

October 31, 2025

ELECTRONIC SUBMISSION

Attn: EPA-HQ-OAR-2024-0505

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Re: Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes; Supplemental Notice of Proposed Rulemaking.
Docket No. EPA-HQ-OAR-2024-0505

To Whom It May Concern:

On September 18, 2025, the U.S. Environmental Protection Agency (EPA) published proposed “Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes; Supplemental Notice of Proposed Rulemaking”¹ (SNPRM) under Section 211 of the Clean Air Act² (CAA). The SNPRM proposes to reallocate Small Refinery Exemption (SRE) amounts recently granted for 2023 and 2024, as well as those projected for 2025, to non-exempt refiners for them to meet their Renewable Volume Obligations (RVOs) in 2026 and 2027.³

In the SNPRM, EPA specifically requests comment on whether it may be more appropriate to refrain from reallocation entirely.⁴ EPA specifically asks that commenters limit their comments to the data and information presented in the SNPRM and states that “EPA intends to respond to comments received after that date only if they are within the scope of this supplemental proposal.”⁵

¹ 90 Fed. Reg. 45,007 (Sept. 18, 2025).

² 42 U.S.C. §§ 7401-7671(q) (1970), as amended.

³ 90 Fed. Reg. at 45,009.

⁴ *Id.* at 45,009, 45011, 45012.

⁵ *Id.* at 45009.

In this letter I strongly urge EPA to refrain from reallocating entirely. However, because the SNPRM highlights broader problems of feasibility and constitutionality of the RFS, this comment letter explores those broader issues. That discussion is necessary in order to fully appreciate the folly of reallocation as an expedient in the effort to manage the intractable problems of the RFS.

The SNPRM is just the latest episode in the slow-motion trainwreck that is the RFS program. As Part I of this comment letter shows, the reallocation contemplated in the SNPRM is not in accordance with law. But as Part II of this comment letter explains, EPA is increasingly forced to resort to expedients that exceed its statutory authority, because the RFS program is simply unworkable, and should be ramped down and phased out. Part III argues that since the statutory thresholds were replaced with arbitrary EPA authority to set the RFS at virtually any level starting in 2023, without meaningful intelligible principles to guide the agency, the RFS violates the Supreme Court's emerging nondelegation doctrine.

Accordingly, I respectfully submit these comments.

Background

Under the RFS, oil refineries and importers must blend a certain volume of renewable fuels into transportation fuel each year or obtain credits (RINs) to meet their RVOs. Small Refinery Exemptions (SREs) are waivers under Section 211(o)(9) of the CAA that relieve qualifying small refineries from their RFS obligations for a given year if they can demonstrate “disproportionate economic hardship.” When an SRE is granted, that refinery's obligation to blend renewable fuel (or purchase RIN credits) is waived, effectively removing a chunk of renewable fuel demand that was assumed in the annual targets. In practical terms, granting SREs reduces the total amount of biofuel that would otherwise be blended, unless adjustments are made elsewhere in the program. Over time, an increasing number of SREs led to billions of RINs being exempted, lowering effective renewable fuel volumes and depressing RIN prices.

This context helps explain the chain of events that led to the SNPRM. On June 17, 2025, the EPA published a Notice of Proposed Rulemaking, “Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes” (NPRM).⁶ EPA proposed among other things to increase the volume requirements under its RFS program, from 22.33 billion gallons of total renewable fuel required in 2025, as had previously been finalized, to 24.02 billion gallons in 2026 and 24.46 billion gallons in 2027.⁷ By 2027, this would represent close to a 10 percent increase over the amount that EPA required in 2025. The implicit cap of 15 billion gallons of conventional biofuel (i.e., ethanol) would remain in effect,⁸ as EPA proposes to attribute increases in overall volume

⁶ 90 Fed. Reg. 25784 (2025).

⁷ *Id.* at 25786.

⁸ Beginning in 2015, the implicit cap for conventional biofuel (i.e., ethanol) was at 15 billion gallons; the subsequent statutory increases in the total renewable fuel statutory targets through 2022, as mandated by Congress, were

requirements to increased volumes of advanced biofuels, especially biomass-based diesel,⁹ which includes soybean oil. The NPRM would create additional challenges for U.S. refiners by reducing the Renewable Identification Number (RIN) credit for imported renewable fuels to a 50 percent credit.¹⁰ The comment period for the NPRM closed on August 8, 2025.¹¹

On August 22, 2025, EPA issued decisions on 175 small refinery exemption (SRE) petitions under the RFS program.¹² These petitions came from 38 refiners, which sought various exemptions from their RFS obligations for the 2016-2024 compliance years.¹³ With the disposition of these petitions, EPA had acted upon all petitions for the 2023 and 2024 compliance years, and accordingly is now able to determine the actual, exempted renewable volume obligations (RVOs) for those years. EPA has not yet acted on any SRE petitions for 2025 but feels able to project the exempt RVOs for 2025 based on historical data for exempted volumes.¹⁴

On September 18, 2025, EPA published a Supplemental Notice of Proposed Rulemaking (SNPRM), “Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes; Supplemental Notice of Proposed Rulemaking.”¹⁵ The SNPRM proposes to reallocate the SRE exemption amounts granted for 2023 and 2024, as well as those projected for 2025, to non-exempt refiners to meet in the calendar years 2026 and 2027.¹⁶ Interestingly but perhaps unsurprisingly, EPA’s projected exempted volumes for 2025 are slightly higher than the amounts exempted in 2023 and 2024.¹⁷

The exempted RVOs are calculated as a percentage of the overall exempted fuel volumes, and thus amount to a combined 1.4 billion granted for 2023 and 2024, and a projected 780 million for 2025.¹⁸ This would amount to a combined total of 2.18 billion gallons in RVOs across these three years, which would be reallocated across the two compliance years for 2026-27. Given that the NPRM proposed required volumes at 24.02 billion and 24.46 billion gallons for 2026 and 2027, respectively,¹⁹ the reallocation would effectively amount to a premium of approximately 4.5 percent above the NPRM’s proposed volumes,²⁰ for non-exempt refiners. It is also perhaps

attributable to increases in the statutory target volumes for advanced biofuel and its components. *See* 42 U.S.C. 7545(o)(2)(B)(i).

⁹ 90 Fed. Reg. at 25786.

¹⁰ *Id.* at 25787-88.

¹¹ *Id.* at 25784.

¹² EPA, “August 2025 Decisions on Petitions for RFS Small Refinery Exemptions,” EPA-420-R-25-010, August 2025.

¹³ *Id.* at 1.

¹⁴ 90 Fed. Reg. 45007, 45012 (2025).

¹⁵ 90 Fed. Reg. 45007 (2025).

¹⁶ *Id.* at 45009.

¹⁷ *Id.* at 45012 (Table IV-1, depicting the total exempted fuel amounts at 5.6 billion gallons and 5.82 billion gallons for the calendar years 2023 and 2024, respectively).

¹⁸ *Id.* at 45012 (Table IV-2, depicting exempted RVOs for the 2023-2025 compliance years).

¹⁹ 90 Fed. Reg. at 25786 and 25829 (containing charts listing the proposed RVO requirements in the NPRM).

²⁰ Assuming that the 2.14 billion gallons in reallocated RVOs are distributed 50 percent across each compliance year

worth noting that these reallocations help push the proposed renewable percentage standards slightly above 15 percent.²¹

Discussion

I. The SNPRM Exceeds EPA Authority under the Clean Air Act.

A. Reallocation of SRE volumes has no statutory basis in the CAA.

When determining renewable fuel volumes under EPA's authority to set RFS requirements after 2022, the final year of statutory volume thresholds, Congress directed EPA to consider six factors.²² Notable about each of these factors is that they are all forward looking rather than backward looking. Making up for alleged, past underestimates is not listed among the appropriate factors to weigh, and it is not obvious where such a consideration would belong, particularly when EPA is unable to articulate specifically which of the statutory policy goals would be advanced by this policy, or how the proposed strategy of reallocating past exemptions would promote these goals.

This is made all the more extraordinary by the fact that in the SNPRM, EPA directly acknowledges that “we do not anticipate impacts on most statutory factors.”²³ EPA even concedes, “The one statutory factor that we do project would be impacted by this proposed action is the impact on the cost to consumers of transportation fuel and the cost to transport goods.”²⁴ EPA then goes on to state that the impact to this factor would be to “increase the cost of transportation fuel to consumers.”²⁵

Given that Congress charged EPA with basing its RFS amounts on these six factors, it is extraordinary that EPA would first state that five of those factors are unaffected by this SNPRM, and that on top of that, the one factor that would be affected would directly contradict its charge by Congress (unless EPA is arguing, improbably, that Congress intended to raise consumer prices rather than lower them). This provides clear evidence, directly from EPA, that this SNPRM imposes obligations on regulated parties that are divorced from the statutory factors that Congress directed EPA to analyze in exercising its set authority. Indeed, as further explained in Part III, this strongly suggests that the six factors in Section 211 do not rise to the level of “intelligible principles,” as EPA clearly does not see any of those factors as constraining its range of options with respect to its set authority.

It is true that there were two years in the program's history, in 2022 and 2023, when unused volumes from a previous year were allocated. Yet the statutory nexus in those years was very

²¹ *Id.* at 45013 (Table V-1, depicting how a lower reallocation percentage reduces the renewable fuel percentage standards closer to the 15 percent blend wall).

²² *Supra*, n. 6-12.

²³ 90 Fed. Reg. at 45015.

²⁴ *Id.*

²⁵ *Id.*

clear. The D.C. Circuit had previously determined that EPA had reduced certain fuel renewable fuel requirements by 500 million gallons in 2016, as provided in the relevant statutory tables.²⁶ In that case, EPA was simply effectuating a previous, express legislative requirement, pursuant to court order, by redistributing those past volume requirements to future years. No such impetus exists here, whether legislative (given that EPA is relying on its own set authority), nor judicial (given the lack of any court ruling).

The CAA lays out the statutory requirements for SREs in detail.²⁷ Without analyzing each subparagraph, it suffices to note that the relevant simply provides relief to small refineries, defined as those with an average daily crude oil throughput that does not exceed 75,000 daily barrels for a calendar year.²⁸ None of the language in this section even contemplates that SRE volumes would be reallocated to nonexempt refiners.

Moreover, it is critical to note that the SNPRM arguably contradicts the specific language of Section 211 (o)(3)(C)(i), which guides EPA in converting the required volume obligations into applicable percentage requirements, and making any necessary adjustments. Under this language, EPA is required to make adjustments “to prevent the imposition of redundant obligations on” refiners, blenders, and importers.²⁹ Thus, EPA’s proposed policy of reallocating obligations from previous years, which the non-exempt refiners were already required to meet, back onto those non-exempt refiners to satisfy again in future, makes use of a power that Congress specifically withheld from EPA.

Any other conclusion would undermine the structure of the regulatory program envisioned by the statute, which requires obligations to be set on an “annual average basis,” for each specific “calendar year.”³⁰ Supplementing the NPRM for a calendar year, with an SNPRM that proposes to adjust that calendar year’s requirements to make up for mistaken projections in previous calendar years, even divorced from any of the statutory factors, directly undermines that regulatory structure, and the predictability that structure provides to the regulated industry.

The RFS paragraphs of the CAA include several provisions allowing limited flexibility based on the previous year’s applicable volumes. Specifically, through 2021, EPA must reduce renewable fuel requirements based on the previous use of fuel by exempt small refineries.³¹ In addition, EPA is required to reduce statutory volumes if it waives at least 20 percent of a volume requirement for two consecutive years, or at least 50 percent of a requirement for one year.³² Finally, obligated parties are allowed to “carry forward a renewable fuel deficit” for a single year.³³ Every single one of these authorized flexibilities allows EPA to mitigate the burden on

²⁶ *Ctr for Biological Diversity v. EPA*, No. 23-1177, p. 48 (D.C. Cir. 2025); *Sinclair Wyo. Refining Co. LLC v. EPA*, 101 F.4th 871, 893 (D.C. Cir. 2024).

²⁷ 42 U.S.C. 7545(o)(9).

²⁸ 42 U.S.C. 7545(o)(1)(K).

²⁹ 42 U.S.C. 7545(o)(3)(C)(i).

³⁰ 42 U.S.C. 7545(o)(2)-(3).

³¹ 42 U.S.C. 7545(o)(3)(C)(ii).

³² 42 U.S.C. 7545(o)(7)(F).

³³ 42 U.S.C. 7545(o)(5)(D).

obligated industry members, which makes EPA's decision to invent a new, extra-statutory mechanism instead to increase the burden on regulated stakeholders all the more noteworthy.

In the SNPRM, EPA expresses a concern that the availability of RINs from earlier years, by reducing RIN demand and prices in future years, could lower renewable fuel production in 2026 and 2027.³⁴ Yet, to the extent such a concern is motivated by legitimate statutory factors, there is a straightforward solution: EPA could promulgate (presumably higher) renewable fuel volume levels in the NPRM at the first instance, to take such concerns into account.

Doing so would provide proper notice to industry members and affected parties, who would have a more accurate basis on which to submit the feedback that is meant to inform agency rulemaking as envisioned under the terms of the Administrative Procedure Act. Instead, EPA waited for the initial NPRM comment period to pass, and only two weeks later published their SRE decisions. Less than a month after that, EPA published an SNPRM that only then gave the industry an accurate view of the full scope of their potential obligations under the proposal, but declared that only comments related to the new SNPRM would be considered. Only after the publication of the SNPRM did it become clear that the approximately 10 percent increase on RVOs for obligated parties in fact amounted to an almost 15 percent increase on the obligated amounts for non-exempt refiners, when the SNPRM amounts are also included. Of course, by the time this became clear, EPA made clear that they would only respond to comments on the SNPRM.

Divorcing the SNPRM (and its RVOs) from the NPRM like this, and doing so in a way that both prevents stakeholders from fully understanding or commenting on the full volume requirements until after well after the NPRM comment period has passed, violates the Administrative Procedure Act, and its requirements that affected parties have the opportunity to comment on how they would be impacted by proposed rules. This is made especially egregious by EPA's acknowledgement that the SNPRM is not actually advancing the statutory factors that it is required to, and by its refusal to even try to disentangle the economic and practical effects of the innovative policy proposed in the SNPRM, from the effects of the policies proposed in the NPRM, which are also innovative in their own right.

B. The timing of the SNPRM puts EPA in violation of the timeliness requirement of the RFS.

As noted above, for EPA rulemaking proposals under the RFS "set authority" provisions, the CAA requires a 14-month lead-time "before the first year for which such applicable volume will apply."³⁵ Even in the initial NPRM proposing the 2026 and 2027 volumes, EPA acknowledged that it was "proposing applicable volume requirements for the 2026 compliance year after the statutory deadline to establish such requirements."³⁶

Even so, at the time of publication for the initial NPRM, it was at least conceivable that EPA might promulgate volume requirements within the appropriate statutory timeframe for 2027.

³⁴ 90 Fed. Reg. 45010.

³⁵ 42 U.S.C. 7545(o)(2)(ii).

³⁶ 90 Fed Reg. at 25791-92.

However, given the 14-month timeframe, October 31st, the day that the SNPRM comment period closes,³⁷ is also the last legally permissible day to promulgate RFS volume standards for 2027. Given that this SNPRM leaves open the question of nearly 6 billion gallons of renewable fuel obligations for each of the relevant calendar years, this timeframe automatically places EPA in violation of the statutory timeframe established by the plain language of the CAA. After October 31, the earliest that EPA can possibly promulgate these reallocated volume standards, and remain compliant with the statute, is for the 2028 calendar year.

The application of the statutory deadlines to EPA's management of the RFS program has been extensively litigated,³⁸ and the D.C. Circuit has been consistent in allowing EPA to set RFS program requirements even after the statutory deadline has passed. Therefore, any persuasive argument that the SNPRM's breach of the statutory deadline should affect EPA's actions would either need to convince the courts to overturn this precedent, or otherwise distinguish the current SNPRM from the cases previously litigated.

Beginning in 2010 with *Nat'l Petrochemical Petrochemical & Refiners Ass'n v. EPA*,³⁹ the D.C. Circuit has been permissive in allowing EPA to breach its RFS deadlines as laid out in the CAA. Part of the problem is that while the CAA creates a statutory lead time requirement, the CAA does not specify any consequence for EPA in breaching that requirement, and the D.C. Circuit has found that the "precedent from the Supreme Court and our court thus makes clear that in the face of congressional silence in the EISA on the effect of EPA's delay in promulgating the revised regulations, we should not presume Congress intended EPA would lose authority to act upon missing statutory deadlines but must determine...without deferring to *post hoc* arguments of counsel...what Congress would have intended when EPA missed a statutory deadline."⁴⁰ The court worried that in absence of any specific remedies, invalidating the entire rule would be too drastic of a solution.⁴¹

Turning to Congressional intent, the court determined that "Congress' purpose in expanding the renewable fuel program under the EISA is better served by EPA's approach in the Final Rule than it would be forgoing the 2009 applicable volume requirement." The Court reasoned that using EPA's tardiness to invalidate the entire rulemaking project would therefore both frustrate Congressional intent and "turn agency delay into a windfall for the regulated utilities."⁴² The court instead held that EPA may issue late volume requirements, provided that the agency acted reasonably in so doing.⁴³

³⁷ 90 Fed. Reg. at 45007.

³⁸ *E.g.*, *Ctr. for Biological Diversity v. EPA*, No. 23-1177 (D.C. Cir. 2025); *Sinclair Wyo. Refin. Co. LLC v. EPA*, 101 F.4th 871 (D.C. Cir. 2024); *Ams. For Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017); *Monroe Energy, LLC v. EPA*, 750 F.2d 909 (D.C. Cir. 2014); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (2010).

³⁹ *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

⁴⁰ *Nat'l Petrochemical & Refiners Ass'n*, 630 F. 3d at 154 (internal citations omitted).

⁴¹ *Id.* ("[W]here there are less drastic remedies available for an agency's failure to meet a statutory deadline, courts should not assume Congress intended for the agency to lose its power to act." (citing *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)).

⁴² *Id.* at 154-58.

⁴³ *Id.* at 157 (citing *Brock*, 476 U.S. at 258).

The Court later relied on the precedent in *Nat'l Petrochemical & Refiners* to finalize the 2013 RFS requirements after the statutory deadline in *Monroe Energy, LLC v. EPA*.⁴⁴ In the course of its reasoning, the court in *Monroe* justified its decision by pointing out, “Obligated parties had long been aware of the applicable volumes prescribed in the statute.”⁴⁵ Subsequently, in 2017, while still on the D.C. Circuit Court of Appeals, Judge Kavanaugh authored a decision, *Ams. for Clean Energy v. EPA (ACE)*,⁴⁶ relying on this precedent to allow EPA to finalize the 2014 and 2015 renewable fuel requirements after the relevant statutory deadline. According to then-Judge Kavanaugh, this precedent stood for the principle “that EPA must exercise its authority reasonably by considering the ‘benefits and burdens attendant to its approach’ of issuing late renewable fuel requirements.”⁴⁷

Although *Nat'l Petrochemical* and *Monroe Energy* were decided in the context of EPA’s authority to implement the volumes that Congress listed in the statutory tables, *ACE* was slightly different. Although the total volume of renewable fuel was still established in the statutory tables, the statutory tables for the subcategory of biomass-based diesel (BBD) only cover the calendar years 2009-12. Rather than treat the statutory volumes for total renewables differently from the set BBD volumes, Judge Kavanaugh drew four broader principles, which he held applied both to EPA’s statutory and set volume authority. According to Judge Kavanaugh, “the Court pointed to: (i) Congress’s failure to specify the consequences of EPA’s failure to meet a statutory deadline; (ii) the principle that ‘where there are less drastic remedies available for an agency’s failure to meet a statutory deadline, courts should not assume Congress intended for the agency to lose its power to act’; (iii) EPA’s ‘statutory mandate’ to ‘ensure’ that the annual volume requirements are met; and (iv) the notion that it would be ‘drastic’ and ‘incongruous’ to preclude EPA from fulfilling that ‘statutory mandate’ based on its delay.”⁴⁸

Accordingly, Judge Kavanaugh held that EPA’s authority to set volumes even after the statutory deadline applied both to its authority to administer the overall statutory volumes as established by Congress in the statutory tables, and to EPA’s set authority to increase the BBD requirement beyond the 2012 statutory level.⁴⁹ In 2024, the D.C. Circuit relied on this precedent to reiterate yet again, in resolving challenges to EPA’s late publication of the 2020, 2021, and 2022 standards, that they “have made clear, however, that EPA ‘may promulgate late 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.’”⁵⁰

Sinclair Wyoming was the last case to challenge EPA’s ability to set RFS standards according to the statutory tables. It might appear that the transition from the statutory tables to EPA’s set authority could provide an opportunity to reexamine the importance of the statutory deadline, particularly since the statutory deadline itself also became far longer with the transition to EPA’s

⁴⁴ *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014).

⁴⁵ *Id.* at 920.

⁴⁶ *Ams. For Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017) (Kavanaugh, J.).

⁴⁷ *ACE*, 864 F.3d at 718.

⁴⁸ *ACE*, 864 F.3d at 721 (citing *Nat'l Petrochemical*, 630 F.3d at 154, 157; and *Monroe Energy*, 750 F.3d at 920).

⁴⁹ *ACE*, 864 F.3d at 723.

⁵⁰ *Sinclair Wyo. Refin. Co. LLC v. EPA*, 101 F.4th 871 (D.C. Cir. 2024) (citing *ACE*, 864 F.3d at 718).

set authority. However, without much analysis, the D.C. Circuit simply held, “*ACE* squarely forecloses that argument. There, we held that the principles established in *National Petrochemical* and *Monroe Energy* govern regardless of whether the tardy volume requirements derived from the statutory tables or imposed in the first instance by EPA.”⁵¹

When Congress created the RFS program, the legislation included statutory tables that mandated specific RFS levels for each year from 2006 until 2022,⁵² although Congress did provide EPA with the authority to adjust those numbers downward in certain circumstances, and although EPA’s discretion to set the BBD volume levels transitioned from the statutory tables to the set authority ten years earlier, after 2012.⁵³ As a result, the obligated parties had at least a rough notice of their obligations, as laid out in the statute, particularly given that the BBD volumes had always constituted a comparably small share of the total renewable amounts, which had remained fixed by the statutory tables. As of 2023, that longstanding statutory notice is effectively gone, now that the statutory tables have been replaced with a regime that entrusts EPA with broader authority to use its judgment to set renewable fuel volumes, subject to weighing six Congressionally mandated factors.⁵⁴

The change in this legal regime naturally makes it far more difficult for refiners to predict RFS volume obligations going forward. However, Congress provided an important concession to refiners in order to help them deal with these challenges. Under the statutory provision that prevailed until 2022, EPA was allowed to publish the applicable fuel blend percentages by November 30 of the year before they took effect.⁵⁵ In essence, this only gave refiners one month’s notice before the RFS requirements took effect, which seems to provide little notice, until one remembers that the refiners had longstanding guidance from the statutory volumes, which EPA was (in theory, at least) merely implementing. As the D.C. Circuit noted in *Monroe*, notwithstanding any EPA delays, “Obligated parties had long been aware of the applicable volumes prescribed in the statute.”⁵⁶

Predicting and planning around RFS volumes in the post-2022 regime of EPA’s virtually arbitrary set authority is more challenging. Congress showed that it recognized the greater challenges for regulated parties to predict compliance obligations under the new set regime, and Congress showed this recognition and addressed that challenge by increasing the statutorily required notice from one month until 2022, to 14 months afterwards. Thus, at the very time where Congress gives EPA *more* discretion to determine the volumes to set, Congress simultaneously singled out this one factor to treat more strictly – the length of the required lead time. For EPA to ignore the lengthened notice requirement, at a time when Congress has expanded its authority to set volume requirements so significantly, effectively allows EPA to

⁵¹ *Ctr. for Biological Diversity v. EPA*, No. 23-1177 at p. 47 (D.C. Cir. 2024) (citing *ACE*, 864 F.3d at 721).

⁵² 42 U.S.C. 7545(o)(2)(B)(i).

⁵³ 42 U.S.C. 7545(o)(2)(B)(i)(IV).

⁵⁴ 42 U.S.C. 7545(o)(2)(B)(ii)(I) - (IV).

⁵⁵ 42 U.S.C. 7545(o)(3)(B)(i).

⁵⁶ *Monroe*, 750 F.3d at 920 (citing 42 U.S.C. 7545(o)(2)(B)(i)).

ignore one of its most concrete remaining constraints in administering the RFS volumes as Congress envisioned the program

Indeed, unlike certain statutory deadlines in other contexts that are often designed to keep Federal agencies on track with Congressional requirements (with varying levels of success),⁵⁷ the statutory deadline here is important for the regulated stakeholders themselves. Refiners need a lead time in order to incorporate RVO mandates into their business practices, particularly in a situation like the current rulemaking process, in which EPA is taking a market-forcing approach that exceeds the volumes currently available on the domestic market. Refiners need this lead time to contract with feedstock and biofuels producers, and to mitigate both the uncertainty and costs associated with the relatively illiquid and volatile market in Renewable Identification Numbers (RINs), which the SNPRM would make more illiquid by the sudden addition of an obligation for over two billion gallons' worth of RINs. Indeed, EPA acknowledges in the SNPRM that the proposed reallocation is intended to prop up the renewable fuel market by making RINs more expensive for nonexempt producers that are subject to the NPRM requirements.⁵⁸

In *Nat'l Petrochemical*, the D.C. Circuit noted that the deadlines in the EISA were unrealistic for promulgating the revised regulation in time for the statutory deadlines, which is clearly not the case here, where EPA has had extensive time to promulgate upcoming volume requirements. In addition, in *Nat'l Petrochemical* the Court noted that Congress specifically mandated EPA to ensure that the volumes available in the statutory tables were sold or introduced into commerce for the respective years.⁵⁹ Thus, for the Court to hold EPA to the deadline strictly, the Court would effectively be causing EPA to flout the clear Congressional intent in promulgating the statutory volumes. As the D.C. Circuit emphasized, "The statute set the renewable fuel obligation."⁶⁰

Yet after 2022, there is no longer any specific, concrete Congressional mandate for EPA to implement with respect to RFS volumes. Accordingly, requiring EPA to publish RFS regulations in alignment with the (Congressionally lengthened) deadline does not undermine Congressional intent, as was the case when EPA worked off of Congressionally specified volumes. If anything, Congressional intent now goes the other way; absent volumes, the lengthened notice requirement is the most concrete procedural directive that Congress left in place to give affected parties the minimum notice they fairly need.

⁵⁷ *E.g.*, 42 U.S.C. 10101 *et seq.* (1982) (establishing a timetable of key milestones that Federal agencies were required to follow to carry out the safe storage and disposal of nuclear waste by 1998, which still has not happened).

⁵⁸ 90 Fed. Reg. at 45010 ("The availability of these RINs [from SREs from previous compliance years]—and the ability for obligated parties to use them to comply with their RFS obligations in lieu of RINs generated for renewable fuel produced and used in 2026 and 2027—could reduce RIN demand and RIN prices in future years and may ultimately result in the market failing to produce the volume of renewable fuel anticipated by the volume requirements in the Set 2 proposal").

⁵⁹ *Nat'l Petrochemical*, 630 F.3d at 163 (discussing the importance of ensuring that "Congress' focus on ensuring the annual volume requirement was met regardless of EPA delay").

⁶⁰ *Monroe*, 750 F.3d at 920.

It is true that in *ACE*, the D.C. Circuit allowed EPA to proceed with a tardy rulemaking, even after the BBD volumes were authorized under EPA's set authority, and even as EPA set the BBD volumes above the ones that Congress established in the last year of the BBD statutory table. However, *ACE* is distinguishable in two critical respects. First, the BBD volumes were a comparatively small part of the overall program; in 2012, BBD accounted for a mere 1.0 billion gallons⁶¹ out of the total renewable fuel requirement of 15.2 billion gallons that year.⁶² Holding the RFS program accountable to an extended notice requirement on the basis of the BBD program alone would have either complicated the program by requiring two different sets of rulemaking, or otherwise would have held the congressionally mandated RFS requirements hostage to the more rigid requirements of BBD, which at the time constituted slightly over 6.5 percent of the entire statutorily mandated renewable fuel volume. In contrast, the RFS requirements would result in closer to a 15 percent increase in effect requirements for non-exempt refiners.

Moreover, as the Judge Kavanaugh took pains to note in *ACE*, "EPA set the volume requirements (and associated percentage standards) for all fuel types for the years 2014 and 2015 based on the volumes of renewable fuel that were actually introduced and available for compliance during those years."⁶³ The statutory notice concerns would be significantly ameliorated in a context in which the volumes are being set to production levels anyway. In contrast, EPA's proposal in the SNPRM to reallocate SRE volumes so that, over the coming years, non-exempt refiners are liable not only for 2026 and 2027 volumes that have already been inflated above market levels, but also liable for an increase based on previous year requirements by other refiners that went unmet, creates significantly more harmful notice implications.

The current context in which the entire RFS program has now moved on to EPA's set authority, and where EPA is using that authority to set volume requirements significantly above the blendwall and current production levels, also creates a very different fact pattern from the one that underlay Judge Kavanaugh's decision in *ACE*. The only subsequent D.C. Circuit opinion that discussed EPA's set authority, *Center for Biological Diversity*, adopted *ACE*'s holding without any analysis as to how, or even whether, its rationale may have changed.⁶⁴ Yet if EPA finalizes these volume reallocations, both at the tardy timeline made inevitable by the SNPRM, and so far above the levels that the market has demonstrated, that would raise renewed questions as to how EPA and the courts should appraise the CAA's timeline requirements, as the RFS program transitions from being governed by concrete, well-known statutory tables, to a more open-ended regime of EPA's set authority.

C. The SNPRM is impermissibly retroactive.

⁶¹ 42 U.S.C. 7545(o)(2)(B)(i)(IV).

⁶² 42 U.S.C. 7545(o)(2)(B)(i)(I).

⁶³ *ACE*, 864 F.3d at 717.

⁶⁴ *Ctr for Biological Diversity*, No. 23-1177 at 47 (simply stating that "*ACE* squarely forecloses that argument" that the precedents involving the statutory tables are inapposite to volumes set under EPA's set authority, without providing any further explanation).

Absent clear Congressional intent, there is a longstanding presumption against retroactivity when reading statutes.⁶⁵ Given that agencies derive their power from implementing Congress directives, that presumption extends to agency rulemaking. “Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.”⁶⁶ As such, it is a well-recognized principle of administrative law that “[a]n agency may not promulgate retrospective rules absent express congressional authority.”⁶⁷

There is no such express authority in the RFS provisions of the CAA. While the D.C. Circuit has allowed some retroactivity in EPA’s administration of the RFS program, EPA’s proposed actions in the SNPRM extend far beyond the precedent, parameters, and constraints of what the D.C. Circuit has previously allowed

As with the statutory tardiness issue discussed above, the issue of retroactivity under the RFS program has been litigated extensively. In that litigation, the D.C. Circuit has consistently deferred to EPA in its ability to administer the program with retroactive effect on obligated industry members. However, EPA’s proposed actions in the SNPRM are more ambitious than anything that the courts have allowed in the past.

Refiners have argued that EPA administered the RFS program in a way that was impermissibly retroactive since the beginning of the program. In *Nat’l Petrochemical*, EPA did not promulgate the 2010 standards until July of that year. The petitioners in that case therefore argued that the final rule was not merely delayed beyond statutory requirements, but imposed retroactive requirements on the obligated parties to the extent that the standards regulated business practices in the months before the 2010 standards were finalized.

EPA’s primary argument, as summarized by the court, was that Congress had directed EPA to “ensure”⁶⁸ that the relevant volumes would be sold or introduced into commerce “on an average annual basis,”⁶⁹ and to do so “regardless of the date of promulgation.”⁷⁰ The court did not concede retroactivity in this case, holding only that, “To the extent the Final Rule may be retroactive, we hold that EPA did not exceed its statutory authority under the EISA.” Throughout its analysis, the court in *Nat’l Petrochemical* expressed that a midyear Final Rule that promulgated volume requirements, which due to the operation of the RIN compliance, were not due until the end of the year anyway, did not constitute impermissible retroactivity.

Given the court’s reasoning and fact pattern in *Nat’l Petrochemical*, it is unsurprising that they made the same decision four years later, in *Monroe Energy*. In *Monroe*, the refiners were again challenging a midyear RFS Final Rule governing renewable fuel volumes for the year 2013, which was only promulgated in August of that year.⁷¹ Citing *Nat’l Petrochemical*, the court in

⁶⁵ *E.g., Landgraf v. U.S. Film Prods.*, 511 U.S. 244 (1994).

⁶⁶ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

⁶⁷ *Nat’l Min. Ass’n v. Dep’t of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002).

⁶⁸ 42 U.S.C. 7545(o)(2)(A)(i).

⁶⁹ *Id.*

⁷⁰ 42 U.S.C. 7545(o)(2)(A)(iii).

⁷¹ 78 Fed. Reg. 49794 (2013).

Monroe stated that “the ‘retroactivity’ label may somewhat overstate the issue.” As the court went on to note, “EPA finalized its standards during the compliance year, well before the compliance demonstration deadline, so the rule did not change the legal effect of a completed course of conduct.”⁷²

In both cases, the court by its own description did not allow retroactivity, particularly given the cited statutory language relating to “average annual volumes”; the court merely held that EPA’s promulgation of statutory volume requirements during the year they were meant to govern was not in fact retroactive. In contrast, in the SNPRM at hand, EPA is not proposing merely to publish annual volumes after the start of the year in which they are meant to govern behavior. Rather, the SNPRM proposes to take exempt volumes from previous compliance years, from refiners exempt from the RFS regulations, and to reallocate those exempted volumes to non-exempt refiners, 2-4 years later. This use of the RFS regulations was contemplated in neither *Nat’l Petrochemical*, nor in *Monroe*.

A more clear-cut example of retroactivity occurred in December of 2015, when EPA published a rule setting renewable fuel requirements for the years 2014 through 2017.⁷³ As has become predictable for the RFS program, this rulemaking also was contested in the courts. Unlike the previous cases, the fact that this rulemaking effectively covered two years that had already passed (it was only published on December 14th of 2015) made it incontestable that the rule in question was at least partly retroactive. Yet the contrast in EPA’s use of that retroactivity is striking.

As Judge Kavanaugh described in *ACE*, EPA felt that it was “duty-bound to issue volume requirements and percentage standards” for the years in question under the terms of the statute, but “EPA also recognized its duty to consider and mitigate any hardships caused to obligated parties by reason of its lateness.”⁷⁴ Specifically, Judge Kavanaugh described “the most important of those steps”⁷⁵ as “EPA’s choice to set the volume requirements for the years 2014 and 2015 based on the actual volumes of renewable fuel that were introduced and available for compliance.”⁷⁶ This mitigating measure clearly made a strong impression on the court, which also noted this measure in its factual summary of the case,⁷⁷ and when describing EPA’s mitigating measures for BBD as well as for the total volumes.⁷⁸

⁷² *Monroe, LLC* at 920.

⁷³ 80 Fed. Reg 77420 (2015).

⁷⁴ *ACE*, 864 F.3d at 718.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 717 (“In particular, EPA set the volume requirements (and associated percentage standards) for all fuel types for the years 2014 and 2015 based on the volumes of renewable fuel that were actually introduced and available for compliance during those years”).

⁷⁸ *Id.* at 722 (“Most importantly for present purposes, EPA avoided placing any unreasonable burden on obligated parties by setting the 2014 and 2015 requirements based on the actual volumes of biomass-based diesel available in those years”).

Since *ACE*, the court has only heard the retroactivity argument on two occasions. In *Sinclair Wyoming*, EPA had in July of 2022 published standards that governed for the years 2020-22.⁷⁹ For 2022, EPA reduced the required volume of cellulosic biofuel from the statutory volume to the “projected volume available,”⁸⁰ and for the years that had “already passed” EPA reduced the applicable volumes to the amount actually used in those years.⁸¹ Similarly, for the advanced biofuel and total renewable fuel volumes, EPA used the “actual volumes of such fuels available in 2020 and 2021,”⁸² although they increased the volume requirement for these fuels for 2022. As might be expected, the D.C. Circuit relied on *ACE* to allow EPA to rely on the volumes actually used for the years past, and cited various cases to allow the late issuance of the 2022 standards, based on various mitigating measures by EPA.

It is a noteworthy contrast that, in the most analogous examples to the current SNPRM, EPA implemented retroactive volume requirements at their actual levels, so as to minimize the harmful impact on regulated industry members. It would be extraordinary if EPA tried to apply that precedent in the current case, to justify a retroactive policy that would take RVOs from past years, to exacerbate rather than minimize the compliance burden for non-exempt refiners over the next two years, in the context of a rule that already seeks to expand the renewable fuel market dramatically.

There is one way in which this SNPRM mirrors previous EPA actions. Specifically, in *ACE*, the court had vacated EPA’s decision to reduce the 2016 statutory renewable fuel requirement by 500 million gallons.⁸³ To remedy this, EPA published supplemental standards adding 250 million gallons each to the 2022 and 2023 volume requirements.⁸⁴ The D.C. Circuit upheld this action in *Sinclair Wyoming* under its statutory authority to “ensure” that renewable volume requirements are “met.”⁸⁵ Given that decision upholding the supplemental 2022 volume requirements at issue in *Sinclair Wyoming*, and the lack of any distinguishing factors between the 2022 and 2023 supplemental volume requirements, the D.C. Circuit in *Center for Biological Diversity* similarly upheld the 2023 supplemental requirement.⁸⁶

However, there are three major distinctions that would make this action far less justifiable as proposed in the current SNPRM. First, EPA promulgated the 2022 and 2023 requirements subject to a court order. After the D.C. Circuit found that EPA had, as a matter of law, allocated too low a renewable fuel requirement in 2016, EPA only had limited ways to comply with the court order. Given that the D.C. Circuit only made that decision in 2017, it is hard to imagine how EPA could honor that holding without trying to do something with a retroactive impact.

In addition, the amount of the reallocation makes an enormous difference. The retroactive reallocations required by the court in *ACE* amount to 250 million gallons per year. In contrast,

⁷⁹ 87 Fed. Reg. 39600 (2022).

⁸⁰ 87 Fed. Reg. at 39606.

⁸¹ 87 Fed. Reg. at 39617.

⁸² 87 Fed. Reg. at 39608.

⁸³ See *ACE*, 864 F.4d at 713.

⁸⁴ See *Sinclair Wyo.*, 101 F.4th at 893.

⁸⁵ See *id.* at 893-96.

⁸⁶ *Ctr. for Biological Diversity*, No. 23-1177 at 47-48.

the SNPRM is proposing to reallocate close to 2.18 billion RINs, more than eight times as much. This would effectively represent a nine percent volume premium on the compliance obligations of nonexempt refiners. The sheer numbers alone make it dubious that a precedent based on agency action that “reasonably considers and mitigates any hardship caused to obligated parties by reason of the lateness” would apply here.⁸⁷

Finally, the retroactive application in these cases involved the volumes that Congress had established in the statutory tables. Given that the D.C. Circuit found that EPA had improperly lowered these Congressionally mandated volumes in 2016 in the first place, reinstating those volumes was the obvious way to effectuate Congressional intent. Yet given that the 2023-2025 volumes that EPA seeks to reallocate comes from the period within its own set authority, there is no clear Congressional imperative that EPA is carrying out by reallocating these volumes. This is particularly the case with a rulemaking that violates the notice requirements that Congress did set for the RFS rulemaking processes conducted according to EPA’s set authority.

II. The RFS Is Unworkable. EPA Should Use SREs to Gradually Phase Down the RFS under Its Set Authority.

A. Creation and design of the RFS

The Renewable Fuel Standard (RFS) can trace its roots to the 1970s, an era when American policymakers feared an imminent exhaustion of global oil supplies. In the wake of the 1973 Arab oil embargo and the 1979 Iranian revolution, oil prices spiked and fuel shortages loomed. Experts warned that world oil production would soon peak and decline, prompting President Jimmy Carter to declare that the nation was “running out of gas and oil” and must prepare for harsh measures to avert a crisis.⁸⁸ Carter’s 1977 energy address envisioned “the moral equivalent of war” in responding to the energy crunch, including proposals for wartime-style gasoline rationing and strict conservation to avoid a “national catastrophe.” In 1978–1980 the government introduced a subsidy for ethanol made from corn, offering a tax credit of \$0.30–\$0.40 per gallon and authorizing funding to promote ethanol with a goal of displacing 10 percent of gasoline by 1990.⁸⁹ This early support for “gasohol” was predicated on the logic that domestically produced biofuel could extend gasoline supplies in an era of perceived permanent scarcity.

History, however, showed that the 1970s scarcity scare was short-lived. By the mid-1980s, oil markets entered a prolonged glut. Non-OPEC oil production surged, undercutting OPEC’s dominance.⁹⁰ In 1985, Saudi Arabia abruptly doubled oil output, sending global crude prices into freefall. The price of oil collapsed in 1986 (dropping by more than half within months) and remained relatively low for nearly two decades thereafter. Fears of dwindling oil reserves had been overblown. The rationale for subsidizing ethanol as an emergency substitute for gasoline

⁸⁷ *Sinclair Wyo.*, 101 F.4th at 887 (citation omitted).

⁸⁸ Carter, J. Address to the Nation on Energy. April 18, 1977.

⁸⁹ Jerry Taylor, “Wrong Then, Too.” *National Review*, August 18, 2008.

⁹⁰ Tyler Marshall, “British Resist Saudi Push to Ease Oil Glut,” *L.A. Times*, Feb. 2, 1982.

weakened considerably once petroleum became abundant and cheap. Indeed, U.S. oil imports and consumption patterns stabilized or declined in the 1980s, and the urgent scarcity mindset faded. The corn ethanol tax incentives persisted politically, but ethanol struggled to compete economically with cheap gasoline through the 1980s and 1990s.⁹¹

After two decades of low oil prices, the early 2000s brought another surge in energy prices. By 2005, gasoline exceeded \$3 per gallon and U.S. oil imports were again viewed as an economic and strategic vulnerability. In this environment – and amid renewed calls to support American farmers and develop alternative fuels – Congress established the Renewable Fuel Standard in the Energy Policy Act of 2005. This was later expanded by the Energy Independence and Security Act of 2007 (EISA). The RFS is a federal mandate requiring that transportation fuel sold in the U.S. contain a minimum volume of renewable fuels. The program’s aims included reducing dependence on foreign oil and fostering cleaner, “home-grown” energy. Notably, by the mid-2000s climate change had also emerged as a policy driver, so the RFS was justified not just on energy security grounds but also as a purportedly carbon-reducing measure.

EISA established aggressive, multi-year targets for biofuel consumption, reaching a total of 36 billion gallons of renewable fuel by 2022. Within this overall mandate, the law differentiated between categories of biofuel based on their feedstock and environmental profile: “Conventional” biofuel (primarily corn-starch ethanol) and “Advanced” biofuels, which includes cellulosic biofuel (e.g. from switchgrass, wood chips, agricultural residues), biomass-based diesel (from vegetable oils, animal fats, or waste oils); and “Other” advanced fuels.

Crucially, the RFS schedules were front-loaded with rapid growth in biofuel volumes, anticipating technological progress. By design, after 2015 the majority of new growth was supposed to come from advanced biofuels (especially cellulosic ethanol) rather than from corn ethanol. Congress wrote these escalating targets into the statute, but also granted EPA authority to adjust requirements under certain conditions, a recognition that the real-world availability of fuels might not meet the statutory timetable.

The law specified both volume mandates and greenhouse gas (GHG) emissions reductions (20 percent improvement for conventional biofuel; 50 percent for advanced; and even a 60 percent reduction required for cellulosic fuels specifically). The intent was to ensure that biofuels would deliver climate benefits. The RFS therefore wouldn’t count high-emission biofuels toward the advanced mandate. For example, corn ethanol does not qualify as “advanced” because of its higher lifecycle emissions, whereas fuels from waste biomass or sugarcane could qualify if they meet the threshold. These criteria foreshadowed later disputes about whether corn ethanol in fact reduces GHG emissions.

In sum, by 2007 the federal government fully embraced corn ethanol as a major fuel source (15 billion gallons, roughly equal at that time to 10 percent of U.S. gasoline supply) and simultaneously bet on next-generation biofuels to overtake corn ethanol by 2022 period. The RFS thus established a complex framework of sub-mandates and future projections, essentially

⁹¹ Jerry Taylor, “Wrong Then, Too.” *National Review*, August 18, 2008.

attempting to engineer a transformation of the liquid fuels market over 15 years.

On paper, the RFS's escalating volumes were clear. In practice, the program's implementation has been fraught with technical shortfalls and regulatory adjustments, which have rendered the RFS's real requirements unpredictable and subject to agency waivers. The Environmental Protection Agency (EPA) is charged with administering the RFS and has several statutory tools to waive or modify the fuel mandates if circumstances warrant. Two major challenges have emerged: (1) the chronic shortfall of cellulosic biofuel production, and (2) the constraints of the "blend wall" in the gasoline market. Both have caused EPA to repeatedly revise the targets and have spurred the creation of a complex credit trading system to facilitate compliance. The net effect has been to put EPA in the role of transport fuels central planner in the United States.

Cellulosic ethanol has never commercially materialized at the scale Congress envisioned. Despite the statutory mandate for billions of gallons, by the early 2010s it became evident that technological and economic hurdles were too great to achieve significant production in the near term. The RFS compels EPA to scale down the annual cellulosic requirement if projected output falls short of the target. EPA has indeed exercised this *cellulosic waiver* authority every single year for the past decade. From 2010 onward, EPA annually reduced the cellulosic biofuel volume to match reality.⁹² For instance, the 2011 mandate of 250 million gallons was cut to just 6.6 million gallons that year, since only a few million gallons could actually be produced. By 2013, with cellulosic fuel still essentially non-commercial, EPA was routinely setting the cellulosic standard at 99 percent or more below the statutory volume. (EPA instead allows refiners to purchase "*cellulosic waiver credits*" in lieu of unattainable cellulosic gallons.)

In short, the advanced biofuel revolution Congress hoped for has not arrived: the cellulosic ethanol mandate has been waived every year for lack of supply. This has also forced downward adjustments of the overall RFS volumes, undermining the predictable ramp-up originally envisioned. Regulated parties cannot know from year to year exactly how far EPA will lower the targets, which has introduced significant uncertainty into the program. What began as a straightforward schedule in law has become an annual exercise in EPA rulemaking discretion, contingent on market realities. This unpredictability of the RFS's moving goalposts is perhaps the most critical flaw in the program's design.

Even for conventional corn ethanol, a practical limit known as the "blend wall" has constrained further expansion. Most gasoline in the United States is sold as a blend containing 10 percent ethanol (E10). This 10 percent blend has long been the maximum ethanol content suitable for the existing vehicle fleet and fuel infrastructure in general use. Conventional cars, fuel pumps, and distribution systems were engineered for E10 or lower; higher blends such as E15 (15 percent ethanol) or E85 (85 percent) are only compatible with certain vehicles or entail risks of engine damage, corrosive effects on fuel systems, and higher evaporative emissions leading to air pollution.

⁹² CRS, The Renewable Fuel Standard (RFS): Cellulosic Biofuels, R41106, August 31, 2015.

Additionally, burning ethanol can increase certain pollutants like nitrogen oxides and evaporative ozone formation in warm weather, which raised regulatory concerns about higher blends exceeding air quality standards. For these reasons, the effective nationwide blend limit for years has been about 10 percent. This means that total ethanol volume beyond roughly 10 percent of gasoline supply faces a distribution bottleneck, namely, the blend wall. With U.S. gasoline consumption on the order of 140 billion gallons per year, about 14 billion gallons of ethanol can be absorbed as E10 before hitting saturation. (Indeed, virtually every gallon of U.S. gasoline today is at least E10.) The RFS's conventional mandate of 15 billion gallons slightly exceeds this E10 volume, which is achievable in theory with some expansion of higher blends or gasoline export practices, but in practice the blend wall has made it difficult for refiners to use ethanol beyond ~10 percent of their supply without technical and legal complications.⁹³

To implement the RFS mandates, EPA established a credit trading system centered on Renewable Identification Numbers (RINs). Each batch of biofuel produced or imported is assigned a unique RIN. When an obligated party (generally, a refinery or fuel importer) blends a gallon of renewable fuel into gasoline or diesel, the RIN can be separated and counted toward that refiner's annual quota. Refiners must turn in sufficient RINs each year to show compliance with the required volumes (expressed as a percentage of their overall fuel production). The RIN system adds flexibility: if a refiner cannot blend enough physical ethanol or biodiesel to meet its obligation (for instance, due to the blend wall or other limits), it can purchase RIN credits from others who have blended more than required.

In effect, a secondary market for RINs has developed, allowing the mandate burden to be balanced among companies. A refiner that over-complies (blends extra biofuel) will have surplus RINs to sell, while another that under-complies can buy those RINs to make up the difference.⁹⁴ In theory, this trading promotes efficiency by letting the market determine the cheapest way to achieve the overall blending target.

In practice, the RIN market has been volatile and contentious. Because of the blend wall and other logistical constraints, there is a limit to how much ethanol can be blended by the refining sector as a whole (roughly 10 percent of gasoline). Once most refiners have saturated their E10 blends, any additional RINs must come from other sources – chiefly from blending biodiesel (which is not subject to the same 10 percent cap in gasoline, since biodiesel is used in diesel fuel, or from niche sales of higher ethanol blends like E85).

This dynamic has created a scarcity of RINs in some years. When EPA's nominal RFS percentages force refiners to require more RINs than the physical blending system can easily generate, the price of RIN credits spikes. For example, a refiner blending to the E10 limit may still fall short of its RFS percentage obligation (if that obligation effectively calls for an average of E11 or E12 across the industry).⁹⁵ That refiner must buy extra RINs from someone else. But

⁹³ Mario Loyola, "Stop the Ethanol Madness," *The Atlantic*, Nov. 23, 2019.

⁹⁴ *Id.*

⁹⁵ *Id.*

“excess” RINs are limited, since essentially all refiners are in the same boat hitting the blend wall. Many refiners end up chasing a relatively small pool of surplus RINs (often those created by out-of-mandate biodiesel blending), bidding up the price. This has led to periods of extremely high RIN prices, swings in credit values, and alleged market manipulation concerns – all of which underscore that the RFS compliance mechanism is introducing significant costs and uncertainties.⁹⁶ Volatile RIN prices have, at times, affected fuel markets and even stock prices of refineries, illustrating how a regulatory credit can become a major financial commodity.

B. Caught between Farmers and Refiners

The RFS has pitted two of America’s most powerful industries against each other—the oil refining sector and the corn-agribusiness sector—with the White House often caught in the middle. Hundreds of billions of dollars in sales are at stake across the fuel supply chain. Not surprisingly, the program has been the focus of intense lobbying and political intervention, yielding an oscillating regulatory approach as policymakers attempt to appease first one side and then the other. The fault line of this conflict is created by the combination of blend wall and RIN market.

Refining companies (especially those without their own blending and retail operations) complain that RFS compliance has become exorbitantly expensive and, for some smaller refineries, potentially ruinous. Under the Clean Air Act, small refineries that can demonstrate “disproportionate economic hardship” from RFS compliance may petition for an exemption in a given year. These small refinery exemptions (SREs) have become a flashpoint. The Obama EPA began granting a few exemptions around 2013, and the Trump EPA greatly expanded their use, granting dozens per year in some cases. For example, in 2018 the EPA granted 31 small-refinery exemptions in one batch, exempting those refineries from their 2018 RFS obligations. While lawful, these exemptions have ripple effects: when EPA waves its wand to excuse certain refineries, the total demand for RIN credits drops (since those refineries no longer need to buy RINs). Thus SRE decisions can cause RIN prices to plummet overnight. Refiners who receive exemptions are relieved, but the flip side is that ethanol producers see demand for their product (and for RINs) weaken, which they decry as undermining the RFS mandate.

Indeed, after the August 2018 mass-grant of exemptions, RIN prices cratered, and the corn-ethanol lobby was furious.⁹⁷ Ethanol interests – including powerful agribusiness companies, corn growers’ associations, and Midwestern elected officials – exerted counter-pressure on the Administration. They accused EPA of “*backdoor*” sabotage of the RFS and demanded measures to boost ethanol usage to compensate. In late 2018 and 2019, the White House found itself besieged by opposing demands: on one side, small refiners (and their allies in Congress) pleading for relief from RFS costs, and on the other side, farm-state constituencies insisting the RFS be enforced in full. The result has been a policy whipsaw. As one observer put it, the government has “oscillated between helping refineries and helping corn producers” on a nearly continuous basis. For instance, after a wave of refinery exemptions angered the corn lobby, the

⁹⁶ *Id.*

⁹⁷ *Id.*

Administration responded with moves to placate ethanol proponents – such as exploring regulatory changes to allow higher ethanol blends. President Donald Trump intervened in October 2018, directing EPA to begin rulemaking to permit year-round sale of E15, which previously had been restricted in summer due to air pollution rules. The Administration also floated proposals to reform the RIN market to prevent price spikes. Shortly thereafter, EPA released higher biofuel volume proposals for future years, signaling support for the ethanol industry.

These measures, however, then raised concerns on the refining side, illustrating the zero-sum nature of the RFS's special-interest politics. Permitting E15 fuel sales year-round was a boon to ethanol producers, opening the door to expand ethanol's market beyond the 10 percent blend wall, but it carries risks that many consumers and automakers have warned about. Higher ethanol blends can cause engine damage or fuel-system corrosion in older vehicles, and even in newer ones not explicitly built for E15, there is controversy over long-term impacts. The public could react negatively if E15 causes driveability problems or voided warranties. Moreover, the environmental benefit is dubious: summer use of E15 can increase evaporative emissions (ethanol has a higher vapor pressure), potentially worsening ozone smog in hot weather. In short, what pleases one side of this policy battle tends to infuriate the other. Officials in EPA's Office of Air and Radiation, tasked with somehow implementing the RFS fairly, have described a difficult tightrope as they try to advance conflicting priorities.⁹⁸

Since 2013, this pattern has been remarkably consistent: when RIN prices soar and refiners howl, EPA finds ways to tamp down obligations (via waivers or revised rules); when corn prices or ethanol sales suffer and farmers howl, EPA pivots to prop up the demand (through raising targets or expanding allowed blends). The tug-of-war has played out across administrations of both parties. The RFS thus exemplifies a regulation caught between two powerful interest blocks – making it politically perilous to reform or repeal, despite strong substantive arguments (as detailed below) that the policy is counterproductive. Even high-level officials have been reluctant to “touch the issue with a 10-foot pole,” given the political risks.

C. An Unworkable Program

Renewable fuels will likely play a role in our energy future, but the current RFS, with its heavy reliance on corn ethanol, has proven to be a flawed policy. The RFS corn ethanol program has not delivered meaningful climate benefits, has imposed tangible economic costs on consumers, and has caused collateral damage to the environment and food system. Its primary beneficiaries are a narrow set of agricultural and ethanol production interests, bolstered by political support from farm-belt representatives, rather than the general public.

The goal of transitioning to renewable, low-carbon transportation fuels is not inherently objectionable. However, choosing corn ethanol as the chief vehicle for that goal was, in hindsight, a costly mistake. As a 2016 policy review succinctly noted, growing corn to run our

⁹⁸ Vinson & Elkins, “EPA Walks the Tightrope with Proposal to Reallocate Exempted Renewable Fuel Volumes,” Sept. 30, 2025.

cars was “a bad idea whose time has passed.”⁹⁹ Advanced biofuels derived from wastes, algae, or truly sustainable feedstocks could in theory avoid many of corn ethanol’s pitfalls, but despite years of effort, those fuels have not yet become commercially viable at scale. If one day cellulosic ethanol or other advanced biofuels can be produced economically and with minimal environmental harm, they might be a welcome addition to the energy mix.

The RFS’s architects hoped for this outcome, but it has not materialized. The reality is that today’s corn-ethanol-centric RFS is a policy failure. It has not significantly reduced GHG emissions or oil dependence; it has introduced market distortions and volatility; it has raised food and feed prices; and it has incentivized agricultural practices that harm water quality and ecosystems. Yet, politicians of both parties have so far conspired to keep it alive, largely due to fear of the political backlash from vested interests. Scaling down the corn ethanol component of the RFS would benefit the public interest in multiple dimensions.

The RFS is an unworkable failure. Born of 1970s oil scarcity fears and then recycled for the climate carnival, the ethanol mandate has in practice become economically irrational, environmentally destructive, and politically divisive. It creates irresolvable dilemmas for the administration. EPA should not reallocate the volumes implicated in the SREs. It should use the SREs to gradually reduce the applicable volumes under the RFS until market forces, not regulatory dictates, become the central driver of renewable fuel production.

III. EPA’s Set Authority under of the Clean Air Act Violates the Nondelegation Doctrine, because Section 211(o)(2)(ii) Does not Provide Intelligible Principles.

In *J.W. Hampton, Jr. & Co. v. United States*,¹⁰⁰ the Supreme Court held that Congress has broad authority to delegate rulemaking authority to the executive branch. But that authority must include “intelligible principles [...] to which the person or body authorized to [exercise the delegation] is directed to conform.”¹⁰¹ In the case of *Gundy v. United States*, Justice Gorsuch elaborated the “intelligible principles” standard within a searching review of the Court’s nondelegation and related decisions.¹⁰² Under that standard, which now almost certainly enjoys the support of a majority of the Court, Congress cannot delegate essentially open-ended authority to agency officials and leave them to make all the policy judgements.

The six factors that EPA is supposed to “analyze” in setting renewable fuel volumes for calendar years after 2022 fall short of the “intelligible principles” that the Court has said are necessary to guide agencies in the exercise of delegated authority. In the era of EPA’s virtually arbitrary set authority, the RFS violates the nondelegation doctrine, and should be held unconstitutional.

⁹⁹ C. Ford Runge, “The Case Against More Ethanol: It’s Simply Bad for Environment,” *Yale Environmental* 360, May 25, 2016.

¹⁰⁰ 276 U.S. 394 (1928).

¹⁰¹ *Id.*

¹⁰² 588 U.S. 128 (2019) (Gorsuch, J., dissenting).

A. “Intelligible Principles” and the *Gundy* Dissent.

Gundy concerned a provision of the Sex Offender Registration and Notification Act (SORNA) that authorizes the Attorney General to “specify the applicability” of SORNA’s registration requirements to individuals convicted of a sex offense before SORNA’s enactment, and “to prescribe rules for [their] registration.”¹⁰³ As both the majority and dissent agreed, the provision allowed the Attorney General to require all pre-Act offenders to register, some but not all, or none at all. Furthermore, for those the Attorney General does require to register, a further decision can be made on which of SORNA’s requirements to apply. After serving a five-year term for a sex offense, Herman Gundy was released from prison. Apparently unaware that some of SORNA’s requirements applied to him by action of the Attorney General, Herman Gundy was rearrested and now faced an additional 10-year prison term.

In a dissent that many hailed as a sign of a new direction in the Court’s separation of powers jurisprudence, Justice Gorsuch reviews begins with early cases. “First,” Gorsuch observed, “we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’” Gorsuch quotes the majority opinion in *Wayman v. Southard*, in which Chief Justice John Marshall seemed to anticipate the major questions doctrine, distinguishing between those “important subjects, which must be entirely regulated by the legislature itself,” and those of less interest, in which a general provision may be made, and power given to those are to act . . . to fill up the details.”¹⁰⁴ This allows the executive to fill the content of a rule with more precise detail, a function Marshall thought appropriate for subjects of lesser interest where a general provision on the part of Congress would do.

Second, recalling *Cargo of Brig Aurora v. United States* (1813),¹⁰⁵ Gorsuch explained, “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.” Unlike the first principle, this second dispensation makes the precise application of the rule in a given case dependent on the facts as the executive finds them, clearly a larger delegation of authority, but still ministerial, as the facts in question are susceptible of objective verification by a court.

Third, Gorsuch writes that Congress may delegate discretion over matters that are already within the scope of executive power, and can regulate the exercise of that discretion. He related this third category to both *Brig Aurora* and *Wayman*:

Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in

¹⁰³ 24 USC § 2913(d).

¹⁰⁴ 588 U.S. at 138 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall)).

¹⁰⁵ 11 U.S. (7 Cranch) 382.

the absence of any statute, courts have the power under Article III “to regulate their practice.”

Gorsuch then turned to several modern cases: *J.W. Hampton Jr. & Co. v. United States* (1928),¹⁰⁶ *A. L. A. Schechter Poultry Corp. v. United States* (1935),¹⁰⁷ and *Panama Refining Co. v. Ryan* (1935).¹⁰⁸ Citing them as if they were still good law¹⁰⁹ he located in them a basic test of nondelegation:

To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

In *J.W. Hampton*, the Supreme Court upheld a statute which delegated to the president the authority to impose tariffs on another country at such levels as might be necessary to “equalize” the costs of production in both countries. Upholding the delegation, the Court wrote, “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹¹⁰

The New Deal’s broad delegations soon led to a pair of decisions which entrenched the “intelligible principles” standard of *J.W. Hampton*. In *Panama Refining Co. v. Ryan*¹¹¹ the Court struck down Section 9(c) of the National Industrial Recovery Act (NIRA), which allowed the President to prohibit interstate commerce of petroleum in excess of quotas set by the states, on the grounds the provision did not establish when the President was required to act. It amounted to a delegation of discretionary power to prohibit competition against the state-based petroleum quotas. The delegation of such discretionary power failed to provide “an intelligible principle” to which the President was required to conform.

Later that year the Court went further still and thoroughly gutted NIRA, striking down all of Title I, in *Schechter Poultry Corp. v. United States*.¹¹² This case dealt with Section 3 of NIRA, which allowed trade associations to adopt “fair competition” codes (i.e., cartel arrangements) that would then become legally binding upon presidential approval. The Court found several problems in the law. First, “fair competition” was nowhere defined, so the provision was “void for vagueness.” As a result, it failed to establish an intelligible principle, which was a second ground for striking down

¹⁰⁶ 276 U.S. 394.

¹⁰⁷ 259 U.S. 495.

¹⁰⁸ 293 U.S. 388.

¹⁰⁹ The non-delegation doctrine “had one good year and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

¹¹⁰ 276 U.S. 394 (1928).

¹¹¹ 293 U.S. 388 (1935).

¹¹² *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

the provision. Finally, the Court ruled that the law failed to establish “fair procedures” for implementation. The latter point was important, for it brought a procedural element into the non-delegation analysis.

Panama Refining and *Schechter Poultry* tied the “intelligible principle” standard to a supposedly blanket prohibition on delegating “essential legislative functions.” Legislative power could be delegated only if Congress “perform[s] its function in laying down policies and establishing standards.”¹¹³

Gorsuch touches on a two other cases that bears mentioning: *Yakus v. United States*.¹¹⁴ *Yakus* is likely the high-water mark of the Court’s permissive approach to congressional delegations. The case concerned a broad delegation of authority to regulate commodity prices, with the intelligible principle that the prices be “fair and equitable.” The Court upheld the delegation, because the legislation’s intelligible principle was “sufficiently definite and precise to enable Congress, the courts and the public to ascertain” whether the agency had conformed to Congress’s standards.¹¹⁵

In his review of these and related separation-of-powers cases, Gorsuch reasoned that the delegation in SORNA was not a case of filling up details or fact-finding, nor was it one of overlapping authorities with Congress solely making the policy judgments, nor did it even impose a loose standard of “fairness.” The delegation was open-ended and left all the policy judgment to the executive branch. And that, reasoned Gorsuch, violated the nondelegation doctrine.

Precisely the same may be said of the EPA’s set authority under Section 211(o)(2)(ii) of the CAA.

B. EPA’s Arbitrary Set Authority Rests on No Intelligible Principles

Section 211 of the CAA set statutory thresholds for the applicable minimum volume of each renewable fuel category that was to be blended into the nation’s fuel supply. The last of those statutory thresholds applied to 2022. Starting in 2023, EPA has exercised “set authority” with respect to the fuel volumes for all four renewable fuel categories. In setting these post-statutory-threshold volumes, EPA is supposed to be guided by six factors.

But nowhere in Sec. 211 does it explain which way those factors are supposed to cut, or whether they’re supposed to cut any particular way. Indeed, EPA itself notes in the SNPRM that only one of the six factors is potentially affected, namely consumer prices. But the effect of the SNPRM will be to significantly raise consumer prices, so the fact that EPA itself doesn’t believe this consideration cuts against its proposed reallocation and relate volume setting vividly demonstrates that even as far as EPA is concerned, the factors provide no policy guidance at all.

¹¹³ 295 U.S. at 530.

¹¹⁴ *Yakus v United States*, 321 U.S. 414 (1944).

¹¹⁵ *Id.* at 426.

Section 211(o)(2)(ii) provides:

[T]he applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

- (I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;
- (II) the impact of renewable fuels on the energy security of the United States;
- (III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);
- (IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;
- (V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and
- (VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The provision provides no indication, explicit or implicit, on what weight to give any of the six factors, or how any “impact” should guide the agency action. Indeed, the factors are not related to the “applicable volumes” at all. The impacts merely relate to renewable fuels in general. There is not even an indication of which way any of the factors should cut. Given the factors, is there a volume that would be set too high to pass muster under the CAA? Is there a level that would be too low? Nobody knows.

This stands in sharp contrast to more familiar factor-based analyses under the CAA. For example, Section 111 requires the Administrator to set new source performance standards in part by “taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” It has long been clear which way those factors cut: If the costs of compliance are unreasonable and prohibitive, or the standards would cause energy scarcity, a federal court would be likely to vacate the Administrator’s determination of standards.

Under the post-thresholds RFS, however, the set authority of EPA is completely arbitrary: EPA can set the applicable volumes virtually as high or as low as it likes, and courts would have little basis for saying that any given volume was not supportable on the basis of the six factors.

There is therefore a real possibility that EPA's set authority would not survive challenge under the Court's developing nondelegation doctrine.

Conclusion

For the foregoing reasons, the EPA should set a course for phasing out the RFS by progressively diminishing the applicable volumes of renewable fuels under the program to the point where natural market dynamics can sustain the production of renewable fuels without its intervention. EPA is not suited for the role of central planner of America's motor fuels. It should give up that role, and let the market take over.

Thank you for your consideration of these comments.

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¹¹⁶ These comments are submitted in my individual capacity and do not necessarily represent the views of Florida International University or of The Heritage Foundation.