Growth Energy Comments on EPA's Proposed RFS Small Refinery Exemption Decision

Docket # EPA-HQ-OAR-2021-0566

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February 7, 2022

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INTRODUCTION

Growth Energy respectfully submits these comments on the Environmental Protection Agency's *Proposed RFS Small Refinery Exemption Decision*.[1] Growth Energy is the world's largest association of biofuel producers, representing 89 biorefineries that produce nearly 9 billion gallons annually of low-carbon renewable fuel and 95 businesses associated with the biofuel production process.

EPA's Proposed Decision will strengthen the RFS program, reduce the nation's emission of greenhouse gases, and support renewable, American-grown biofuels. Congress intended the RFS program as a market-forcing policy to increase the nation's consumption of renewable fuel and move the United States toward greater energy independence and security. However, EPA's previous policies regarding extensions of exemptions for small refiners and refineries (together, "small refineries") undermines Congress's intent and jeopardizes the RFS program as a whole. EPA's Proposed Decision is a step forward in righting EPA's previous wrongs. Not only will denying the 65 pending petitions for small refinery exemptions ("SREs") increase access to renewable fuel, but such action also is necessary to bring EPA's policies in line with federal law and EPA's own long-held findings that RFS program compliance does not disproportionally harm small refineries. EPA should also deny all other pending SRE petitions (and all future petitions) that fail to meet the criteria set forth in the Proposed Decision, including the 36 2018 SRE petitions that the U.S. Court of Appeals for the D.C. Circuit remanded to the EPA on December 8, 2021.

Since at least 2015, EPA has consistently found that obligated parties—big and small—do not face disproportionate hardships from compliance with the RFS. Obligated parties recover the cost of RINs they purchase by passing those costs downstream. EPA's findings were based on extensive and careful analysis of empirical evidence and industry comments. At the same time, and counter to this clear finding, EPA radically increased the number of SRE extensions it granted to small refineries for purported "disproportionate economic hardship." SREs increased to nineteen for 2016, thirty-five for 2017, and thirty-one for 2018. The SREs represented more than 4 billion gallons of renewable fuel that were exempted from the RFS program.[2]

The Proposed Decision is necessary to bring EPA's SRE policy and decisionmaking into line with EPA's longstanding assessment of the empirical realities that obligated parties face in complying with the RFS program. As the Proposed Decision explains, EPA's proposal is well supported by sound economic principles and all available market data, including data provided by the small refineries to EPA.

Moreover, the Proposed Decision is necessary for EPA to comply with federal law. In *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020) ("*RFA*"), the Tenth Circuit held

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[1] *Proposed RFS Small Refinery Exemption Decision* ("Proposed Decision"), EPA-420-D-21-001, December 2021.

[2] Prior to the 2020 RFS Annual Rule, volume lost due to SREs was not replaced by additional production from non-exempted parties and resulted in net reduction of the total renewable fuel volume produced. *See* 85 Fed. Reg. 7016 (Feb. 6, 2020).

that EPA's policies on SREs were unlawful in multiple ways. The Tenth Circuit held that EPA had impermissibly expanded the plain language of the RFS statute by extending exemptions for small refineries based on factors other than hardship caused by compliance with the RFS program.[3] The Tenth Circuit also held that EPA's SRE decisions were arbitrary and capricious because the EPA had failed to consider its long-standing finding that obligated parties pass through their compliance costs.[4] Those portions of the court's ruling were untouched by the Supreme Court's later rejection of a different part of the Tenth Circuit's decision in *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n* ("*HollyFrontier*").[5] The surviving portions of the Tenth Circuit's decision are persuasive, and EPA should adopt them nationally for all SRE decisions, as EPA proposes to do. Under those standards, EPA's Proposed Decision to deny all pending and remanded SRE petitions is sound and should be adopted. In fact, EPA cannot do otherwise.

Additionally, EPA proposes to revert to its prior position that only refineries that received the initial blanket statutory exemption are eligible for an SRE extension. This proposal accords with—indeed, is compelled by—the plain statutory text and binding judicial precedent.

In short, Growth Energy supports the adoption of the Proposed Decision for the following reasons: *First*, EPA's statutory authority is limited, and EPA cannot grant SRE extensions for reasons other than economic hardships directly caused by compliance with the RFS. *Second*, EPA also cannot grant SRE extensions unless the economic hardship is disproportionate. *Third*, EPA's conclusion that small refineries do not face disproportionate economic hardships because of compliance with the RFS is well-supported and sound decisionmaking. In fact, EPA has long-held this conclusion, and EPA's failure to consider this important fact when evaluating SRE petitions would be arbitrary and capricious. And *fourth*, EPA cannot grant an SRE extension to a refinery that did not receive the initial blanket exemption.

Finally, as Growth Energy explained recently in its comment on EPA's proposed annual standards for 2020-2022, EPA should retain its 2020 revision of the standard equation to account for projected SREs, even if it denies all pending and remanded SRE petition. That would enable EPA to set future standards that are rationally and reasonably calculated to fulfill its statutory duty to ensure that the applicable volume requirements are met.[6]

DISCUSSION

I. EPA CANNOT GRANT SRE EXTENSIONS BASED ON HARDSHIPS NOT DIRECTLY CAUSED BY COMPLIANCE WITH THE RFS PROGRAM

EPA should adopt the Proposed Decision and a clear policy that petitions seeking SRE extensions will not be granted if they do not demonstrate disproportionate economic hardship

[3] *RFA*, 948 F.3d at 1253.

[4] *RFA*, 948 F.3d at 1257.

[5] 141 S. Ct. 2172 (2021).

[6] *See* Growth Energy, Comments on EPA's Renewable Fuel Standard (RFS) Program: RFS Annual Rules at 81-84 (Feb. 4, 2022), EPA-HQ-OAR-2021-0324.

("DEH") directly caused by compliance with the RFS program. EPA should deny all 65 pending SRE petitions and any other remanded or submitted petitions that do not meet this standard.

EPA's obligations here are clear. EPA *must* adopt the Proposed Decision because it comports with Congress's clearly expressed intent, as shown by the language and purpose of the statute and the compelling reasoning of the Tenth Circuit in *RFA*. An SRE can be granted only due to DEH costs incurred because of the RFS program. Granting SREs based in part on any alternative basis—such as general economic considerations or diverse factors that impact profitability—violates federal law and exceeds EPA's statutory authority under the RFS program. Small refineries have had nearly two decades to adapt to the goals of the RFS and to enhance their blending of renewable fuel. Because, among other things, EPA has found the renewable fuel market is competitive and a small refinery can purchase RIN credits to meet its compliance obligations, no small refinery can demonstrate it suffers DEH compared to other obligated parties. Therefore, not only is EPA correct in its conclusion that DEH must be directly caused by compliance with the RFS program, but also that conclusion is compulsory under the RFS program's plain language.

And if there were any doubt about Congress's intent, certainly EPA's proposed interpretation would be a reasonable and therefore valid resolution of statutory ambiguity for all the same reasons.

A. The RFS Program's Plain Language Requires Small Refineries to Demonstrate DEH Is Directly Caused by RFS Compliance

EPA cannot grant SREs that are inconsistent with the plain language of the RFS program. The Proposed Decision is correct that the "best reading of the statutory language is that compliance with the RFS program *must* be the impetus for DEH warranting an SRE."[7] This interpretation of the statute accords with the Tenth Circuit's decision in *RFA* that Congress indicated "that renewable fuels compliance must be the direct cause of any disproportionate hardship."[8] Because the intent of Congress is clear from the text of the RFS program, there is no statutory gap for EPA to fill; EPA "must give effect to the unambiguously expressed intent of Congress."[9]

There is no dispute that EPA's power under the statute is limited to granting small refineries an *extension* of an exemption that was previously granted pursuant to 42 U.S.C. § 7545(o)(9)(A).[10] Thus, EPA's authority to grant an extension should be read in a "consistent sense" with the language that authorizes the exemption in the first place.[11]

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[7] *Proposed Decision* at 24 (emphasis added).

[8] *RFA*, 948 F.3d at 1253.

[9] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[10] *HollyFrontier*, 141 S. Ct. at 2177.

[11] *See id.*

Subparagraph "(A) Temporary Exemption" makes clear that Congress intended SREs only for DEH directly caused by *compliance* with the program. Subparagraph A initially exempted small refineries from "[t]he requirements of paragraph [§ 7545(o)(2)] … until calendar year 2011."[12] The "requirements of paragraph [§ 7545(o)(2)]" are, among other things, the applicable annual volume targets for the required categories of renewable fuel.[13] In other words, the statute initially exempted small refineries from compliance with the applicable annual volume targets. Subparagraph A also instructed the Department of Energy ("DOE") to "conduct … a study to determine whether compliance with the requirements of paragraph [§ 7545(o)(2)] would impose [DEH] on small refineries."[14] EPA was then authorized to extend the initial exemption for two years under Subparagraph A if DOE found that a small refinery "would be subject to [DEH] if required to comply with paragraph [§ 7545(o)(2)]."[15] Subparagraph A created a direct link between DEH and the otherwise-required compliance with annual volume targets. DOE was instructed to study—and EPA was empowered only to extend exemptions for—DEH caused by compliance with the RFS program's annual volume targets.

EPA's authority under Subparagraph "(B) Petitions based on disproportionate economic hardship" is likewise limited by a causation requirement. Under Subparagraph B, EPA considers petitions "for an extension of the exemption under *subparagraph (A)* for the reason of disproportionate economic hardship."[16] Congress carried over the direct causal link between DEH and compliance by limiting EPA's authority only to extension of an extension that was previously granted due to DEH caused by compliance with the RFS program. As the Tenth Circuit noted, any argument that EPA may authorize extensions based on factors other than compliance with the program is simply a failure to read the two provisions in context.[17] Furthermore, in *HollyFrontier*, the Supreme Court held that the word "extension" in Subparagraph A and Subparagraph B should be read in "one consistent sense" because there was no "persuasive countervailing evidence that Congress meant to adopt one meaning of the term in subparagraph (A)(ii) and a different one next door in subparagraph (B)(i)."[18] EPA should expect that the Supreme Court would apply the same logic here and hold that any "extension" under Subparagraph A or Subparagraph B requires the same showing—DEH *directly caused* by compliance with the RFS program.

Other provisions reinforce that EPA must evaluate an SRE petition based on whether DEH is caused by compliance with the program. Subparagraph B first instructs EPA to evaluate petitions based on findings from DOE's study conducted pursuant to Subparagraph A.[19] DOE's

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[12] 42 U.S.C. § 7545(o)(9)(A)(i).

[13] *Id.* § 7545(o)(2).

[14] *Id.* § 7545(o)(9)(A)(ii)(I).

[15] *Id.* § 7545(o)(9)(A)(ii)(II).

[16] *Id.* § 7545(o)(9)(B)(i).

[17] *RFA*, 948 F.3d at 1253.

[18] *HollyFrontier*, 141 S. Ct. at 2177.

[19] 42 U.S.C. § 7545(o)(9)(B)(ii).

study is confined by statute to determining "whether compliance with the requirements of paragraph [§ 7545(o)(2)] would impose [DEH] on small refineries."[20] Thus, EPA's evaluation of SRE petitions is also confined to whether a small refinery suffers DEH as a result of compliance with annual renewable fuel volume targets. Subparagraph B also instructs EPA to evaluate SRE petitions based on "other economic factors" than those disclosed in DOE's study.[21] However, this language merely allows EPA to look at other evidence of DEH beyond the factors identified in DOE's study. Nothing in the statute suggests EPA's review of "other economic factors" may consider economic factors caused by something other than compliance with the RFS program. To read the statute otherwise would in effect permit EPA to grant *extensions* of an exemption based on factors that could never justify the exemption in the first place, contrary to the clear statutory structure.

In sum, EPA is correct that it cannot grant extensions of SREs unless the small refinery has demonstrated DEH *directly caused* by compliance with the RFS program. Congress's intent is clear from the plain language of the statute. EPA's reading is also consistent with *RFA* and *HollyFrontier*. EPA cannot interpret § 7545(o)(9) in a way that would permit extensions of SREs based on something other than DEH directly caused by compliance. Such an interpretation would violate federal law and be "in excess of statutory jurisdiction, authority, or limitations."[22]

B. The RFS Program's Purpose Requires Small Refineries to Demonstrate DEH Is Directly Caused by RFS Compliance

The Proposed Decision's conclusion that "compliance with the RFS program must be the impetus for DEH warranting an SRE" is also consistent with the purpose of the RFS program.[23] The goal of the RFS program is to "move the United States toward greater energy independence and security" and "increase the production of clean renewable fuels."[24] The RFS program achieves this market-forcing policy through annually increasing mandatory volume requirements. Wholesale exemptions from the market-forcing policy would not encourage increases in the production of clean renewable fuels.

The Proposed Decision is correct that Subparagraph B's purpose is not to be a broad curative tool to correct any underlying hardships that may already exist in the market and that are unrelated to compliance.[25] There is nothing in the language, the legislative history, or recent judicial decisions to support such an illogical expansion of the meaning of Subparagraph B. Congress did not intend to give EPA broad police power to correct any inequality or hardship that may stem from preexisting or independent market conditions. For example, small refineries may have been noncompetitive even before they were obligated to produce renewable fuel due

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[20] *Id.* at § 7545(o)(9)(A)(ii)(I).

[21] *Id.* at § 7545(o)(9)(B)(ii).

[22] 5 U.S.C. § 706(2)(c).

[23] *Proposed Decision* at 24.

[24] Pub. L. No. 110-140, preamble, 121 Stat. 1492 (2007).

[25] *Proposed Decision* at 25.

to, for example, unique geographical issues, poor economic performance, unique financial limitations, or limitations resulting from individual business decisions. EPA also does not have the power to exempt small refineries due to general economic considerations, such as the COVID-19 pandemic, which impacts not only all obligated parties, but renewable fuel producers as well. EPA does not have power to use SREs to prop these refineries up. In implementing the statute, EPA is limited to addressing new hardships that are directly caused by RFS compliance. Indeed, granting SRE extensions based on previous hardships likely causes more harm than good, by creating a windfall for small refineries and a distortion of the marketplace for renewable fuel.[26]

EPA's Proposed Decision is also consistent with *HollyFrontier*, where the Supreme Court considered two "competing narratives and metaphors" for the purpose of Subparagraph B.[27] The *HollyFrontier* petitioners argued that Subparagraph B served as a "safety valve" from compliance with the RFS program obligations.[28] The respondents argued that the purpose was as a "funnel" for phasing out the initial SREs over time.[29] Ultimately, the Supreme Court held it lacked "sufficient guidance to be able to choose with confidence" between these two narratives concerning the purposes of the statute.[30]

EPA is well-positioned to resolve the question about the purpose of the statute, as EPA plans to do in the Proposed Decision. EPA intends to interpret Subparagraph B as a "phase-out provision[]" that provides some "initial time for small refineries to come into compliance, with the expectation that they would do so, and would only be eligible for an extension of the exemption if they suffered hardship specifically due to the RFS program itself."[31] EPA's interpretation is based on EPA's expertise with other hardship provisions for other fuel programs that "provide particular parties additional time to come into compliance with new regulations."[32] EPA's interpretation is also consistent with the Tenth Circuit's persuasive reasoning in *RFA* that Subparagraph B's purpose is to provide temporary relief that will be "tapered down" moving forward as small refineries adjusted to the new requirements,[33] and the D.C. Circuit's recognition that Congress provided the "temporary exemption" "with an eye toward eventual compliance."[34] However, EPA's Proposed Decision is also fully consistent with the "safety valve" purpose advanced by Petitioners in *HollyFrontier*.[35] Even if, as the Petitioners argued, "*compliance*

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[26] *Id*.

[27] *HollyFrontier.*, 141 S. Ct. at 2182-2183.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 2183.

[31] *Proposed Decision* at 25.

[32] *Id.*

[33] *RFA*, 948 F.3d at 1246.

[34] *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 578 (D.C. Cir. 2015).

[35] *HollyFrontier*, 141 S. Ct. at 2182.

depends on numerous factors unique to each year and circumstances," EPA is still limited to using the "safety valve" only for small refineries that demonstrate DEH directly caused by *compliance.*[36]

C. The RFS Program's Plain Language Requires Compliance Hardship to Be "Disproportionate" When Compared to Other Obligated Parties

EPA should also adopt the Proposed Decision's recognition that small refineries must demonstrate that any economic hardship they suffer due to RFS compliance would be "disproportionate" compared to the RFS-caused hardship suffered by other obligated parties. The statute is clear: EPA may grant extensions of SREs based only on "*disproportionate* economic hardship."[37] In other words, it is not enough for a small refinery to show a hardship stemming from RFS compliance. It must also show that that hardship is more serious than the RFS compliance burdens faced by other obligated parties.

In *RFA*, the Tenth Circuit accepted that EPA "did not dispense with a comparative analysis" when evaluating SRE petitions.[38] Although the Tenth Circuit acknowledged that the record before it was limited, the Court declined to remand the SRE petitions at issue based on a failure by EPA to consider whether economic hardships were disproportionate to other obligated parties.[39]

The Proposed Decision, however, now discloses for the first time that "in none of these years [post-2013] did EPA require small refineries to demonstrate that they faced RFS compliance costs that were higher than for other obligated parties (i.e., disproportionate)."[40] It is troubling that EPA concealed this defect in its prior SRE decisions. This new disclosure demands that EPA carefully evaluate, for all pending and remanded SREs, whether the applicant refinery has demonstrated that any hardship it would suffer due to RFS compliance is actually disproportionate to other obligated parties' compliance burdens. EPA exceeds its statutory authority and violates federal law when it grants SRE extensions that are not based on "disproportionate" economic hardships when compared to other obligated parties.

II. EPA'S PROPOSED FINDING THAT RFS COMPLIANCE WOULD NOT CAUSE SMALL REFINERIES DISPROPORTIONATE ECONOMIC HARDSHIP IS SOUND

EPA should also adopt the Proposed Decision's analysis that small refineries do not in fact face any DEH from complying with their RFS program obligations. Because EPA may extend SREs only for DEH caused by compliance, EPA cannot grant any of the pending, remanded or other SRE petitions.

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[36] *Id.* (emphasis added).

[37] 42 U.S.C. § 7545(o)(9)(B)(i) (emphasis added).

[38] *RFA*, 948 F.3d at 1252.

[39] *Id.* at 1252-1253.

[40] *Proposed Decision* at 14.

EPA's proposed conclusions concerning the cost of RFS program compliance are correct and well supported by economic theory and relevant market data, and therefore should be adopted.[41] The structure of the RFS program places a proportional burden on all obligated parties. All obligated parties can meet their RFS compliance obligations through the purchase of RIN credits in the liquid RIN market. The RIN market enables less-efficient obligated parties to comply at approximately the marginal cost of more-efficient obligated parties. Further, obligated parties that purchase RINs to meet their obligations do not ultimately have higher compliance costs because they can and do pass on their RIN cost by selling their fuel at a premium that reflects the RIN value (i.e., RIN Cost Passthrough").[42] Parties that blend renewable fuel do not acquire RINs below market price because they must discount the price of blended fuel they sell to match market prices (i.e., RIN Discount).[43] The Proposed Decision also fully responds to and rejects responses presented by small refineries following the Tenth Circuit's decision in *RFA*.[44] EPA has clearly met its obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[45]

Not only are EPA's conclusions about the RFS program correct, but they also are conclusions that EPA has long and consistently held since at least 2015. EPA *must* adopt the Proposed Decision because it cannot "entirely fail[] to consider an important aspect of the problem" or "offer[] an explanation for its decision that runs counter to the evidence before" it.[46] As the Tenth Circuit held in *RFA*, EPA's SRE decisions are arbitrary and capricious when it fails to consider its longstanding and consistent views, fails to explain why those views should no longer control, or renders a decision that contradicts its own empirical evidence.[47] EPA's findings regarding RIN Cost Passthrough and RIN Discount are based on a thorough review of market data and demonstrates that small refineries do not suffer any disproportionate economic hardship by compliance with the RFS program. Accordingly, EPA cannot go back to a world where it ignores its own findings on RIN Cost Passthrough and RIN Discount without violating the basic principles of reasoned decisionmaking recognized in the Tenth Circuit's decision in *RFA*.

A. The Structure of the RFS Program Places a Proportional Cost on All Obligated Parties

Small refineries cannot demonstrate DEH caused by compliance because their costs under the program are proportional by definition. As Congress directed, EPA has implemented

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[41] *Id.* at 29-51.

[42] *Id.* at 3, 33-34.

[43] *Id.* at 3, 34-36.

[44] *Id.* at 52-62.

[45] *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quotations omitted).

[46] *Id.*

[47] *RFA*, 948 F.3d at 1255.

the RFS program in a proportional manner. An obligated party's individual renewable volume obligation is defined as a percentage of the obligated party's individual annual use of gasoline and diesel fuel.[48] In other words, the RFS program imposes the same obligation on all parties in proportion to their volume of transportation fuel. Therefore, each party's compliance cost is proportionally equivalent. Obligated parties meet their obligations by acquiring RINs, either by purchasing RINs or by blending their own renewable fuel. Obligated parties do not need to create a new line of business to blend fuel but may meet their obligations by purchasing RIN credits. And the RIN market is liquid, with more than 300 companies generating RINs and approximately 5 billon RINs trading hands each month.[49]

The Proposed Decision discloses that EPA had historically granted SRE petitions solely in reliance on DOE findings that a small refinery could receive at least 50% relief based on DOE's matrix score.[50] This meant that EPA may have granted SRE extensions simply because a small refinery demonstrated some burden caused by compliance. EPA did not require "small refineries to demonstrate that they faced RFS compliance costs that were higher than for other obligated parties (i.e., disproportionate)."[51] Applicant small refineries must do more than point to costs; some cost or impact alone will never be enough to justify an SRE extension. They must demonstrate that their costs are disproportionate compared to other obligated parties. Given that the RFS program is proportional by nature, disproportionate impacts from compliance should be rare or non-existent.

The Proposed Decision, therefore, correctly concludes after careful analysis that all obligated parties have proportionally the same cost of compliance.[52]

B. EPA's Proposed Findings Regarding RIN Cost Passthrough and RIN Discount Are Based on Sound Economic Principles

EPA has clearly met its obligation to provide a satisfactory explanation for its adoption of RIN Cost Passthrough and RIN Discount. Not only does the Proposed Decision provide a thorough examination of the economic principles at play, but it also takes care to analyze these issues under the various ways by which different obligated parties may participate in the fuels market (i.e., merchant refiners, blenders, and integrated refiners) and evaluate any differences between different types of renewable fuels (i.e., ethanol vs. biodiesel).[53] EPA also discloses the assumptions in its models and why these assumptions do not materially affect EPA's

[48] *Proposed Decision at* 9.

[49] *Id.* at 29.

[50] *Id*. at 14.

[51] *Id.*

[52] *Id*. at 37-43.

[53] *Id.* at 31-33, 37-44.

conclusions.[54] EPA clearly has applied its expertise to reach a compelling explanation of the market forces on small refineries.

As the Proposed Decision details, the fuel market—and the market for renewable fuel in particular—is highly competitive in the United States.[55] Gasoline and diesel fuel are fungible products with high price transparency.[56] Fuel markets across the United States are linked, and obligated parties must sell their products at competitive prices.[57] Economic theory suggests that all obligated parties are "price takers" in a competitive market for a fungible product, and they must pass on their compliance costs.[58]

RIN Cost Passthrough prevents disproportionate hardships on those obligated parties that meet their obligations by purchasing RIN credits. Parties that purchase RIN credits fully recover their costs of buying these credits by passing those costs downstream in the form of increased prices for their fuel in the competitive market.[59] This is further demonstrated by the fact that gasoline and diesel fuel prices increase and decrease in conjunction with prices for petroleum fuel subject to an RFS obligation.[60] A small refinery that purchases RIN credits is able to recover its compliance costs even if it is not a "price setter" in the fuel market.[61] This is because the market prices for these fuels rise and fall on a daily basis to reflect changes in RIN prices.[62]

RIN Discount prevents market participants that blend renewable fuels from obtaining RIN credits at a discount from the market price. A party that blends renewable fuel and separates the RIN obtains a separate revenue stream from selling the RIN credit. However, in the competitive market, the party must use the revenue they receive from selling the RIN credit to discount the price at which it sells the blended fuel.[63] Otherwise, the party will lose market share and be undercut by their competitors that use their RIN credit revenue to discount the fuel price.[64]

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[54] *Id.* at 43-44.

[55] *Id.* at 29.

[56] *Id.*

[57] *Id.* at 29-30.

[58] *Id.* at 30.

[59] *Id*. at 33.

[60] *Id.*

[61] *Id.* at 34.

[62] *Id.*

[63] *Id.* at 34-35.

[64] *Id.* at 35.

C. EPA Has Verified Its Economic Theories Through the Use of All Available Evidence, Including Evidence from the Small Refineries

EPA has also met its obligation to examine the relevant data and demonstrate a connection between the data and its conclusions. The data confirm EPA's economic principles and confirm that small refineries do not suffer any hardship (disproportionate or otherwise) from compliance due to RIN Cost Passthrough and RIN Discount.

EPA considered a broad set of data. EPA's analysis considered market pricing data for petroleum fuel, renewable fuel, and pricing data of similar fuels that do not have an RFS obligation.[65] EPA also considered publicly available financial data from obligated parties, data submitted directly by small refineries, and fuel pricing contracts submitted by small refineries.[66] EPA also reviewed past data and analyses from previous assessments of the renewable fuel market and more recent data.[67] The data and analyses confirmed that compliance costs are passed through regardless of whether an obligated party purchased or created RIN credits.[68] As EPA notes, individual business decisions made by obligated parties in an attempt to "time" or speculate on the RIN market may result in different passthrough rates.[69] However, those individual business decisions do not demonstrate DEH *caused* by compliance.[70]

EPA has used the relevant data at its disposal to conclude that obligated parties pass on their cost of purchasing RIN credits. Specifically, EPA's evaluation of two similar fuels, where one fuel is subject to an RFS obligation and one is not, strongly demonstrates the phenomenon of RIN Cost Passthrough.[71] The nearly identical fuel that is subject to an RFS obligation consistently was priced higher in the market equivalent to the market cost of the RIN credit.[72] Moreover, EPA collected significant data that demonstrated the highly connected and competitive fuel market in the United States. All the data EPA has reviewed to date, including data submitted directly by small refineries, indicates that the sale prices for fuel in all fuel markets reflect pricing based on RIN cost.[73]

EPA has also reviewed the relevant data and concluded that RIN credit sales by obligated parties are passed on in the form of discounts on the price of the blended fuel. Using recent data submitted by the small refineries regarding daily pricing, EPA was able show a strong correlation between the market price and RIN discount. In one example, the data demonstrated

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[65] *Id.* at 44, 49.

[66] *Id.*

[67] *Id.* at 44.

[68] *Id.*

[69] *Id.* at 49.

[70] *Id.*

[71] *Id.* at 44-45.

[72] *Id.* at 45-46.

[73] *Id.* at 48.

that RIN credit value had been passed on consistently from 2010 to present.[74] Another small refinery provided data that indicated that RIN Discount had occurred in a separate market based on daily prices from January 2019 to June 2021.[75]

D. EPA Must Consider Its Long-Held Conclusions on the Impact of RIN Cost Passthrough and RIN Discount When Evaluating SRE Petitions

EPA is also not working on a blank slate. Although the Proposed Decision provides compelling reasons why small refineries do not face DEH from compliance with the RFS program, EPA's proposal simply reaffirms what EPA has long understood. In *RFA*, the Tenth Circuit held that EPA's grant of SREs was arbitrary and capricious because EPA failed to consider its own past finding that obligated parties pass through their compliance costs.[76] Were EPA to again disregard its past or current evidence regarding compliance costs, EPA would again act arbitrarily and capriciously.

Based on its extensive and careful review of market data, EPA has maintained a longstanding and consistent view that obligated parties recover their costs of purchasing RIN credits by passing those costs on:

- Starting in at least 2015, and based on EPA's review of 2013 data, EPA had concluded in a published study that "[m]erchant refiners, who largely purchase separated RINs to meet their RFS obligations," are "recovering these costs in the sale price of their products."[77]

- In 2017, EPA reached the same conclusion when it denied petitions seeking to change the RFS point of obligation. EPA stated that, "[a]fter careful review of the information submitted, … [a]ll obligated parties, including merchant refiners, are generally able to recover the cost of the RINs they need for compliance with the RFS obligations through the cost of the gasoline and diesel fuel they produce."[78] In the course of reaching that conclusion, EPA considered but found "not convincing" studies purporting to show "an inability to 'pass-through' the cost of the RFS program."[79] The D.C. Circuit subsequently upheld EPA's 2017 analysis and conclusion, finding that EPA had "reasonably[] analyz[ed] the data and explain[ed] its decision."[80]

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[74] *Id.* at 50.

[75] *Id*.

[76] *RFA*, 948 F.3d at 1257.

[77] Dallas Burkholder, *EPA Office of Transportation and Air Quality, A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* 3 (May 14, 2015), EPA-HQ-OAR-2015-0111-0062.

[78] EPA, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation at 23-24 (Nov. 22, 2017), EPA-HQ-OAR-2016-0544-0525.

[79] *Id.* at 23.

[80] *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 653 (D.C. Cir. 2019).

- Later in 2017, in the context of setting the 2018 RFS standards, EPA rejected the contention that RFS compliance would cause "severe economic harm" because, again, obligated parties can "recoup the cost of RINs through higher prices of their products."[81] EPA observed that those challenging EPA's position "did not provide sufficient evidence" to the contrary.[82] Again, the D.C. Circuit affirmed EPA's conclusion, stating that EPA "consider an important aspect of the problem" and "offered an explanation for its decision" that accorded with "the evidence before the agency" and that was "[]plausible."[83]

- In EPA's final rule setting the 2020 RFS standards, EPA stated: "We have reviewed and assessed the available information, which shows that obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS standards."[84]

EPA's past history demonstrates why the Proposed Decision *must* be adopted. EPA has long held that obligated parties pass on their compliance costs, and there is no basis in the record to overturn that view. To ignore EPA's findings on RIN Cost Passthrough when evaluating SRE petitions would be arbitrary and capricious.[85] An "unexplained inconsistency in agency policy" is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[86]

Indeed, if EPA were to consider not adopting the Proposed Decision, EPA would first need to explain why it is deviating from its past evidence and conclusions on RIN Cost Passthrough. EPA must "display awareness that it is changing position" and "show that there are good reasons for the new policy."[87] EPA cannot "depart from a prior policy sub silentio" by merely ignoring its RIN Cost Passthrough findings in private SRE petition decisions.[88] The record, of course, contains no evidence that would justify such an about face.

E. EPA Must Adopt Its Own Conclusions on DEH, and Cannot Rely Blindly on Recommendations That Also Failed to Consider RIN Cost Passthrough

The Proposed Decision is also necessary for EPA to evaluate SRE petitions based on EPA's own expertise. EPA must evaluate SRE petitions "in consultation with the Secretary of

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[81] 82 Fed. Reg. at 58,486, 58,517 (Dec. 12, 2017).

[82] *Id.*

[83] *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 581 (D.C. Cir. 2019).

[84] 85 Fed. Reg. at 7,067-68.

[85] *RFA*, 948 F.3d at 1257.

[86] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quotations omitted).

[87] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[88] *See id.*

Energy" and shall "consider the findings of the study" created by DOE.[89] However, the Clean Air Act clearly vests the ultimate decision to extend an SRE, or not, with the Administrator of the EPA.[90] EPA's actions violate its statutory duty and are arbitrary and capricious when EPA does not provide and rely on its own reasoned explanation for its SRE decisions. Thus, EPA should adopt the Proposed Decision as a means of ensuring that EPA's SRE decisions are based on its own analysis.

EPA cannot "blindly adopt" DOE's recommendations with respect to SRE extensions.[91] The Proposed Decision discloses how EPA had historically abdicated its own statutory duty by relying "solely" on the recommendation of DOE.[92] EPA "began granting a full exemption whenever DOE findings indicated that the small refinery could receive at least 50% relief, based on [DOE's] matrix score."[93] EPA's past practice of adopting DOE's recommendations is clearly inconsistent with EPA's legal duty to make its own decisions on SRE extension petitions.

The Proposed Decision meets EPA's obligation to "consider the findings of the study" and consult with DOE.[94] In the absence of further instructions from Congress, EPA has substantial discretion in the form its consultation must take.[95] Here, EPA has considered DOE's study—both the 2009 and 2011 DOE studies with contradictory conclusions.[96] However, both of DOE's studies failed to consider the important fact that obligated parties pass on the costs of purchasing RIN credits.[97] EPA also reviewed DOE's predictions from the 2011 study, and concluded DOE's concerns about the marketplace have not come to pass.[98] EPA's proposal, therefore, shows that it has "considered" DOE's analysis but also correctly downplayed the importance of that analysis in light of EPA's own analysis.

Likewise, EPA is not bound by dicta in *HollyFrontier* that small refineries face disproportionate compliance costs because they must purchase RIN credits in a volatile market.[99]

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[89] 42 U.S.C. § 7545(o)(9)(B)(ii).

[90] *Id.*

[91] *See Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 610 (4th Cir. 2018) (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006)).

[92] *Proposed Decision* at 14.

[93] *Id.*

[94] 42 U.S.C. § 7545(o)(9)(B)(ii). EPA has also met its statutory obligation to consult with DOE by participating in "meetings and phone conversations regarding the pending SRE petitions, the supplemental supporting information the small refineries provided, and the analysis and proposed determinations in" the Proposed Decision. *Proposed Decision* at 21.

[95] *Hermes Consol.*, 787 F.3d at 575.

[96] *Proposed Decision* at 21.

[97] *Id.* at 22

[98] *Id.*

[99] 141 S. Ct. at 2182.

First, the Supreme Court was merely reciting the petitioner's argument, not agreeing with or adopting it.[100] Indeed, the Supreme Court had no occasion to opine on the issue because it was not relevant to the case. *Second*, the Court was not presented with, and did not consider, the potential for RIN Cost Passthrough and how even small refineries can pass and historically have passed on their compliance costs—and have done so to the same degree as larger refineries. In no way does this passing remark from *HollyFrontier*, therefore, constrain EPA's authority to adopt its own reasoned explanation concerning any DEH to small refineries.[101]

III. EPA'S PROPOSED REVERSION TO ITS PRIOR POSITION THAT ONLY REFINERIES THAT RECEIVED THE INITIAL BLANKET EXEMPTION ARE ELIGIBLE FOR FUTURE SREs IS SOUND

EPA should also revert to its prior policy that a small refinery must have received the initial blanket exemption under Subparagraph A to be eligible for an extension of that exemption.[102] EPA previously had adopted this eligibility requirement, but starting in 2017, EPA changed course without explanation and granted extensions to small refineries that had never received the original exemption.[103] EPA should deny the four pending SRE petitions and any other SRE petitions where the small refinery did not receive the original statutory exemption.

The plain language of the statute requires EPA to revert to its old policy. EPA does not have the authority to grant new exemptions. Subparagraph A permits EPA only to "extend" the temporary blanket exemption for two years based on DOE's findings.[104] Subparagraph B likewise permits EPA only to grant an "extension of the exemption under subparagraph A."[105] This means that a small refinery is not eligible for an extension if it did not receive the original exemption. The Supreme Court confirmed this interpretation of the statute in *HollyFrontier*. The plain language, the Court said, "permit[s] hardship relief only to small refineries in existence in 2008 and not to new ones" and there is nothing "odd about the fact that Congress chose only to protect existing small refineries rather than new entrants."[106]

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[100] *Id*.

[101] *See Fox Television Stations*, 556 U.S. at 515 (Agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better").

[102] *Proposed Decision* at 18.

[103] *Id.*

[104] 42 U.S.C. § 7545(o)(9)(A)(ii)(II).

[105] *Id.* at § 7545(o)(9)(B)(i).

[106] *HollyFrontier*, 141 S. Ct. at 2181-2182.

CONCLUSION

EPA should adopt the Proposed Decision and deny the 65 pending SRE applications, along with all remanded SRE applications and any other SRE applications it receives. The plain language and purpose of the RFS program make clear that EPA may grant SRE extensions only if it finds that RFS *compliance itself* will directly *cause* the refinery *disproportionate* economic hardship.

Based on EPA's well-supported and detailed analysis of all the available data and information, EPA has correctly concluded that small refineries do not experience DEH *caused* by compliance because all obligated parties, big and small, can and do pass on their compliance costs for purchasing RIN credits. Moreover, this conclusion is necessary to bring EPA back in line with its longstanding recognition of RIN Cost Passthrough in the market. Failing to adopt the Proposed Decision would amount to a departure from EPA's past findings without reasoned explanation.

EPA's Proposed Decision does not eliminate the SRE provision created in the RFS program. Instead, the proportionality of the renewable fuel obligations, combined with the realities of the RIN market and the long-proven ability to pass on RIN costs, ensures that small refineries do not face a disproportionate cost of compliance when compared to other refineries.

EPA has a long way to go in correcting its past actions that resulted in billions of gallons of renewable fuel use being lost from the RFS program. Nonetheless, the Proposed Decision is a step in the right direction of implementing the RFS program as Congress intended and expanding the domestic production and use of clean renewable fuels.