Increasing non-exempt parties' RFS obligations based on secret proceedings in which they have no opportunity to participate violates procedural due process, and provisions of the CAA and APA requiring transparency in agency decision making. As the D.C. Circuit recently put it, EPA's small refinery exemptions "paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review."² Reallocating small refinery obligations would only compound the problem.

Fifth, reallocation is arbitrary and capricious because it would result in exceedance of the "blendwall," an issue the Supplemental Proposal ignores. Because most infrastructure and vehicles cannot handle gasoline containing more than 10% ethanol, there are major constraints on the ability of the market to exceed a 10% ethanol mandate. EPA's Supplemental Proposal, however, would result in a substantial exceedance of the blendwall, by imposing a total renewable fuel obligation of 11.46%, marking the first time that the 11% threshold would be exceeded. Yet EPA does not even *mention* the blendwall in the Supplemental Proposal, much less explain why this increase would be practicable. That approach is, by definition, arbitrary and capricious.

Sixth, EPA has failed to consider the relevant statutory factors for biomass-based diesel. The RFS establishes detailed factors EPA is required to consider in setting annual biomass-based diesel standards.³ EPA failed to evaluate these factors in the context of the Supplemental Proposal, and so may not reallocate any biomass-based diesel volumes.

Seventh, the Supplemental Proposal demonstrates that the underlying legal flaw is EPA's drastic and unlawful expansion of small refinery exemptions. The purported need to reallocate small refinery exempt volumes is the direct result of EPA's decision to massively increase the

² *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, Slip. Op. at 5 (D.C. Cir. Nov. 12, 2019).

³ 42 U.S.C. § 7545(o)(2)(B)(ii).

number of small refinery exemptions. That increase, however, is contrary to the statute, which authorizes only a limited and temporary *extension* of a pre-existing exemption, not a reinstatement of an exemption.⁴ The increase is also arbitrary and capricious because EPA has repeatedly found that obligated parties, including small refineries, generally are able to pass through RIN costs to consumers. As a result, the RFS program should have *no* economic impact on most small refineries, much less inflict a “disproportionate economic *hardship*” on over 30 small refineries. In the handful of recent small refinery exemption decisions EPA has made public, the agency has failed even to acknowledge that RIN costs generally are passed through. Accordingly, rather than reallocate small-refinery exempt volumes, EPA should limit its small refinery exemptions to those actually authorized by the statute and supported by the administrative record.

⁴ 42 U.S.C. § 7545(o)(9)(B).

II. The Statute Does Not Permit Reallocation.

The Clean Air Act (“CAA”) requires EPA to establish a single “volume percentage” renewable fuel standard each year.⁵ Congress was well-aware of how to give EPA authority to alter this percentage or otherwise adjust the program to account for small refineries, as shown by several other statutory provisions. But none of those other provisions grants EPA authority to reallocate small refinery exempt volumes to other obligated parties. The Supplemental Proposal therefore exceeds EPA’s statutory authority.

First, the CAA requires EPA to make adjustments to its RVO calculation “to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt.”⁶ Congress easily could have drafted this provision to provide authority for EPA to account for the use of *nonrenewable* fuel by exempt small refineries, but did not do so.

Second, the CAA provides that EPA’s credit program is to account for the “*generation* of credits by small refineries in accordance with paragraph 9(C).”⁷ Congress could have provided that the credit program account for other aspects of the exemption of small refineries under paragraph 9, but did not do so.

⁵ 42 U.S.C. § 7545(o)(3)(B)(ii)(II).

⁶ 42 U.S.C. § 7545(o)(3)(C). While the statute uses the plural term “adjustments,” the only adjustment specific to small refineries relates to accounting for their use of renewable fuel. Moreover, the statutory provision providing that RVOs are to “be applicable to refineries, blenders, and importers, as appropriate” does not imply any authority allowing EPA to alter the RVO for small refineries. *Id.* § 7545(o)(3)(B)(ii)(I). That provision would have specifically referred to “small refineries” had that been Congress’s intent, as evidenced by the repeated use of the term “small refinery” throughout the statute where adjustments specific to small refineries are contemplated.

⁷ 42 U.S.C. § 7545(o)(5)(A)(iii) (emphasis added).

Third, the statute provides that small refineries that waive their exemption are to be assigned an RVO, but contains no similar provision altering the RVOs if a refinery receives an exemption.⁸

In short, Congress was well aware of the fact that small refineries might change their exemption status or otherwise affect the program, but gave EPA only limited authority to adjust the program in response to those exemptions. Congress knew how to authorize EPA to alter the RVO to account for the use of fuel by small refineries in past years, as evidenced by the fact it requires adjustments to account for the use of *renewable* fuel by exempt small refineries. But Congress did not grant EPA authority to reallocate small-refinery exempt volumes to other obligated parties, an omission that is dispositive in light of the other small refinery adjustment provisions described above.

EPA's consistent understanding of the statute over nearly a decade confirms this interpretation. EPA has long maintained that the statute does not permit reallocation of small refinery exempt volumes, other than for exemptions already granted at the time of the RVOs. *Infra* Part III. As EPA said just last year in rejecting any reallocation: “[w]e determined our legal, technical, and policy approach to these issues many years ago, and have simply applied our longstanding regulations and policies in this action. We also note that we have addressed and rejected many of the commenters’ concerns in prior rulemakings.”⁹ As is explained below, EPA’s previous interpretation was correct, and it is arbitrary and capricious for EPA to reverse course now.

⁸ 42 U.S.C. § 7545(o)(9)(D).

⁹ EPA, RFS 2019 Response to Comments at 183-84, EPA-420-R-18-019 (Nov. 2018).

The sole snippet of statutory text EPA points to in support of its proposed new interpretation is a provision that EPA should “ensure” that the statutory renewable-fuel volumes are met.¹⁰ But both the courts and EPA previously have rejected this precise argument, and EPA fails even to mention these past decisions. Most notably, the D.C. Circuit has rejected reliance on the term “ensure,” explaining that “Congress, however, did not pursue its purposes of increased renewable fuel generation at all costs. It included waiver provisions that allow EPA to lessen the Renewable Fuel Program’s requirements in specified circumstances.”¹¹ Small refinery exemptions are one such waiver provision.

Likewise, EPA does not grapple with its own prior interpretation of “ensure” on this very topic, set forth in its RFS 2012 rule. There, EPA rejected a similar argument and explained: “we are not required to ensure that the biofuel volumes in the statute are precisely met. We are required to use the specified volumes to set the percentage standards, but there are no provisions for ensuring that the percentage standards actually result in the specified volumes actually being consumed.”¹²

In sum, the statutory text, EPA’s own past interpretations, and pertinent judicial precedent all point to the same conclusion: the statute prohibits EPA from reallocating small refinery exempt volumes.

III. An EPA Reversal of Course on Reallocation Would Be Arbitrary and Capricious.

As noted above, EPA has, since 2010, interpreted the CAA as not allowing the annual RVOs to be adjusted based on anticipated or projected small refinery exemptions that have not

¹⁰ 84 Fed. Reg. 57,677, 57,680 (Oct. 28, 2019).

¹¹ *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 714 (D.C. Cir. 2017) (cleaned up).

¹² 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012).

actually be granted as of the date of the final rule setting the annual RVO. EPA’s reversal on this record is inadequately justified, and so violates the requirements that “the new policy must be permissible under the statute, and the agency must acknowledge it is changing its policy and show that ‘there are good reasons’ for the new policy.”¹³ Moreover, such an abrupt shift would in this context—where the agency has reaffirmed its existing approach at least six times, spanning almost the entire duration of the RFS program—upset settled reliance interests and contradict previous EPA findings, making it unlawful for those reasons as well.¹⁴ While EPA acknowledges that it would be changing course, it does not provide a sufficient explanation for doing so on this record and in light of the RFS program’s history on this issue.¹⁵

EPA’s previous position on the reallocation issue has been clear and consistent for nearly a decade: the statute does not allow reallocation, and reallocation is inappropriate and unworkable. In 2010, when this issue was first raised, EPA explained that it would determine RVOs based only on small refinery exemptions in effect at the time of the final rule, rather than speculating about action on pending or future small refinery exemption petitions.¹⁶ In 2011, EPA reiterated this interpretation, explaining that revisions to reflect small refinery waivers “would be inconsistent with the statutory text.”¹⁷ In 2012, EPA rejected comments arguing that small-refinery volumes should be reallocated, explaining that “we are not required to ensure that the biofuel volumes in the statute are precisely met. We are required to use the specified volumes to set the percentage

¹³ *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 19, 28 (D.C. Cir. 2019); *see also Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (an agency reversing course must “provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”).

¹⁴ *Id.* at 28.

¹⁵ *Id.*

¹⁶ 75 Fed. Reg. 76,970, 76,805 (Dec. 9, 2010); *see also* 76 Fed. Reg. 38,884, 38,859 (July 1, 2011).

¹⁷ 75 Fed. Reg. at 76,804.

standards, but there are no provisions for ensuring that the percentage standards actually result in the specified volumes actually being consumed.”¹⁸ EPA took comment on this specific issue in the 2013 RFS rulemaking, and decided to maintain the existing approach.¹⁹ EPA re-confirmed this approach in its RFS 2018 rulemaking, explaining that “the current approach for accounting for small refinery hardship exemptions is appropriate.”²⁰ Finally, just last year, EPA confirmed this approach for the sixth time, explaining that it determined its approach to this issue many years ago, and had “addressed and rejected” commenters’ counterarguments in previous rulemakings.²¹

EPA has also defended this position in litigation, explaining that it would be unduly difficult and impracticable to attempt to predict future waivers, “making this task [*i.e.*, reallocation] nigh impossible. And of course, if EPA gets this task wrong, it could end up setting compliance standards that are unachievable for obligated parties.”²²

EPA summarily dismisses its longstanding past analysis of this issue, proffering a handful of rationales that do not withstand scrutiny. EPA’s cursory analysis does not demonstrate that “there are good reasons for the new policy” or that a change in course is justified.²³

EPA provides only one underlying reason for its change in course: that exempt “volumes are projected to constitute a significant portion of the total volume of obligated fuel This has

¹⁸ 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012).

¹⁹ 78 Fed. Reg. 9,282, 9,303 (Feb. 7, 2013); 78 Fed. Reg. 49,794, 49,826 (Aug. 15, 2013).

²⁰ EPA, RFS 2018 Response to Comments at 216, EPA-420-R-17-007 (Dec. 2017).

²¹ EPA, RFS 2019 Response to Comments at 183-84, EPA-420-R-18-019 (Nov. 2018).

²² EPA Br., *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258, Doc. 1757157 (D.C. Cir. filed Oct. 25, 2018).

²³ *Nat’l Lifeline Ass’n*, 915 F.3d at 25.

occurred in recent years but did not occur in the first years of the program when we first established the regulatory definitions and interpretations.”²⁴

That statement is factually inaccurate. In 2011 and 2012, EPA extended exemptions for 24 small refineries, a number that was not exceeded until the 2017 compliance year.²⁵ Nevertheless, as noted above, EPA in its annual rulemakings for both compliance years reiterated its position that it should not attempt to make adjustments for future potential small refinery-exempt volumes. EPA does not explain why there is a meaningful difference between 24 small refinery exemptions and 31 small refinery exemptions for purposes of evaluating its longstanding reallocation policy.

Likewise, when EPA discussed this issue in its December 2017 Response to Comments Document, EPA had already granted 19 small refinery exemptions for the 2016 compliance year, and may have already decided on its approach to the 2017 compliance year. Yet EPA again declined to change its position. In short, EPA’s reliance on the change in volumes as a basis to revisit its reallocation position is arbitrary and capricious.

EPA also offers a few passing sentences explaining why its shift in policy is workable, despite its repeated past determinations that reallocation would require an inappropriate degree of speculation.

First, EPA notes that the statute requires various projections.²⁶ This is true with respect to some aspects of the RFS program, but nothing in the statute suggests that any projections are

²⁴ 84 Fed. Reg. at 57,680.

²⁵ EPA has not made publicly available the volumes for those 24 refineries in 2011 and 2012; that information became publicly available beginning for compliance year 2013. *See* <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (noting that “[f]or 2011 and 2012, 24 small refineries were granted an exemption under this provision,” but not providing volumes).

²⁶ 84 Fed. Reg. 57,682.

required or appropriate with respect to small refinery exemptions. Moreover, as noted the statute expressly addresses various adjustments to the RFS program based on small refinery exemptions, but does *not* contain any adjustment for granted exemptions.

Second, EPA asserts that because it is projecting “*aggregate* exempted volume in 2020,” it “need not wrestle with the difficulties of predicting precisely which refineries will apply” for or receive an exemption, but “only need[s] to estimate the total exempted volume.”²⁷ EPA does not explain why this was not just as true in past compliance years. Moreover, EPA ignores that the aggregate exempted volume is merely the sum of individual exemptions. EPA does not explain how predicting aggregate volumes is feasible, particularly in light of the difficulties it continues to concede would apply to predicting individual exemptions. In any event, predicting even aggregate exempt volumes is clearly not feasible. *See infra* Part IV.

Third, EPA claims that it can always adjust the standards if its small refinery projections do not pan out. That approach, however, is inconsistent with the statute, which requires annual standards to be set in the *preceding* year (i.e., for 2020, the day after the comment period on the Supplemental Proposal closes).²⁸ Moreover, this failing is exacerbated by the fact that EPA often does not act on small refinery exemption petitions until well after the end of a compliance year. For example, EPA did not act on the 2018 small refinery exemption petitions until August 2019. A scheme which is likely to require adjustments in light of changes in small refinery exemption policy, and where those adjustments won’t be made until after the close of the compliance year, conflicts with the statute, is arbitrary and capricious, and simply unworkable as a practical matter

²⁷ 84 Fed. Reg. at 57,682.

²⁸ 42 U.S.C. § 7545(o)(3)(B)(i).

for obligated parties. *See also infra* Part IV.C (explaining why adjustment in this fashion is problematic).

Fourth and finally, EPA vaguely asserts that it has “the benefit of additional experience administering the RFS program, knowledge of relatively high levels of exempted volumes in prior years, and a proposed approach for how we intend to adjudicate 2020 small refinery exemption petitions.”²⁹ None of these amounts to an adequate rationale. The generic reference to program experience is a makeweight. EPA does not explain why recent higher levels of exempted volumes may be used to predict future levels, particularly given the recent year-to-year fluctuations. And the “proposed approach” appears to refer only to the non-binding intent of the agency to grant partial (rather than full) small refineries where appropriate, which even on its own terms is only a portion of the small refinery exemption analysis. As is explained below, EPA’s small refinery approach has fluctuated so wildly in recent years that it is arbitrary and capricious for EPA to presume it can project volumes with any reasonable accuracy. *See infra*, Part IV.

In sum, EPA has not adequately justified its proposed change in course.

IV. Reallocation Is Arbitrary and Capricious Because It Is Based on an Unstable and Unpredictable Small Refinery Exemption Policy.

EPA’s proposed reallocation based on historic small refinery exempt volumes is unworkable because EPA has not taken a consistent approach to small refinery exemptions, such that past years’ exemptions provide a reasonable predictor of future exemptions. Instead, EPA’s policy has fluctuated wildly over the past several years, with EPA changing and reversing several key legal interpretations relating to small refinery exemptions. To make matters worse, those reversals have come in the form of informal, ad-hoc decisions in which third parties had no

²⁹ 84 Fed. Reg. at 57,682.

opportunity to participate. Moreover, EPA’s own proposal provides no reassurance that EPA will not yet again radically alter its small refinery exemption policy. In light of this unstable and shifting policy, it would be arbitrary and capricious for EPA to base future reallocations on past small refinery exemptions, or to use any other method to reallocate future volumes.

A. EPA’s Small Refinery Policy Is Unstable and Unpredictable, as Evidenced by Drastic Fluctuations in Its Exemption Decisions and Publicly-Available Changed Interpretations.

As an initial matter, EPA’s own small refinery exemption information reflects a massive shift in such exemptions in recent years:

Table 1: Exempted Volume of Gasoline and Diesel Each Compliance Year*

Compliance Year	Estimated Volumes of Gasoline and Diesel Exempted (million gallons)	Estimated Renewable Volume Obligations (RVO) Exempted (million RINs)
2013	1,980	190
2014	2,300	210
2015	3,070	290
2016	7,840	790
2017	17,050	1,820
2018	13,420	1,430

Table 2: Summary of Small Refinery Exemption Decisions Each Compliance Year

Compliance Year	Number of Petitions Received	Number of Grants Issued	Number of Denials Issued	N
2013	16	8	7	
2014	13	8	5	
2015	14	7	6	
2016	20	19	1	
2017	37	35	1	
2018	42	31	6	30

³⁰ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>

The numbers make clear there was an abrupt upward shift between 2015 and 2017, followed by a significant downturn in 2018.

While it is impossible to identify all of the reasons for these changes due to EPA's secretive handling of small refinery exemption petitions, publicly-available information indicates that EPA has reversed course on some few key issues.

First, EPA's own *proposal* reflects a reversal in course. EPA admits that "in prior years, EPA has taken different approaches in evaluating petitions."³¹ As one example, EPA notes that it issued in August 2019 a decision holding that the statute authorizes only full, not partial, waivers. EPA then, in its Supplemental Proposal issued less than three months later, stated the agency's intent to "depart from the interpretation taken in the August 9 Memorandum Decision" by interpreting the statute as allowing for partial small refinery exemptions.³² That EPA is reversing a policy it announced only a few months ago demonstrates the unstable and unpredictable nature of its small refinery exemption regime.

Second, EPA has apparently reversed course on whether it may issue an "extension" of a small refinery exemption to a small refinery that has not maintained its exemption in recent years. As EPA has explained: "[a]lthough EPA previously 'regarded as eligible for the hardship relief only those refineries that received the initial statutory exemption' under § 7545(o)(9)(A)(i), EPA has changed its view."³³ More recently, EPA stated in litigation that it "explained its changed interpretation of 42 U.S.C. § 7545(o)(9)(B)(i) in a small refinery exemption decision document

³¹ 84 Fed. Reg. at 57,681.

³² 84 Fed. Reg. at 57,681.

³³ EPA Br., *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, Doc. 1785554, at 50 (D.C. Cir. filed May 1, 2019).

that is not before the Court, is being treated as confidential business information, and thus cannot be disclosed in this case.”³⁴

Third, EPA has taken the position that it has broad discretion to apply differing methodology to different small refinery exemption petitions, and is not bound by any particular methodology: “An EPA decision to grant or deny a small refinery petition applies only to that small refinery. EPA may apply the same methodology underlying its decision to evaluate other small refinery petitions. But it is not required to.”³⁵

EPA’s Supplemental Proposal does nothing to bring an end to these repeated shifts in small refinery exemption policy, and fails even to acknowledge some of these shifts. Most notably, nothing in EPA’s Supplemental Proposal rule binds the agency to an approach in issuing future small refinery exemptions. The regulatory text would simply amend the RVO formula to require EPA to include the total amount of diesel and gasoline “projected to be exempt” in the relevant calendar year.³⁶ Nothing requires EPA to use a specific method or approach for determining that projection. To the contrary, EPA admits its own approach might change. The Supplemental Proposal notes that if “for any reason we anticipate a different approach to evaluating SRE petitions by the time of the final rule, we may also consider adjusting our methodology[.]” demonstrating the unstable and unpredictable nature of EPA’s small refinery exemptions.³⁷

EPA’s proposal thus deprives obligated parties of the certainty that they need to make year-to-year determinations about how to comply with the RFS—certainty the statute’s lead-time

³⁴ EPA Br., *Renewable Fuels Ass’n v. EPA*, No. 18-9533, Doc. 010110245381, at 4 (10th Cir. filed Oct. 15, 2019).

³⁵ EPA Br., *Advanced Biofuels Ass’n v. EPA*, No. 18-1115, Doc. 1785554, at 25 (D.C. Cir. filed May 1, 2019).

³⁶ 84 Fed. Reg. at 57,684-85.

³⁷ 84 Fed. Reg. at 57,683.

provisions are designed to provide. Instead of having a predictable, fact-based RVO issued by November 30 in the year preceding the compliance year, EPA now proposes to subject obligated parties to lengthy uncertainty based on whatever methodology it chooses to use during (or after) the compliance year to adjudicate small refinery exemption petitions. That process is not contemplated by the statute and is arbitrary and capricious.

EPA received interagency comments on this specific issue, underscoring the concern: “EPA justifies using a counter-factual level of granted waivers as a basis for the future projection in 2020, but does not deal with the much bigger question about the changes in policy that justify deviating from a strict three-year average. Future policymakers, faced with other challenges, have the discretion to again change the policy for granting waivers (without public notice or comment).”³⁸ EPA’s response simply stated the agency’s “intention” regarding future small refinery exemption petitions, without addressing the underlying issue (other than to claim it could reconsider its percentage standards, an issue discussed below).

B. EPA Has Abused Its Discretion By Developing Its Small Refinery Exemption Policy Via Adjudications and Relying on Those Policies in this Rulemaking.

EPA’s Supplemental Proposal is invalid for another related reason: while agencies generally have discretion to proceed by adjudication rather than rulemaking in setting policy, the courts recognize that “there may be situations where the [agency’s] reliance on adjudication would amount to an abuse of discretion.”³⁹ EPA’s reliance on secret adjudications to drastically shift small refinery exemption policy in a manner that will now directly translate to increased RVOs for obligated parties is one such situation.⁴⁰ Moreover, as explained above, the fact that EPA’s small

³⁸ EPA to OMB Email, EPA-HQ-OAR-2019-0136-0351 (Oct. 11, 2019).

³⁹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

⁴⁰ See *First Bancorporation v. Bd. of Governors*, 728 F.2d 434, 438 (10th Cir. 1984) (“[T]he Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order.”).

refinery exemption interpretations and policies are not set forth in binding regulations, but rather unpublished, ad-hoc decisions, is one of the key reasons why EPA's policies have shifted so drastically. It is arbitrary and capricious for EPA to rely on those shifting, non-binding policies in this rulemaking.

C. EPA's Suggestion That It Can "Adjust" RVOs During or After the Compliance Year Exacerbates, Rather Than Cures, These Flaws.

EPA has suggested that it could adjust its methodology and percentage standards if its future approach to small refinery exemptions diverges from its latest speculation.⁴¹ EPA's reliance on any such adjustment authority as a potential safety-valve is contrary to the statute, arbitrary and capricious, and simply compounds the problem.

To begin with, the statute requires RVOs to be set by November 30 of the year before the compliance year, acknowledging that obligated parties require lead time to comply.⁴² Preemptively relying on after-the-fact adjustment authority is inconsistent with that statutory duty.

This difficulty is exacerbated by the fact that EPA often does not act on small refinery petitions until well after the end of a compliance year. For example, EPA did not act on the 2018 petitions until August 2019, long after the compliance year. Likewise, to date EPA has so far received only 10 small refinery exemption petitions for the 2019 compliance year, and has not yet ruled on a single one.

Instead of having predictable, fact-based RVOs issued by November 30 in the year preceding the compliance year, EPA now proposes to subject obligated parties to lengthy uncertainty based on whatever methodology it chooses to use during (or after) the compliance year to adjudicate small refinery exemption petitions.

⁴¹ EPA to OMB Email, EPA-HQ-OAR-2019-0136-0351 (Oct. 11, 2019); 84 Fed. Reg. at 57,683.

⁴² 42 U.S.C. § 7545(o)(3)(B)(i).

To be sure, there is authority holding that EPA has authority to “promulgate late renewable fuel requirements—and even apply those standards retroactively—so long as EPA reasonably considers and mitigates any hardship caused to obligated parties by reason of the lateness.”⁴³ But the situation in those cases, where EPA failed to promulgate RVOs *at all*, and later set the RVOs at the level of fuel actually used, bears no resemblance to EPA’s proposal here. EPA’s Supplemental Proposal would, by contrast, promulgate higher RVOs based on speculation about future small refinery exemptions, in preemptive reliance on future adjustment authority. It is one thing to recognize that an agency may have authority to act in situations in which a deadline has been missed; it is quite another for EPA to premise a new regulatory scheme on making future adjustments that would violate a statutory deadline.

V. Reallocation Violates Due Process, the Clean Air Act, and the Administrative Procedure Act Due to the Secret Nature of Small Refinery Exemption Decisions.

EPA’s proposed reallocation scheme would impose additional burdens on non-exempt obligated parties, predicated directly on EPA’s grant of small refinery exemptions, even though the burdened obligated parties have no opportunity to participate in small refinery exemption determinations. Granting small refinery exemptions without any opportunity for obligated parties to participate, and then imposing those obligations on those obligated parties, is fundamentally unfair and inequitable: *either* EPA must not reallocate those volumes, *or* it must allow obligated parties to participate in the small refinery exemption decisionmaking process. Proceeding otherwise would violate the requirements of procedural due process and provisions of the Clean Air Act and Administrative Procedure Act, and would be arbitrary and capricious.⁴⁴

⁴³ *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 718 (D.C. Cir. 2017).

⁴⁴ API agrees that EPA should not disclose confidential business information. That said, obligated parties could participate based on non-CBI information. For example, obligated parties could comment on legal issues raised during small refinery exemption proceedings. Obligated parties could also participate

As a threshold matter, it is clear that API's members have a constitutionally-protected property interest in not being unlawfully forced to acquire RINs, on pain of massive daily penalties if such RINs are not acquired.⁴⁵ EPA has agreed that "the costs of compliance and the monetary fines and damages associated with noncompliance qualify as protected property interests" under environmental statutes.⁴⁶

The Supplemental Proposal would base projected small refinery exemption volumes on historic grants of small refinery exemptions, which EPA views as a proxy for expected future small refinery exemption grants.⁴⁷ However, no third parties, including obligated parties who would bear the burden of EPA's proposed reallocation, had any notice or opportunity to participate in those proceedings. Nor will they have any notice or opportunity to participate in future small refinery exemption proceedings, which will presumably form the basis of EPA's projections in future compliance years.

Accordingly, the Supplemental Proposal would violate the Due Process Clause by imposing increased RVOs on API's members based on the results of proceedings they had no notice of or opportunity to participate in. EPA's action would violate "the fundamental requirement of due process . . . the opportunity to be heard at a meaningful time and in a meaningful

pursuant to a protective order that rigorously limits access to CBI, modeled on the protective orders courts have issued in litigation over small refinery exemptions. *See, e.g., Advanced Biofuels Ass'n v. EPA*, No. 18-1115, Doc. 1767622 (D.C. Cir. Jan. 9, 2019) (protective order limiting access to information and directing confidential business information to be filed under seal).

⁴⁵ *See* 40 C.F.R. § 80.1463.

⁴⁶ *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 118 (D.C. Cir. 2010).

⁴⁷ Because EPA's proposal relies on its previous small refinery exemption decisions, those decisions constitute part of the administrative record and must be made available to parties and the court in any litigation over the final rule, in order to evaluate whether those past decisions can reasonably be relied on in projecting future exempt volumes. *See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

manner.”⁴⁸ As the D.C. Circuit has explained, “secrecy” is “inconsistent[] . . . with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.”⁴⁹ Notably, the D.C. Circuit has recently commented on this very issue, observing that “EPA’s briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency’s actions without a viable avenue for judicial review.”⁵⁰

EPA would also violate its statutory obligations by relying on secret small refinery exemption decisions to reallocate volumes in its annual rules. The Clean Air Act requires EPA to include its factual, legal, and policy considerations as part of the rulemaking record.⁵¹ Yet none of EPA’s small refinery exemption decisions (other than the August 2019 memorandum, and three decisions released in response to a FOIA request) have been made available. While an agency may be able to “simply refer” to a result in other proceedings if the “reasoning remains applicable and adequately refutes the challenge,” that rule cannot apply where interested parties had no opportunity to participate in (or even know about the existence of) those proceedings.⁵² For example, interested parties ought to be allowed to argue that the previous small refinery exemption determinations rely on facts that are no longer true or legal interpretations that have since been abandoned, and thus do not form a basis for reasonably projecting exempt volumes in future compliance years. Such arguments cannot be made if all the exemption decisions are not part of the administrative record for the annual volumetric rulemaking.

⁴⁸ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted).

⁴⁹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977).

⁵⁰ *Advanced Biofuels Ass’n v. EPA*, No. 18-1115, Slip. Op. at 5 (D.C. Cir. Nov. 12, 2019).

⁵¹ 42 U.S.C. § 7607(d).

⁵² *Alon Ref. Krotz Springs, Inc. v. EPA*, 2019 WL 4123519, at *21 (D.C. Cir. Aug. 30, 2019).

EPA's Supplemental Proposal is also inconsistent with the provision of the APA requiring every agency to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."⁵³ If such opinions are *not* published, they may not be "relied on, used, or cited as precedent" unless the affected party "has actual and timely notice thereof."⁵⁴ EPA is plainly using and relying on its (and DOE's) past small refinery exemption opinions in setting the 2020 RVO in its Supplemental Proposal, in violation of this provision.

While the CAA does not contain a provision specifically authorizing obligated parties to participate in small refinery exemption proceedings, principles of due process, and other general provisions of the CAA and APA, provide such a right to participation in this context. Moreover, a provision of the APA applicable to informal adjudications confers a general right to interested third parties to "appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."⁵⁵ This provision is "universally understood to establish the right of an interested person to participate in an on-going agency proceeding."⁵⁶

The notion that interested parties may have participated in and objected to EPA's grants of small refinery exemptions, if they had been afforded an opportunity to do so, is not speculative. Lawsuits in the D.C. and Tenth Circuits challenge EPA's 2018 and 2017 small refinery exemption

⁵³ 5 U.S.C. § 552(a)(2)(A).

⁵⁴ 5 U.S.C. § 552(a)(2).

⁵⁵ 5 U.S.C. § 555(b).

⁵⁶ *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995).

grants.⁵⁷ Moreover, EPA’s practice of keeping secret the identities of the small refineries that received exemptions has itself impeded judicial review (amounting to an independent Due Process violation), because EPA Clean Air Act actions that are locally or regionally applicable are reviewable only in the relevant regional circuit, which is impossible to identify without knowing the geographic location of the exempt small refinery.⁵⁸ For example, the petitioners in Tenth Circuit litigation mentioned above were only able to bring a challenge because of public disclosures contained in Securities and Exchange Commission filings identifying a few small refineries that received exemptions.⁵⁹

VI. Reallocation Is Arbitrary & Capricious Because It Would Result in Exceedance of the Blendwall, an Issue EPA Entirely Ignores.

EPA’s Supplemental Proposal is also arbitrary and capricious because the agency fails to address the effects of reallocation on the “blendwall.”

Both the courts and EPA have recognized the existence of the “blendwall,” an “infrastructure and market-related constraint on ethanol demand” that “arises because most U.S. vehicle engines were not designed to handle gasoline consisting of more than 10 percent ethanol.”⁶⁰ EPA has determined that “there are real constraints on the ability of the market to

⁵⁷ *Advanced Biofuels Ass’n v. EPA*, No. 18-1115 (D.C. Cir.); *Renewable Fuels Ass’n v. EPA*, No. 18-9533 (10th Cir.).

⁵⁸ 42 U.S.C. § 7607(b). The three exemption decisions EPA recently released all state that the agency’s decision is reviewable “in the United States Court of Appeals for the appropriate circuit.” Decision on Island Energy Services 2016 Compliance Year Small Refinery Exemption (Feb. 2, 2018); Decision on Island Energy Services 2017 Compliance Year Small Refinery Exemption (Mar. 23, 2018); Decision on United Refining Company 2017 Compliance Year Small Refinery Exemption (Mar. 14, 2019), available at [https://foiaonline.gov/foiaonline/api/request/downloadFile/2019-07-31_RFA%20v.%20EPA%20\(18-2031\)_Production%20Set.pdf/c82d4070-f211-4875-be2e-2a6a6aeae32a](https://foiaonline.gov/foiaonline/api/request/downloadFile/2019-07-31_RFA%20v.%20EPA%20(18-2031)_Production%20Set.pdf/c82d4070-f211-4875-be2e-2a6a6aeae32a)

⁵⁹ Petition for review, *Renewable Fuels Ass’n v. EPA*, No. 18-9533, Doc. 01019999252 (10th Cir. filed May 29, 2018).

⁶⁰ *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 714 (D.C. Cir. 2017); see also *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015) (“[B]eginning in 2013, the nature of the ethanol RIN market changed due to a so-called ‘ethanol blendwall’ or ‘E10 blendwall.’ Conventional engines can handle only

exceed a pool-wide ethanol content of 10%,” and at most there could be “small increases in ethanol volumes above 10%.”⁶¹

EPA Supplemental Proposal would result in a dramatic exceedance of the blendwall, by imposing a total renewable fuel obligation of 11.46%.⁶² This is a significant increase—an increase of .49% increase from the 2019 standard, and .54% from the proposed 2020 standard—and would represent the first time that the 11% threshold would be exceeded. As a result, the 11.46% standard would severely push if not exceed the limits of the blendwall.

Yet EPA does not so much as *mention* the blendwall in its Supplemental Proposal. It is arbitrary and capricious for EPA to have “failed to consider an important aspect of the problem.”⁶³ To the extent EPA may argue the blendwall is not implicated because the Supplemental Proposal would not change the overall volume requirements, such an argument is contrary to EPA’s position that small refinery exemptions “effectively reduce the volumes of renewable fuel required by the RFS program.”⁶⁴

VII. EPA’s Reallocation of Biomass-Based Diesel Volumes Is Unlawful.

EPA’s Supplemental Proposal would increase the biomass-based diesel percentage standard by .09% from the original proposal. However, EPA nowhere in the supplemental proposal evaluates the statutory factors it is required to assess in setting annual BBD standards.⁶⁵

a certain percentage (about 10%) of ethanol in fuel. In 2013, the statutory renewable fuels volume requirements exceeded the amount of ethanol that the transportation market could absorb. Because of the ethanol blendwall, RIN prices increased in 2013 and began to fluctuate widely.”)

⁶¹ EPA, RFS 2019 Response to Comments at 96, EPA-420-R-18-019 (Nov. 2018).

⁶² EPA, Calculation of Supplemental Proposed % Standards For 2020, EPA-HQ-OAR-2019-0136-0346.

⁶³ *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 582 (D.C. Cir. 2019).

⁶⁴ 84 Fed. Reg. at 57,680.

⁶⁵ 42 U.S.C. § 7545(o)(2)(B)(ii).

While EPA may argue that this obligation attaches only to the volume requirements, not the percentage standards, EPA's linkage of the two in the Supplemental Proposal renders this distinction untenable: EPA cannot logically take the position that small refinery exemptions "effectively reduce[] the required volume of renewable fuel for that year," but then ignore the converse proposition that an increased percentage standard effectively increases the BBD volumetric requirement in light of EPA's small refinery exemptions.⁶⁶ That is particularly the case given that EPA's BBD proposal relies in part on historic BBD RIN costs, which reflect small refinery exemptions granted during those compliance years.⁶⁷

VIII. The Critical Underlying Flaw Is EPA's Unlawful Expansion of Small Refinery Exemptions.

EPA's Supplemental Proposal is based on the significant increase in small refinery exemptions in recent years, with EPA seeking to reallocate those volumes to other obligated parties to "ensure" that the statutory renewable-fuel volumes are met. EPA should instead conform its small refinery decisions to the statutory requirements, which would result in dramatically fewer small refinery exemptions, thus addressing the root cause of the asserted problem. At a bare minimum, it is arbitrary and capricious for EPA to exclude from the scope of this rulemaking an evaluation of its small refinery legal interpretations and policy positions, particularly because that could resolve the issue without causing the host of problems associated with reallocation.

A. Reallocation Demonstrates the Illegality of EPA's Expansion of Small Refinery Exemptions.

The purported need to reallocate is caused by EPA's significant and unlawful expansion of small refinery exemptions. Most notably, EPA has violated the statute by providing "extensions"

⁶⁶ 84 Fed. Reg. at 57,679.

⁶⁷ 84 Fed. Reg. 36,762, 36,792-96 (July 29, 2019).

to small refineries whose exemptions had expired in previous years. Such “extensions” are not authorized by the statute.

The CAA contemplates a scheme under which declining numbers of small refineries will receive temporary, continuous extensions for a limited period of time. To start, the statute provided a blanket exemption to all small refineries until 2011.⁶⁸ Then, for a subset of small refineries determined to face disproportionate economic hardship based on a Department of Energy study, EPA was required to “extend *the* exemption” for “a period of not less than two additional years.”⁶⁹ Finally, EPA could thereafter provide “an extension of *the* exemption” based on a finding of disproportionate economic hardship.⁷⁰

The statute thus contemplates a single continuous exemption for each small refinery, which could be extended over time until it terminated. This reading is supported by the definition of the term “extend,” which means a “stretching out” or “lengthening.”⁷¹ This “*first* definition” supplies “the word’s primary meaning.”⁷² A longer period of time with gaps in it is not an extension of a period of time, but rather multiple separate periods of time. Likewise, another definition of “extend” means to “cause to be longer,” with the dictionary providing the example of individuals who “extended their visit another day.”⁷³ If a visit were to take place in one year, and then again two years later, no one would say “the” visit was “extended;” instead there would be two separate visits.

⁶⁸ 42 U.S.C. § 7545(o)(9)(A)(i).

⁶⁹ 42 U.S.C. § 7545(o)(9)(A)(ii) (emphasis added).

⁷⁰ 42 U.S.C. § 7545(o)(9)(B) (emphasis added).

⁷¹ Extension, *Webster’s Third New International Dictionary* at 804 (first definition).

⁷² *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

⁷³ Merriam Webster, <https://www.merriam-webster.com/dictionary/extending>

EPA’s contrary textual argument, advanced by litigation counsel in the 10th Circuit, is that “extend” should mean “to make available” or “grant.”⁷⁴ That argument has multiple flaws. *First*, that is a definition of the term “extend,” not “extension,” and there is no equivalent definition of “extension” in the dictionary EPA’s counsel relies on.⁷⁵ *Second*, EPA’s definition ignores the temporal context in which the term “extension” is used, which strongly implies continuity in time, as described above. *Third*, EPA’s definition ignores the use of the singular phrase “the exemption,” which indicates there is only a single exemption that may be extended. *Fourth*, EPA’s reading impermissibly excises the phrase “extension of the” from the statute. If Congress intended EPA to be able to grant a small refinery an exemption at any time, without requiring a small refinery to have received an extension in past years, it could have easily written the statute to read “[a] small refinery may at any time petition the Administrator for an ~~extension of the~~ exemption under subparagraph (A) for the reason of disproportionate economic hardship.” EPA’s reading thus “violate[s] a basic canon of statutory construction by treating the [three] words as surplusage.”⁷⁶

The statutory structure and context provide further support for the textual requirement that there be a single, continuous exemption for an individual small refinery to remain eligible for a further extension. Notably, the title of the subsection refers to a “[t]emporary exemption” for small refineries.⁷⁷ Likewise, the D.C. Circuit has stated that the small refinery exemption is a “[t]emporary exemption,” and the statute has “an eye towards eventual compliance with the

⁷⁴ EPA Br., *Renewable Fuel Ass’n v. EPA*, No. 18-9533, at 29 (10th Cir. filed Sept. 20, 2019).

⁷⁵ Extension, *Webster’s Third New International Dictionary* at 804-805.

⁷⁶ *Consumer Fed’n of Am. v. United States*, 83 F.3d 1497, 1593 (D.C. Cir. 1996).

⁷⁷ 42 U.S.C. § 7545(o)(9)(A).

renewable fuels program for all refineries.”⁷⁸ EPA’s own regulations thus require that the small refinery provide, in any petition seeking an exemption, “the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.”⁷⁹

EPA apparently used to agree with this interpretation, but at some point changed its view based on a 2014 amendment to the RFS program relating to the definition of a “small refinery” under the RFS program.⁸⁰ While EPA’s precise position is unclear because it has not published either its initial interpretation or its new interpretation, its reliance on the 2014 rule is misplaced. In 2013, EPA proposed that to remain an eligible “small refinery” under the RFS program, a refinery must not exceed 75,000 barrels per day not just in 2006 (when the statute was first enacted), but in each calendar year thereafter.⁸¹ In its final rule EPA altered course, recognizing that it may be unfair to retroactively deny small refineries eligibility if they exceeded the 75,000 barrel threshold several years ago.⁸² But on a going-forward basis, EPA did require that “the throughput be no greater than 75,000 barrels in the most recent full calendar year,” that a small refinery “can’t be projected to exceed the threshold in the year or years for which it is seeking an exemption,” and that the exemption would not apply if the 75,000 barrel limit were exceeded.⁸³

⁷⁸ *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015) (also noting that EPA “reasonably expected [a small refinery] to make preparations to comply with its 2013 [RFS] obligations during the company’s five-year exemption period”).

⁷⁹ 40 C.F.R. § 80.1441(e)(2)(i).

⁸⁰ EPA Br., *Advanced Biofuels Ass’n v. EPA*, No. 18-1115, Doc. 1785554, at 50 n.13 (D.C. Cir. filed May 1, 2019).

⁸¹ 78 Fed. Reg. 36,042, 36,063-64 (June 14, 2013).

⁸² 79 Fed. Reg. 42,128, 42,152 (July 18, 2014).

⁸³ 79 Fed. Reg. at 42,152.

The 2014 rule does not address whether “the extension” must be continuous in nature; instead it addresses a wholly separate issue of the definition of a “small refinery.”⁸⁴ To the extent EPA relied on that rule in a later, non-public document to change its interpretation, its non-public change based on a preamble that addresses a separate issue is not worthy of deference.⁸⁵ Indeed, EPA’s interpretations articulated in its small refinery exemptions decisions are not entitled to *Chevron* deference.⁸⁶

This legal issue has significant implications for EPA’s small refinery exemptions. At least 28 small refineries have received extensions only because of EPA’s incorrect legal interpretation. As noted above, in 2015 only 7 small refineries received exemptions, a number that increased to 35 in 2017. Had EPA merely continued with a single-digit number of small refinery exemptions, there would be no basis to argue in favor of a reallocation.

B. EPA’s Disproportionate Economic Harm Analysis Is Flawed.

EPA’s small refinery exemption decisions are also founded on what appears to be a flawed evaluation of the statutory requirement that a small refinery demonstrate “disproportionate economic hardship.”⁸⁷

EPA’s finding of widespread disproportionate economic hardship is inconsistent with EPA’s repeated findings that obligated parties, including merchant refiners and small refineries, generally are able to recoup their RFS compliance costs in the cost of the gasoline they sell. For example, EPA has found that obligated parties “are charging more for domestic gasoline and diesel to ensure that they recoup the costs associated” with RFS compliance, and so on average there is

⁸⁴ 42 U.S.C. § 7545(o)(1)(K).

⁸⁵ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

⁸⁶ *Sinclair Wyo. Ref. Co. v. United States*, 874 F.3d 1159, 1165-66 (10th Cir. 2017).

⁸⁷ 42 U.S.C. § 7545(o)(9)(B).

no negative economic impact on RIN purchasers.⁸⁸ EPA has also noted that even assuming small refineries, which tend to rely on the RIN market, are unable to recoup their compliance costs, the estimated maximum compliance cost-to-sales percentage was at most “.006%,” a negligible amount, and may in fact be negative (reflecting a cost saving).⁸⁹ EPA thus concluded that “there is no net cost to small refiners resulting from the RFS program.”⁹⁰ This is not a new finding. EPA reached the same conclusion in 2015,⁹¹ and explained this analysis to the GAO in 2014.⁹²

EPA reiterated this point in November 2018, explaining: “Commenters provided no new credible evidence to indicate that they do not or cannot recover the cost of RINs. Accordingly, we do not believe that the price paid for RINs is a valid indicator of the economic impact of the RFS program on these entities, since a narrow focus on RIN price ignores the fact that these parties are recovering the cost of RINs from the sale of their petroleum products. When the ability for obligated parties to recover the costs associated with acquiring RINs is considered, we do not believe that RIN prices have had a negative economic impact on obligated parties.”⁹³

⁸⁸ EPA, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, No. EPA-420-R-17-008, at 23 (Nov. 2017), *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TBGV.pdf>

⁸⁹ EPA, Renewable Fuel Standard Program – Standards for 2018 and Biomass-based Diesel Volume for 2019: Response to Comments, No. EPA-420-R-17-007, at 221 (Dec. 2017), *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100TDDH.PDF?Dockey=P100TDDH.PDF>.

⁹⁰ EPA Screening Analysis, No. EPA-HQ-OAR-2017-0091-4974, at 11 (Nov. 30, 2017).

⁹¹ 80 Fed. Reg. 77,420, 77,516 (Dec. 14, 2015) (“[O]bligated parties, including small entities, are generally able to recover the purchase cost of the RINs necessary for compliance through higher sales prices of the petroleum products they sell than would be expected in the absence of the RFS program.”).

⁹² Letter from EPA to GAO (Mar. 5, 2014), GAO Report No. 14-249, *available at* <https://www.gao.gov/assets/670/661710.pdf>

⁹³ EPA, Renewable Fuel Standard Program – Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments, at 13-15 (Nov. 2018), *available at* <https://www.epa.gov/sites/production/files/2018-11/documents/420r18019.pdf>

Most recently, EPA emphasized this point in a screening analysis conducted in May 2019.⁹⁴ EPA explained that the “most appropriate way” to evaluate whether the proposed 2020 standards imposed costs on small refineries was to “compare their costs of compliance with the ability for the obligated parties to recover these compliance costs for the gasoline and diesel fuel they sell than would be expected in the absence of the RFS program.”⁹⁵ EPA again stated that it “has determined that while there is a cost to all obligated parties to acquire RINs, including small entities, obligated parties generally recover the cost of acquiring these RINs through the higher sales prices they receive for the gasoline and diesel fuel they sell.”⁹⁶ Accordingly, there is “no net cost of compliance,” regardless of whether companies purchase and blend renewable fuels or purchase separate RINs.⁹⁷

The sheer number and extent of EPA’s small refinery exemptions cannot be reconciled with these findings. According to Energy Information Administration data, there were roughly 57 small refineries with an average daily throughput below 75,000 barrels per day in 2019.⁹⁸ EPA’s small refinery exemptions for 2017 thus imply that 35 out of roughly 57 small refineries suffer disproportionate economic hardship. EPA has never explained how a majority of small refineries could suffer disproportionate economic hardship, even though as a general matter RIN costs are passed through to purchasers of gasoline from small refineries.

⁹⁴ EPA, *Screening Analysis for the Proposed Renewable Fuel Standards for 2020* (May 15, 2019), available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0136-0004>

⁹⁵ *Id.* at 6.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ EIA, *Refinery Capacity Report as of January 1, 2019*, available at <https://www.eia.gov/petroleum/refinerycapacity/>

EPA has made public three small refinery exemption decisions as a result of a FOIA request and related FOIA litigation challenging the agency’s withholding of information.⁹⁹ None of those decisions even mentions *whether* RIN costs are recovered, despite citing the small refinery’s claimed RIN costs (e.g., \$3.9 million by Island Energy Services in 2016).

In litigation raising this issue, EPA’s litigation counsel has argued that there is no contradiction, because larger refineries have certain advantages, and may not be subject to short-term cash flow restrictions or higher relative RIN acquisition costs.¹⁰⁰ These generic, *post hoc* considerations raised in litigation do not discharge the agency’s duty to adequately evaluate the issue, nor do they appear in the three small refinery exemption decisions EPA has publicly released. EPA’s litigation counsel does not even attempt to show that most small refineries suffer from these issues, or that these issues of themselves suffice to create a disproportionate economic hardship.

Moreover, EPA and DOE apparently are not even evaluating one of their metrics—“RINs net revenue or costs”—which on its face would appear to be a critical component of evaluating whether the RFS program in fact imposes a disproportionate economic hardship. Indeed, EPA and DOE appear to be ignoring that the statute authorizes exemptions only if “compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship.”¹⁰¹ While the factors EPA and DOE are considering, such as access to capital, other business lines, the nature of the market in which the refinery operates, etc., may have relevance to a disproportionate economic

⁹⁹ Decision on Island Energy Services 2016 Compliance Year Small Refinery Exemption (Feb. 2, 2018); Decision on Island Energy Services 2017 Compliance Year Small Refinery Exemption (Mar. 23, 2018); Decision on United Refining Company 2017 Compliance Year Small Refinery Exemption (Mar. 14, 2019), *available at* [https://foiaonline.gov/foiaonline/api/request/downloadFile/2019-07-31_RFA%20v.%20EPA%20\(18-2031\)_Production%20Set.pdf/c82d4070-f211-4875-be2e-2a6a6aeae32a](https://foiaonline.gov/foiaonline/api/request/downloadFile/2019-07-31_RFA%20v.%20EPA%20(18-2031)_Production%20Set.pdf/c82d4070-f211-4875-be2e-2a6a6aeae32a)

¹⁰⁰ EPA Br., *Renewable Fuel Ass’n v. EPA*, No. 18-9533, at 59-60 (10th Cir. filed Sept. 20, 2019).

¹⁰¹ 42 U.S.C. § 7545(o)(9)(A)(ii).

hardship analysis as background factors, the actual hardship itself would only warrant relief under the statute to the extent there are RIN costs (or other concrete RFS compliance costs) that are imposed by the RFS—i.e., if “compliance with the requirements of paragraph (2)” causes “a disproportionate economic hardship.”

EPA and DOE’s failure on this score is particularly problematic given that DOE’s 2011 report on small refinery exemptions notes that small refineries can actually “generate revenue” if they blend renewable fuel, and also notes that “many (but not all) the respondents blended ethanol in 2009. These firms separated RINs and either sold them into the market or held them for future use. Indeed, one publically traded firm reported \$4 million of revenue from RINs sales in 2009.”¹⁰²

In sum, EPA appears to be applying an unreasonably broad and unlawful interpretation of “disproportionate economic hardship,” which does not take into account the fact that RIN costs generally are passed through. This was recognized in a June 1, 2018 memorandum prepared for the President by the National Economic Council, asserting that in the future small refinery exemptions will be “based only on *true* disproportionate economic hardship.”¹⁰³ Likewise, EPA staff also apparently recommended denial of a number of the 2017 small refinery exemptions, but were reversed by then-Administrator Pruitt, who asked “who is going to sue me?”¹⁰⁴

Rather than unlawfully reallocate small refinery exempt volumes, EPA should adopt an appropriate definition of the phrase “disproportionate economic hardship,” and evaluate small refinery petitions in a manner that takes into account the fact that RIN costs are generally recouped. EPA’s failure to do so is contrary to the CAA and arbitrary and capricious.

¹⁰² DOE, *Small Refinery Exemption Study*, at 35 (Mar. 2011).

¹⁰³ *Renewable Fuel Ass’n v. EPA*, No. 18-9533, Doc. 010110245381, at 4 (10th Cir. filed Oct. 15, 2019) (emphasis added).

¹⁰⁴ *Id.* at 6.

C. EPA Cannot Decree Small Refinery Exemption Issues to Be Beyond the Scope of the Rulemaking.

EPA cannot declare key legal and policy issues relating to small refinery exemptions to be beyond the scope of the Supplemental Proposal.

First, EPA has put various aspects of its small refinery exemption policy at issue in this rulemaking. EPA has, for the first time in its Supplemental Proposal, stated certain aspects of its “intended approach for adjudicating 2020 SRE petitions.”¹⁰⁵ EPA has also put at issue its past small refinery exemption approaches, by using previous-year volume estimates following the DOE recommendations as the basis for its going-forward projections.¹⁰⁶ EPA has also solicited comment on whether the small refinery exemption “interpretation set forth in the August 9 Memorandum Decision is indeed the ‘best’ interpretation.”¹⁰⁷ By raising multiple aspects of its small refinery exemption policy, EPA has put that policy at issue; EPA cannot cherry pick sub-aspects of that policy to revisit while shielding other closely-related aspects from public comment or judicial review.

Second, by proposing reallocation of small refinery exempt volumes, EPA has constructively reopened all aspects of its small refinery exemption policy and regulations in this rulemaking. An agency effects a constructive reopening when “the revision of accompanying regulations significantly alters the stakes of judicial review” of previous regulations or interpretations, “as the result of a change that could not have been reasonably anticipated” at the time the initial rules or interpretations were developed.¹⁰⁸ Here, as described above, EPA has long

¹⁰⁵ 84 Fed. Reg. at 57,681.

¹⁰⁶ 84 Fed. Reg. at 57,680.

¹⁰⁷ 84 Fed. Reg. at 57,681 n.25.

¹⁰⁸ *Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016) (cleaned up).

adhered to the rule that only the few small refinery exemptions that are granted by the time the annual RVOs are issued are to be factored into the RVO calculation. Accordingly, until now, other obligated parties had far less of a stake in how small refinery exemptions were decided. Now that EPA is proposing to directly convert small refinery exemptions into additional burdens on obligated parties, totaling roughly 770 million RINs in 2020 alone, the regulatory landscape surrounding small refinery exemptions and their significance has radically shifted.

Third and finally, EPA must consider its broader small refinery exemption policy, which is self-evidently an “important aspect of the problem” of whether and how to reallocate small refinery exempt volumes.¹⁰⁹

¹⁰⁹ *Am. Forest & Paper Ass’n v. EPA*, 294 F.3d 113, 116 n.3 (D.C. Cir. 2002) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).