



**American
Fuel & Petrochemical
Manufacturers**

1800 M Street, NW
Suite 900 North
Washington, DC
20036

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202.457.0480 office
202.457.0486 fax
afpm.org

U.S. Environmental Protection Agency
EPA Docket Center, Office of Air and Radiation Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Via: www.regulations.gov

Re: EPA-HQ-OAR-2019-0136 – 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

The American Fuel & Petrochemical Manufacturers (“AFPM”) submits these comments in response to the Environmental Protection Agency’s (“EPA” or “Agency”) Supplemental Notice of Proposed Rulemaking (“Supplemental Proposal”) referenced above.¹ AFPM’s members operate approximately 110 refineries - accounting for more than 95 percent of U.S. refining capacity - that produce the gasoline, diesel, jet fuel, and petrochemical building blocks for thousands of products that make innovation and progress possible. Importantly, AFPM’s members also produce nearly 20 percent of U.S. ethanol and a substantial volume of the renewable diesel produced in the U.S. As such, AFPM’s members would be directly impacted by EPA’s proposal.

In the Supplemental Proposal, EPA proposes to alter the formula and definitions used to calculate the 2020 RVOs. More specifically, EPA would project the volume of gasoline and diesel that would be exempt from the RFS as a result of small refinery exemptions (SREs) based on a 3-year average of the relief recommended by DOE. The amended definitions proposed would effectively increase the percentage standards that apply to non-exempt obligated parties. In other words, EPA proposes to reallocate SRE volumes to non-exempt parties. EPA also proposes to reverse its position on its authority to issue partial exemptions.

For the reasons set forth below, AFPM opposes the Supplemental Proposal, particularly EPA’s proposed reallocations of volumes covered by small refinery exemptions.

¹ See 84 Fed. Reg. 57677 (October 28, 2019).



EPA's SUPPLEMENTAL PROPOSAL

A. EPA's Fundamental Assumptions Underlying Supplemental Proposal Are False

Following the close of the initial comment period, EPA was persuaded by the biofuels industry to revisit SREs² based on the false assumptions that SREs diminish market share of renewable fuels and EPA is obligated to prospectively reallocate exempted volumes.³ Though the word is absent from the Supplemental Proposal, reallocation is precisely what the Agency intends when it states that the proposal would “effectively increase the percentage standards that apply to non-exempt obligated parties to offset future small refinery exemptions and help ensure that the required volumes are met.”⁴ The push to reallocate biofuel requirements – the overriding purpose of the Supplemental Proposal – has been driven by the biofuels industry’s false narrative that SREs have eroded biofuel market share. Government data demonstrate that this argument is false, and that biofuel production and use are at or near all-time highs.⁵ Thus, there are no lost volumes to reallocate.

EPA is proposing to adjust the percentage standards for 2020 to represent the volume of gasoline and diesel that will be exempt in 2020 due to small refinery exemptions based on a three-year average of the relief recommended by the Department of Energy (“DOE”). From 2016-2018 the relief recommended by the DOE averaged 770 million RINs per year. DOE is to (a) conduct a study of disproportionate hardship⁶ and (b) consult with EPA with regard to individual small refinery hardship petitions.⁷ The statute does not specify that either EPA or DOE can project

² When Congress created the RFS in the Energy Policy Act of 2005,² it included a temporary exemption for small refineries from the mandate through 2011. Congress included this exemption in recognition that small refineries are critical strategic assets to the nation.² Following DOE’s assessment that compliance with the RFS would impose a disproportionate economic hardship on small refineries, EPA extended the exemption through 2013.² Thereafter, Congress required EPA to extend the exemption to any small refinery based upon receipt of a petition showing “disproportionate economic hardship” to the refinery.² While Congress spoke to the obligation to provide exemptions to small refineries and provided specific instructions to EPA on how those exemptions were to be implemented, Congress did not provide statutory authority for EPA to reallocate the exempt volumes by adjusting percentage standards to account for projected small refinery exemptions. EPA’s proposal to do so is contrary to law, arbitrary and capricious, and not supported by the statute.

³ “Issuing small refinery exemptions after an RVO rule is finalized – as EPA has now done for the 2016, 2017, and 2018 compliance years – has the practical impact of reducing the effective RVOs to levels well below those specified in the rule.” Comments of the Renewable Fuels Association, August 30, 2019, EPA-HQ-OAR-2019-0136-0281.

⁴ 84 Fed. Reg. at 57677.

⁵ See U.S. Energy Information Administration, Monthly Energy Review October 2019, Table 10.3 “Fuel Ethanol Overview.” <https://www.eia.gov/totalenergy/data/monthly/pdf/sec10.pdf>. See also Table 3.7c “Petroleum Consumption: Transportation and Electric Power Sectors.” <https://www.eia.gov/totalenergy/data/monthly/pdf/sec3.pdf>.

⁶ CAA section 211(o)(9)(A)(ii).

⁷ CAA section 211(o)(9)(A)(ii).



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amounts of “exempted” gasoline and diesel production for purposes of calculating annual renewable fuel obligations pursuant to CAA section 211(o)(3).

B. EPA Cannot Use The Supplemental Proposal to Reallocate RFS Obligations

The Supplemental Proposal would effectively reallocate potentially exempt small refinery obligations by increasing the percentage standards that apply to non-exempt obligated parties. EPA bases its purported authority to reallocate exempted volumes on one word in the statute – the duty to “ensure” that the RFS requirements, including renewable fuel volume targets, are met. As discussed below, both the assumptions that SREs adversely impact the quantities of renewable fuels blended and that EPA has the legal authority and obligation to reallocate such volumes are erroneous.

The reallocation proposal poses extreme costs to stakeholders and consumers. Under the proposed changes, non-exempt obligated parties would be left with few realistic options to acquire the RINs for RFS compliance due to the reallocated volumes: either draw from the renewable identification number (“RIN”) bank or import more biodiesel, the latter of which is often the most available and economically competitive option for marginal compliance, but still much more costly than normal diesel fuel and counter-productive to the goals of the program.⁸ Obligated parties relied on 500 million gallons of foreign biofuel for RFS compliance in 2018. This was not an objective of the RFS. A further increase in biofuel imports should not be incentivized.⁹

An expensive-to-comply-with program is not better for conventional biofuels. Ethanol blending has increased to about 10 percent of the gasoline pool (the blendwall) where it has remained but has not reached the 15 billion gallons mandated. Mandates that exceed the blendwall increase RIN prices but do not affect blend rates. Conventional ethanol blend rates have been consistent whether RIN prices were less than ten cents or more than \$1.50.

The history of the RFS proves this point. When there was room under the blendwall, conventional biofuel RINs cost pennies. Obligated parties were able to over comply with their conventional biofuel RVOs by blending at the E10 level. As a result, RIN costs remained relatively low. When the blendwall was approached in 2013, ethanol blending did not increase appreciably, but costs for American manufacturing and consumers dramatically did. Repeating those mistakes by reallocation would harm the administration’s jobs and energy dominance agendas.

⁸ See Appendix A (Biodiesel price premiums over time).

⁹ See 2018 RIN Supply 2-28-19. Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes, EPA-HQ-OAR-2019-0136-0005. See also data from EPA Moderated Transaction System.



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EPA's proposed RFS adjustments would not only be a painful affront to U.S. refiners and manufacturing workers, they would do nothing to address the real source of what currently ails the biofuel and agriculture industries – lower exports and infrastructure constraints. Nor would this Supplemental Proposal promote energy independence or expand American energy dominance - aspirations of this administration. Instead, the proposal would likely result in some combination of increased biodiesel imports and reduction of the RIN bank. SREs are merely a symptom of the larger problem: RFS mandates are unrealistic and do not comport with the realities of the fuel market. It is time to recognize market realities and avoid doubling down on failed policies.

The Supplemental Proposal references “certain information” provided by the Renewable Fuels Association (“RFA”) during the original comment period as the justification for reallocation, yet it fails to address EPA’s own statements that ethanol consumption has not been affected by the granting of SREs. As recently as four months ago, EPA considered SRE regulations to be a settled issue, proposing to calculate “percentage standards for 2020 without adjustment for exempted volumes.”¹⁰ Pure RFS politics is not a sound justification for making this change.

EPA’s complete lack of an articulated rationale as to why it is seeking to overturn its long-standing interpretation of the statute is not within the Agency’s claimed “inherent authority to revise or amend a rulemaking.”¹¹ EPA must supply a reasoned explanation for why it has decided to “change course.”¹²

I. ASSUMPTIONS UNDERLYING SUPPLEMENTAL PROPOSAL ARE FALSE

The entire supplemental proposal is based on the false premise that SREs reduce demand for ethanol. The ethanol industry has asserted that EPA-approved SREs have resulted in massive market destruction for ethanol:

Issuing small refinery exemptions after an RVO rule is finalized – as EPA has now done for the 2016, 2017 and 2018 compliance years – has the practical impact of reducing the effective RVOs to levels well below those specified in the rule. Thus, we do not consider the volumes that appear in the 2020 Proposed Rule to be actual blending requirements consistent with the Energy Independence and Security Act of 2007.¹³

¹⁰ 84 Fed. Reg. at 36,797.

¹¹ 84 Fed. Reg. at 57,680.

¹² “[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

¹³ See Comments of the Renewable Fuels Association, “Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes,” EPA-HQ-OAR-2019-0136-0281.



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This and other similar assertions by biofuels advocates wilt in the face of market data. EIA demonstrates the falsity of the argument that SREs have eroded ethanol market share. As of August 2019, ethanol consumption was up 4 million gallons over the same period in 2018. Moreover, as a percentage of motor gasoline, ethanol accounted for 10.14 percent,¹⁴ the highest blend rate ever.¹⁵ In addition to looking at *consumption*, which is relevant to compliance with the RFS mandate, ethanol *production* this year is running at or near record highs, with a small decline (2.4 percent) likely explained by a large decline (15 percent) in exports. Biodiesel consumption and production are also at or near record highs.¹⁶

Today's market realities explain why SREs have not negatively impacted biofuel market share. More specifically, refiners today do not produce finished gasoline, rather they produce gasoline blendstocks for oxygenate blending ("BOBs"). BOBs are formulated to be blended with ethanol to reach the required octane specification in finished gasoline. This has been recognized by independent analyses and EPA itself. Agricultural economist Scott Irwin has written, "there is little if any evidence that the blend rate for ethanol has been reduced by SREs."¹⁷ Indeed, U.S. ethanol consumption and blending are higher this year than they have ever been. This is because virtually all BOBs produced today will continue to be blended with 10 percent ethanol regardless of the RFS and the issuance of hardship exemptions. Administrator Andrew Wheeler, relying on EIA data, testified before the House Science, Space, & Technology Committee on September 19, 2019, stating: "[e]thanol demand has not been impacted by the small refinery program and in fact we've seen an uptick in ethanol over the last two years."¹⁸ Secretary of Agriculture Sonny Perdue recently agreed that, "[m]ost of the macroeconomic issues we have had with ethanol this year have been because of lower exports, not small refinery waivers and I've got the facts to prove it."¹⁹

¹⁴ See U.S. Energy Information Administration, Monthly Energy Review October 2019, Table 10.3 "Fuel Ethanol Overview." <https://www.eia.gov/totalenergy/data/monthly/pdf/sec10.pdf>. See also Table 3.7c "Petroleum Consumption: Transportation and Electric Power Sectors." <https://www.eia.gov/totalenergy/data/monthly/pdf/sec3.pdf>.

¹⁵ *Id.*

¹⁶ See U.S. Energy Information Administration, *Monthly Energy Review November 2019*, Table 10.4 Biodiesel and Other Renewable Fuels Overview.

¹⁷ Irwin, S. "Small Refinery Exemptions and Ethanol Demand Destruction." *farmdoc daily* (8):170, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, September 13, 2018. (Accessed October 31, 2019). <https://farmdocdaily.illinois.edu/2018/09/small-refinery-exemptions-and-ethanol-demand-destruction.html>.

¹⁸ Science and Technology at the Environmental Protection Agency: *Hearing before the House Science, Space, & Technology Committee*, 116th Cong. (2019) (*hereinafter* "Testimony of Administrator Andrew Wheeler"). <https://science.house.gov/hearings/science-and-technology-at-the-environmental-protection-agency>.

¹⁹ Brownfield, Ag News for America. "Perdue: Lower Ethanol Exports Hurting Farmers More Than RFS Waivers," November 18, 2019. <https://brownfieldagnews.com/news/perdue-lower-ethanol-exports-hurting-farmers-more-than-rfs-waivers/>.



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The Supplemental Proposal contradicts true ethanol demand data that EPA provided to Congress just a few weeks earlier.²⁰ Moreover, EPA fails to articulate additional rationale for the reversal in its position. Given that EPA’s primary rationale (addressing demand destruction) is erroneous and the absence of any additional rationale to support the reversal of its longstanding interpretation of SREs, EPA’s Supplemental Proposal is arbitrary and capricious.

II. REALLOCATION IS CONTRARY TO CONGRESSIONAL INTENT

While Congress specifically instructed EPA to account for renewable fuels *used* by exempted refineries “in the previous calendar year,” it provided no authorization to reallocate small refinery obligations to non-exempt parties in an upcoming compliance year. Rather, Congress provided authority for EPA to extend exemptions for disproportionate economic hardship “at any time.”²¹ This statutory structure belies any notion that EPA has authority to engage in gross speculation as to what exemption petitions will be filed and when and for what compliance years – and then to adjust percentage standards applicable to remaining obligated parties based on such non-statutory requirements and information.²² EPA can provide no statutory citation or basis for such a formulaic approach since none exists.

A. EPA IS NOT AUTHORIZED TO REALLOCATE EXEMPT VOLUMES

Renewable fuel interests ground their arguments that EPA is obligated to reallocate SRE volumes in the fact that that EPA must “ensure” annual RFS volumes are met. That interpretation is wrong and reads out of the statute EPA’s discretion to grant waivers and exemptions. It is also inconsistent with EPA’s longstanding interpretation of its obligations:

[W]e are not required to ensure that the biofuel volumes 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. This outcome is evidenced by the fact that we use projections of gasoline and diesel volume for the next year which might turn out to be too high or too low. Insofar as those projections are wrong, the percentage standards will not produce a demand for biofuels that exactly corresponds to the volumes in the statute.²³

The RFS has never required the market to meet statutory volumes. In RFS1, EPA considered the energy density of renewable fuels and implemented a structure whereby some renewable fuels are equivalent to more than one gallon as defined in statute. This means that EPA has never

²⁰ See “Testimony of Administrator Andrew Wheeler” referenced at note 20, *supra*.

²¹ CAA section 211(o)(9)(B).

²² Historically, the number of SREs granted by EPA has varied significantly from year-to-year.

²³ 77 Fed. Reg. 1320, 1340 (January 9, 2012) (emphasis added).



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“ensured” that the statutory volumes of renewable fuel were used in any given year since the RFS was implemented. As noted above, EPA acknowledges that a percentage standard is needed given the fact that gasoline and diesel volume may be higher or lower than projected. Fuel consumption is a factor of the mix of vehicles used, miles traveled, weather and road conditions, and driving habits of hundreds of millions of Americans, among other factors. The overarching problem with the RFS program that introduces increasing volumes of renewable fuel is that gasoline demand is much lower today than the government projected 14 years ago when the RFS was enacted. In fact, Congress assumed we would consume about 160 billion gallons of gasoline instead of the approximately 143 billion gallons actually used. If we had used 160 billion gallons of gasoline it would have been very easy to use 15 billion gallons of conventional corn ethanol. Clearly, Congress never intended the ethanol blend rate to exceed the E10 blendwall.

At the time of enactment of the RFS in 2005, there was virtually no renewable fuel in the marketplace outside of the Midwest. Thus, when Congress expanded the RFS in 2007, it recognized that the statutory volumes of renewable fuel were not based on legislative or governmental analysis of realistically achievable volumes but were essentially aspirational goals that may or may not be met. It was for this reason that Congress provided EPA with multiple tools to reduce the volumes through waivers – both during annual rulemakings and at other points in the RFS compliance year. If the supply of renewable fuel volumes was not available, compliance was too expensive or negative effects on the environment occurred, Congress provided EPA with tools to adjust required volumes downward. In fact, *all* of the enumerated statutory waivers are downward adjustments.²⁴ It is telling that in the RFS there is no explicit method for EPA to increase volumes either before or after setting annual levels.

B. THE SUPPLEMENTAL PROPOSAL WOULD CREATE REDUNDANT OBLIGATIONS THAT INCREASE THE RENEWABLE FUEL MANDATES BEYOND WHAT IS ACHIEVABLE

Congress specifically denied EPA the authority to create redundant obligations when adjusting the RFS percentages.²⁵ The Supplemental Proposal runs contrary to this prohibition.

For example, assume a non-exempt refinery with the obligation to blend 100 million gallons of conventional biofuels in 2020 and a small refinery with an obligation to blend 1 million gallons that same year. Further, assume that the small refinery applied for a hardship exemption; however, the small refinery does not receive notification of its exemption until sometime in the following year. The methodology envisioned in the Supplemental Proposal would require the both refineries to blend at a higher volume at the start of the year, with the vision being that the

²⁴ Cellulosic waiver, general waiver for inadequate domestic supply, general waiver for severe economic harm, general waiver for severe environmental harm, BBD waivers, and EPA’s reset authority (which is based on the exertion of waiver authority).

²⁵ See CAA section 211(o)(3)(C)(i).



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non-exempt refinery blends 100 million gallons plus some portion of the small refinery's predicted exempt volumes. But the small refinery's volumes will also be blended and the small refinery will need to acquire RINs. Under these circumstances, both refineries will blend renewable fuels as instructed in the 2020 final rule, resulting in a redundant obligation. The statute not only does not authorize such redundant obligations, it instructs EPA to avoid them.²⁶

Granting an exemption to a small refinery, particularly after the compliance year is complete, will not affect the amount of ethanol that is blended into the fuel produced by that small refinery. Since the small refinery exemptions are typically granted after the end of the compliance year, SRE applicants face the requirement to purchase RINs, with the hope that they will get an SRE and be able to sell (or be credited) RINs sometime in the future. Reallocating the ethanol volumes already achieved by exempted small refineries is yet another example of how reallocation results in a redundant obligation, a direct violation of the statute.

C. THE SUPPLEMENTAL PROPOSAL FAILS TO TAKE ACCOUNT OF EXEMPT SMALL REFINERY BIOFUEL USE

EPA's proposal fails to address how the Agency will account for the *use* of renewable fuel by small refineries as required by CAA §211(o)(3)(C)(ii). EPA cannot prospectively adjust annual RVOs for SREs but simultaneously ignore its obligation to account for the use of biofuels by such exempt parties. Doing so would result in a windfall for biofuel producers. EPA has not proposed language amending 40 C.F.R. §80.1405 for this purpose nor discussed why it did not consider this statutory factor in the Supplemental Proposal, which it previously indicated would require a downward adjustment to be made in the renewable fuel obligations of non-exempt parties.²⁷

Congress requires EPA, "to account for the use of renewable fuel during the *previous* calendar year by small refineries that are exempt."²⁸ EPA's proposed reallocation is contrary to this clear statutory directive and there is nothing in the administrative record for this rulemaking that demonstrates that EPA either attempted to quantify such use or account for such use in proposing 2020 RFS standards.

Exempted small refineries directly and indirectly *use* renewable fuels. As mentioned previously, refiners produce BOBs that *require* ethanol blending to meet finished gasoline specifications.²⁹ Indeed, EPA data demonstrate that exempt refineries generated more than 1.4 billion RINs in

²⁶ "[T]he Administrator shall make adjustments . . . to prevent the imposition of redundant obligations . . ." CAA 211(o)(3)(C).

²⁷ "Accounting for this volume of renewable fuel would reduce the total volume of renewable fuel use required of others, and thus directionally would reduce the percentage standard." 75 Fed. Reg. 14,717 (Mar. 26, 2010).

²⁸ CAA §211(o)(3)(C)(ii) (emphasis added).

²⁹ See text at notes 17-18, *supra*.



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2018. It would be arbitrary, capricious, and contrary to law for EPA to fail to take this use into consideration when establishing 2020 RVOs.

The CAA requires adjustments “to account for the *use* of renewable fuel during the *previous* calendar year by small refineries that are exempt (emphasis added).”³⁰ Congress explicitly directed EPA to consider SREs only in this context and not as a projection as to what might occur in a *subsequent* calendar year. EPA’s proposed amendment to 40 C.F.R. §80.1405 to allow for adjustments based on projected exemptions is thus contrary to statute.

III. EPA’S PROPOSED TREATMENT OF SREs IS ARBITRARY AND CAPRICIOUS

EPA claims that it is proposing adjustment to the calculation of annual percentage standards in 40 C.F.R. §80.1405 based on projections of exemptions for the upcoming year (projections of exemptions that have not yet been received or granted by the Agency).³¹ For purposes of the 2020 RFS requirements, however, EPA proposes to project an “*aggregate exempted volume in 2020* based on DOE’s prior SRE recommendations.”³²

One benefit EPA claims for this approach is that the agency “need not wrestle with the difficulties of predicting precisely which refineries will apply or the economic circumstances of specific refineries in 2020.”³³ But, this statement is nothing more than an admission that EPA’s proposed methodology for predicting SREs in 2020 is arbitrary and capricious. Even if EPA possessed adequate authority, the Agency did not articulate a rationale as to how its proposed approach “account[s] for volumes that may become exempted after the promulgation of the final rule”³⁴ since EPA has made no attempt to calculate the actual *use* of renewable fuel in these volumes of gasoline and diesel. EPA has simply assumed, without further investigation, that the amount of exempted production will result in *zero* use of renewable fuel in these volumes, an assumption which is entirely implausible given the need to blend ethanol into BOBs, as discussed above.

The net effect of the Supplemental Proposal is to increase annual percentage standards for all obligated parties. Thus, EPA has adopted a prohibited “methodology in which the risk of overestimation is set deliberately to outweigh the risk of underestimation”³⁵ EPA entirely avoids the more onerous task of trying to predict who will apply for an SRE and under what economic

³⁰ CAA §211(o)(3)(C)(ii).

³¹ EPA proposes to amend the current formula to base calculations of percentage standards, in part, on the total amount of gasoline and diesel “projected to be exempt.” EPA elsewhere indicates that this projection could be either 770 or 580 million gallons.

³² 84 Fed. Reg. at 57682 (emphasis in original).

³³ *Id.*

³⁴ 84 Fed. Reg. at 57,680.

³⁵ *API v. EPA* 706 F. 3d. 474, 479 (D.C. Cir. 2013).



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circumstances an SRE would be considered and what affect any granted exemptions would have on the actual consumption of renewable fuel in 2020 and what affect any granted exemptions would have on the actual consumption of renewable fuel in 2020.

EPA offers no data that would indicate how its proposed regulatory change would actually "ensure" that the requirements of CAA section 211(o)(2) are met or avoid the result that the actual volumes of renewable fuel used (as a result of higher percentage standards) would not be above, perhaps far above projections that EPA has elsewhere considered to be "reasonably attainable" or "attainable."

EPA's tack in this Supplemental Proposal is also a reversal of its long-standing position on reallocation. Indeed, from the inception of the RFS program, the Agency has stated that:

If any small refinery exemptions for 2011 are approved after this final rulemaking, the parties in question would be exempt but we would not intend to modify the applicable percentage standards and announce new standards for 2011. EPA believes the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements. Periodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties.³⁶ (emphasis added)

Further, EPA in the same rulemaking noted that "we do not intend to revise the . . . standards applicable to other obligated parties to require that they make up for volumes that will not be attained by the exempt refineries."³⁷ EPA has not addressed why these prior interpretations of the statute that the Agency adopted should no longer be applicable, nor what its rationale is with respect to such a sudden "change of course." Lacking a reasoned basis for such a substantial change, EPA's proposal is arbitrary and capricious and must be rescinded.

Relying on past EPA practice or DOE recommendations may also be a poor predictor if economic trends change in the future. For example, if no refineries apply for exemptions or if EPA does not grant any SREs for 2020, then EPA's calculus for setting 2020 RFS standards is wildly off the mark. Further, if EPA reallocates requirements, but does not grant SREs equivalent to the reallocation, then it has created a redundant obligation in violation of CAA 211(o)(3)(C)(i). Moreover, EPA completely ignores a world beyond 2020 and makes no indication whether its methodology for determining the aggregate volumes will change.

³⁶ 75 Fed. Reg. 76,790 (December 9, 2010).

³⁷ *Id.*



V. PARTIAL EXEMPTIONS

EPA “anticipate[s] granting partial exemptions where such exemptions are appropriate.”³⁸ EPA does not explain where it derives the authority to grant partial SREs, and we are uncertain whether EPA has such authority. The plain language of the statute allows EPA to “extend” the original exemption, which was a full exemption from the RFS.³⁹ EPA agreed that “Congress intended that extension to be a full, and not a partial exemption.”⁴⁰ The Supplemental Proposal is a complete reversal of EPA’s existing interpretation of SRE implementation. EPA fails to provide a sufficient rationale for this dramatic change in position.

Regardless of whether the Agency has either received or fully adjudicated small refinery exemption petitions by the time the final rule for 2020 is published in the *Federal Register*, EPA is proposing to establish the percentage standards for compliance year 2020 by projecting the volumes of exempt gasoline and diesel production that *might* be exempted from RFS requirements.

EPA is proposing to use DOE’s analyses of SRE petitions from either 2016 to 2018 or 2015 to 2017. But EPA does not even attempt to articulate how conditions in either three-year period are relevant to conditions that could reasonably be predicted to exist in 2020. There is no analysis that market conditions during these two previous three-year periods are likely or more or less likely to exist in 2020.

With respect to DOE’s statutorily prescribed role in SREs, CAA section 211(o)(9) requires EPA, in consultation with DOE, to “consider the findings of the study under CAA section 211(o)(9)(A)(ii) and other economic factors” when evaluating SRE petitions. In the Supplemental Proposal, EPA fails to even mention this portion of the statute or how EPA’s proposed use of four to five-year-old DOE determinations are relevant to its implementation of its current responsibilities to act on SRE petitions at the point in time that it receives same.

VI. CONCLUSION

EPA set the deadline for comments for the Supplemental Proposal to end one day before the November 30 statutory deadline for promulgation of 2020 RFS standards. This ensures either one of two results: (a) EPA will promulgate a final 2020 RFS rule without being able to review, much less respond to the significant comments received on its Supplemental Proposal; or (b) the 2020 RFS rule will be delayed past its statutory deadline to the disadvantage of obligated parties who need to plan for compliance for the upcoming RFS compliance year.

³⁸ 84 Fed. Reg. at 57680.

³⁹ See CAA § 211(o)(9)(B)(i).

⁴⁰ US. Environmental Protection Agency Memorandum, *Subject: Decision on 2018 Small Refinery Exemption Petitions*, (August 8, 2019).



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Assuming the latter result, the Agency's willingness to again miss the statutory deadline for finalizing next year's mandated volumes, and statements of a political deal reached between the White House and renewable fuel interests,⁴¹ raise concerns that EPA has already made a decision on this Supplemental Proposal. Prior to and during the consideration of the Supplemental Proposal, multiple parties have referred to an Administration "agreement" on how to proceed with respect to small refinery exemptions. While some of the details have varied – *e.g.*, whether the Administration would reallocate some or all of the exempted volumes⁴² – the direction of these comments from within and outside of the Administration is consistent: EPA has already made up its mind in which direction to proceed. Unfortunately, so has the Office of Management and Budget when it stated during the interagency review process that, "...[t]his isn't up for a decision at this point from our perspective."⁴³

The RFS presents a challenge for all refiners, regardless of size. However, certain exemptions are specifically permitted under the law, such as when a small refinery can demonstrate that compliance with the RFS would cause a disproportionate economic hardship. The facts prove that such exemptions have not reduced biofuel use. A reallocation of exempted requirements to other obligated parties is contrary to law and long-standing Agency interpretation, arbitrary and capricious, and would disrupt the fuels market translating into higher prices at the pump for consumers. EPA should therefore abandon its Supplemental Proposal. Instead, the Agency

⁴¹ On October 4, 2019, EPA announced an "agreement" to deliver on a key promise to farmers regarding the promotion of biofuels. EPA's press release indicated that "President Trump successfully negotiated an agreement on the Renewable Fuel Standard (RFS) . . . Under this agreement . . . EPA will seek comment on actions to ensure that more than 15 billion gallons of conventional ethanol be blended into the nation's fuel supply beginning in 2020 . . . This will include accounting for relief expected to be provided for small refineries." EPA Press Office, October 4, 2019 Press Release, "President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels." Biofuel producers also made clear that they viewed the agreement as a commitment. "It has been a long process, but when the chips were down, President Trump delivered for farm families and biofuel producers," Growth Energy . . . said in a statement." Trump Administration tries to pacify farmers with major biofuels boost." <https://www.politico.com/news/2019/10/04/trump-farmers-biofuels-027499>. <https://www.epa.gov/newsreleases/what-they-are-saying-president-trump-delivers-key-promise-american-farmers-epa-usda><http://energy.agwired.com/2019/11/18/sec-perdue-comments-on-ethanol-and-sres/>

⁴² "U.S. Senator Chuck Grassley said Wednesday he met with President Donald Trump this week to push for changes that would restore demand for renewable fuel lost to industry waivers . . . Grassley, along with fellow Iowa Republicans U.S. Sen. Joni Ernst and Gov. Kim Reynolds, said the EPA has failed to uphold a deal Midwestern politicians reached with Trump in September to fully restore fuel gallons lost to waiver the administration granted to the oil industry . . ." Des Moines Register, Nov. 20, 2019. <https://www.desmoinesregister.com/story/money/agriculture/2019/11/20/grassley-lobbies-trump-epa-restore-ethanol-gallons-lost-waivers/4249785002/>

⁴³ See Documentation of OMB Review Under E.O. 12866 RFS 2020 Annual Rule SNPRM, "OMB to EPA 10.9.19," Email From Danielle Y. Jones, EOP/OMB to Julia Burch, Jessica Mroz, USEPA, dated October 9, 2019, regarding EO 12866 Interagency Review: EPA's Renewable Fuel Standard Program: Standards for 2020, Biomass-Based Diesel Volumes for 2021, and Other Changes (RIN 2060-AU42), EPA-HQ-OAR-2019-0136-0351. See attachment



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should finalize 2020 RFS requirements based upon a consideration of AFPM's comments to its original proposed rule.

AFPM appreciates the opportunity to provide its perspective on this critical issue. Unfortunately, the debate in recent months has been untethered from basic facts about the economics of the fuels market. AFPM recommends that the Agency take a close look at the data referenced in these comments and reexamine the claim that EPA's management of the RFS and ancillary programs have harmed the biofuels industry. Market realities should be recognized. RFS implementation should not be driven by politics.

Respectfully submitted,

Tim Hogan
Director, Motor Fuels



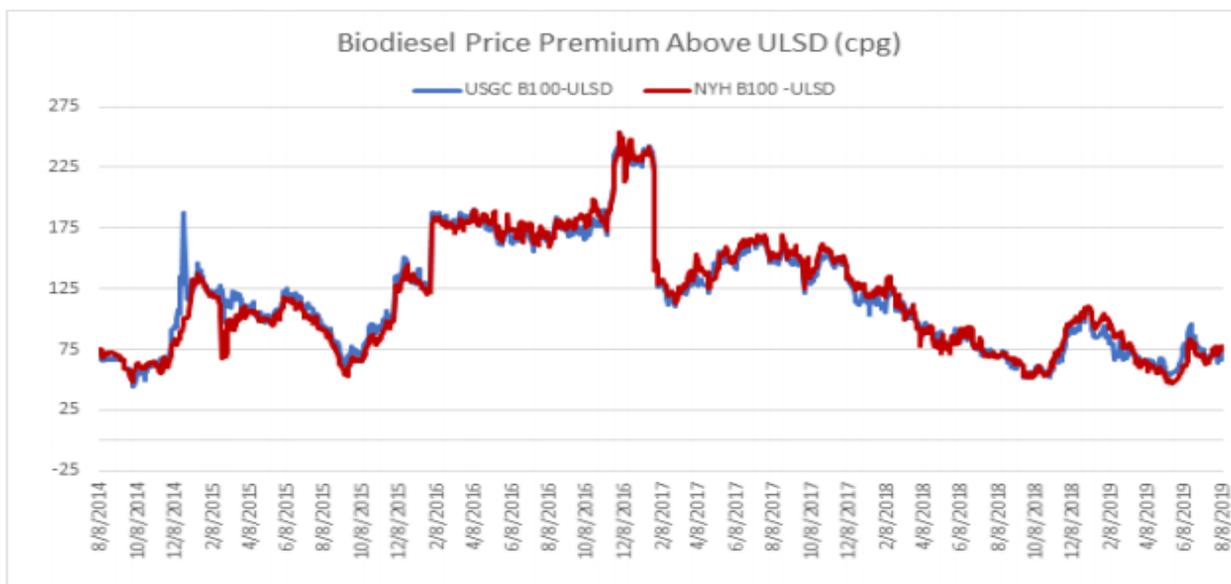
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APPENDIX A

This appendix sets forth data on biofuel blend rates, consumption, and production. The appendix also discusses the significant costs associated with using biodiesel to satisfy the renewable fuel requirements.

Biodiesel is significantly more expensive than diesel. EPA has estimated the cost difference between soybean-based biodiesel and petroleum diesel at \$0.74 to \$1.23 per gallon, and historically this premium has been even higher.⁴⁴ The RFS requires EPA to consider the cost of renewable fuel when establishing the RFS annual mandates.⁴⁵ As noted in a National Public Radio story from last year:

This is an easy one, economically. Biodiesel is very expensive, relative to petroleum diesel, says Scott Irwin, an economist at the University of Illinois, who follows biofuel markets closely. He calculates that the extra cost for biodiesel comes to about \$1.80 per gallon right now, meaning that the biofuel law is costing Americans about \$5.4 billion a year.⁴⁶



⁴⁴ See Cost Impacts of the Final 2019 Annual Renewable Fuel Standards, Table 2-2. EPA-HQ-OAR-2019-0163-0027.

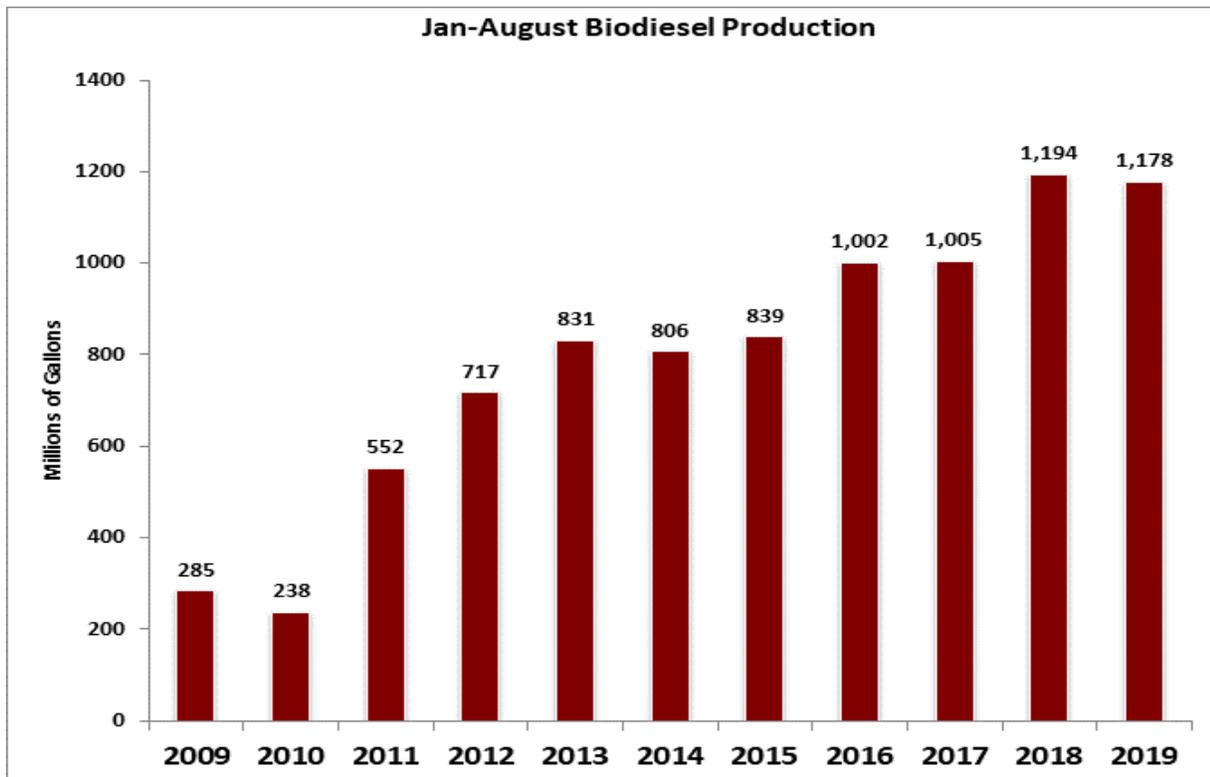
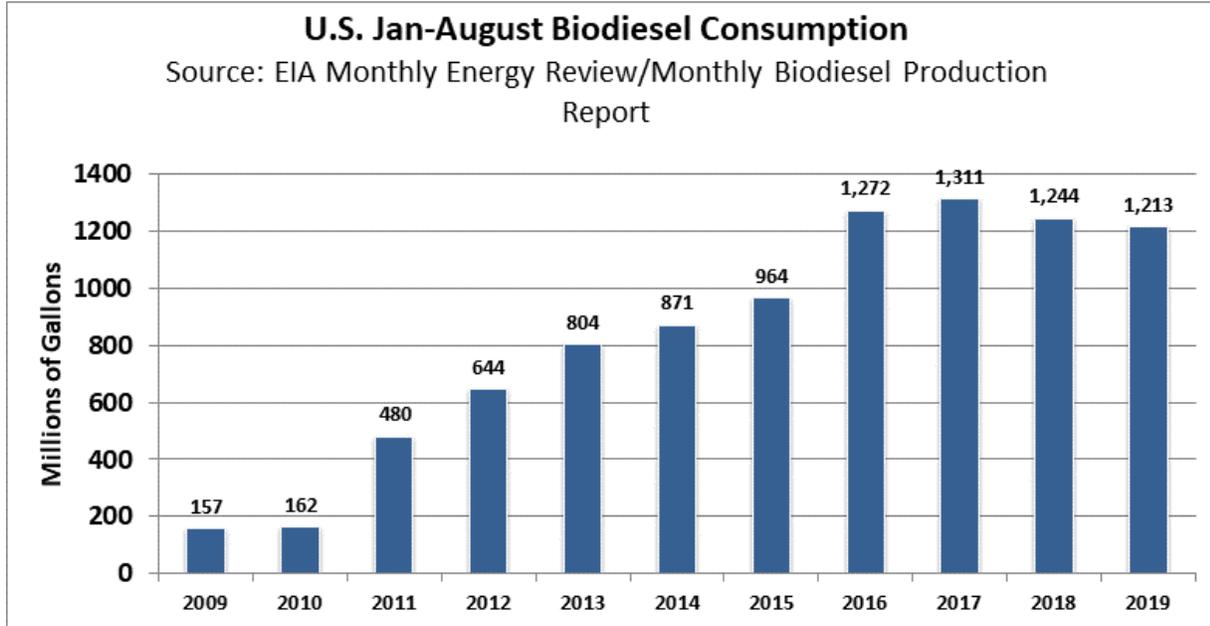
⁴⁵ See CAA §211 (o)(B)(ii)(V). See also Executive Order 12866, requiring agencies to estimate the costs and benefits of their rules.

⁴⁶ Charles, Dan. Turning Soybeans Into Diesel Fuel Is Costing Us Billions.” National Public Radio. January 16, 2018. Available at: <https://www.npr.org/sections/thesalt/2018/01/16/577649838/turning-soybeans-into-diesel-fuel-is-costing-us-billions>



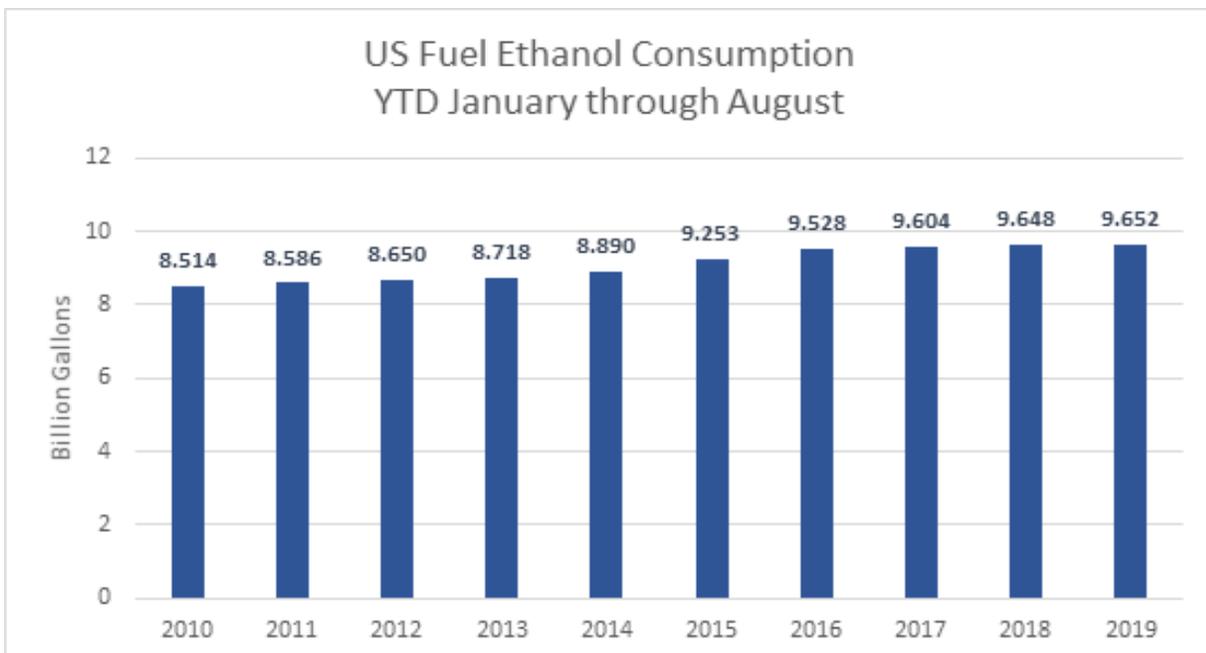
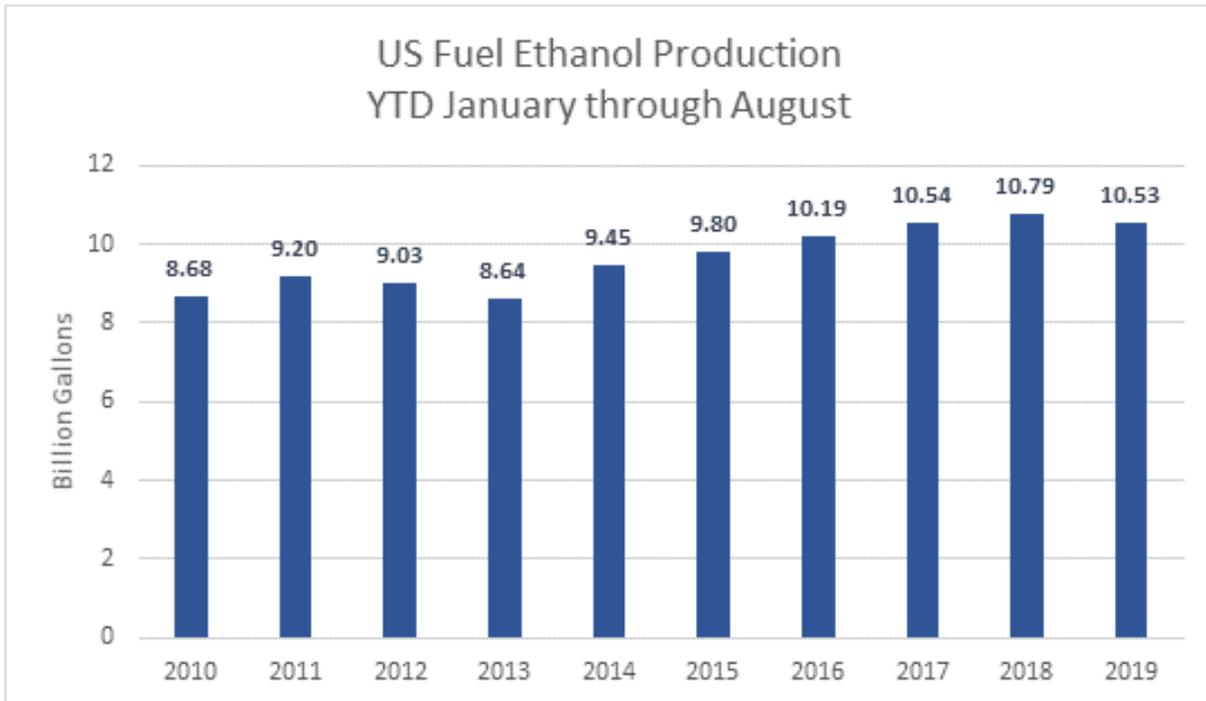
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EIA data was used for the following five charts.





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