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Submitted via Regulations.gov

RE: "Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes," Docket ID No. EPA-HQ-OAR-2021-0427

Mr. Korotney,

We appreciate this opportunity to provide comments on the Environmental Protection Agency's (EPA) proposed rule on the Renewable Fuel Standard (RFS).

The proposed rule has numerous problems, including the unreasonably short comment period, which we detailed in our request for extension submitted on January 31, 2023 (see attachment). In this comment, we detail why the EPA does not have statutory authority to create the proposed eRINs program and identify some problems with the agency's application of Clean Air Act Section 211(o)(2)(B)(ii).

1) The EPA does not have statutory authority for the proposed eRINs

The agency is "introducing a new regulatory program governing renewable electricity" and incorporating it into the RFS.[1] Creating renewable identification numbers (RINs) for renewable electricity through this program, which the EPA refers to as eRINs, is not authorized by law.

Section 206 of the EISA. Congress made it clear in Section 206 of the Energy Independence and Security Act of 2007 (EISA) that the EPA must first study the feasibility of a credits system connected to renewable electricity for electric vehicles (EVs).[2] This is a preliminary study that the EPA, based on the EPA's own statements, has never conducted.[3] Upon completing the study,

[1] *Federal Register*, Vol. 87, No. 250 (December 30, 2022), p. 80584, https://www.govinfo.gov/content/pkg/FR-2022-12-30/pdf/2022-26499.pdf (accessed February 9, 2023).
[2] Energy Independence and Security Act of 2007, Public Law 110-140, § 206, https://www.govinfo.gov/content/pkg/PLAW-110publ140/pdf/PLAW-110publ140.pdf (accessed February 9, 2023).
[3] In a 2016 Freedom of Information Act request, the EPA wrote that no study under Section 206 was conducted "because EPA put in place a mechanism for credit generation in the March 26, 2010 final rule." The proposed rule once again points to the 2010 rule as somehow meeting the requirements of Section 206, explaining, "Finally, EISA required EPA to conduct a study and issue a report to Congress on the feasibility of issuing credits under the RFS program for renewable electricity used in electric vehicles. In the 2010 rulemaking in which EPA promulgated regulations to implement the RFS2 program, EPA determined that electricity, as well as natural gas and propane, could meet the statutory definition of renewable fuel and thus be eligible to generate RINs…" Environmental Protection Agency, National Vehicle and Fuel Emissions Laboratory, letter to Mr. Jim Lemon, March 3, 2016, https://mobile.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=3904 (accessed February 9, 2023); and *Federal Register*, Vol. 87, No. 250, p. 80634.

the EPA is then required to submit a report to Congress describing the results of its required study, including describing alternatives for designing a pilot program to determine the possibility of using renewable electricity for EVs.[4] This report, also based on the EPA's own statements, has not been submitted.[5]

Through the proposed eRINs program, the EPA is acting as if Section 206 does not exist. Congress did not even authorize the creation of a pilot study, but merely directed the agency to look into how to design a pilot study. Yet the EPA, after not conducting the required study and report, has assumed authority to jump ahead and create a program that Congress never approved under Section 206.

The language within Section 206 is instructive in other critical ways as well. Congress directed the EPA to describe alternatives for "designing a pilot program to determine the feasibility of using renewable electricity to power electric vehicles as an *adjunct* to a renewable fuels mandate."[6] [Emphasis added]. By expressly separating "renewable electricity" from the "renewable fuels mandate," Congress was making it clear that renewable electricity for EVs was not part of the renewable fuels mandate. The statute was merely directing the agency to consider how to study the feasibility of using renewable electricity for EVs as an adjunct to the mandate. In other words, it should not be contained within the mandate itself, but be in addition to or supplement it (and certainly not at the expense of the RFS). The proposed eRINs program is not adjunct to the RFS, but as stated by the EPA is, "the incorporation of renewable electricity into the RFS program…"[7] Further, it comes at the expense of the mandate, as will be explained in more detail below.

Responding to a 2016 Freedom of Information Act request, the EPA wrote that no study under Section 206 was conducted "because EPA put in place a mechanism for credit generation in the March 26, 2010 final rule."[8] Apparently, the agency is asserting that compliance is no longer needed since the agency has already acted in contradiction to what Congress directed in Section 206. This 2010 rule does not eliminate the Section 206 requirements. More important, it does not change the fact that Congress did not authorize a credit system or any program using renewable electricity to power electric vehicles as part of the RFS.

The 2010 rule also did not create anything close to what is being proposed with the eRINs. In the rule, the EPA explains, "we are allowing fuel producers, importers and end users to include electricity, natural gas, and propane made from renewable biomass as a RIN-generating renewable fuel in RFS *only if they can identify the specific quantities of their product which are actually used as a transportation fuel.*"[9] [Emphasis added]. The proposed rule ignores the EPA's

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[4] Energy Independence and Security Act of 2007, § 206.
[5] Environmental Protection Agency, National Vehicle and Fuel Emissions Laboratory; and *Federal Register*, Vol. 87, No. 250.
[6] Energy Independence and Security Act of 2007, § 206.
[7] Environmental Protection Agency, Assessment and Standards Division, Office of Transportation and Air Quality, *Draft Regulatory Impact Analysis: RFS Standards for 2023-2025 and Other Changes*, November 2022, p. 323, https://www.epa.gov/system/files/documents/2022-12/420d22003.pdf (accessed February 9, 2023).
[8] Environmental Protection Agency, National Vehicle and Fuel Emissions Laboratory.
[9] *Federal Register*, Vol. 75, No. 58, (March 26, 2010), p. 14686, https://www.govinfo.gov/content/pkg/FR-2010-03-26/pdf/2010-3851.pdf (accessed February 9, 2023).

own requirement and Congressional concern in Section 206 about "identifying the source of electricity used to power electric vehicles."[10]

Instead of requiring that the specific sources be identified, the eRINs program simply allows for the use of electricity to charge EVs regardless of the source. It is impossible to know where the electricity is coming from or how it is generated. The EPA is fully aware of these weaknesses:

> The renewable electricity, once produced, is physically impossible to distinguish from non-renewable electricity. Whether produced from coal, wind, solar, hydro, natural gas, or biogas, and whether produced in California, New York, Canada, or Mexico, once electricity is on the commercial electrical transmission grid, it is only identifiable as electricity. The electricity that shows up in the vehicle's battery is an indistinct commodity.[11]

In addition, the RFS requires that renewable fuels displace fossil fuel present in transportation fuel. Yet, despite this clear requirement, the eRINs program would ignore the fact that about 61 percent of electricity comes from fossil fuels.[12]

Section 202 of the EISA. Section 202, which helped to create the RFS, also makes it clear that the eRINs program is unauthorized.[13] Under this section, Congress was concerned with transportation fuel and specifically liquid fuel. The entire section talks about "volumes" and "gallons."[14] The RFS requires that the transportation fuel sold or introduced into commerce "contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel" required by law.[15] This is an express list of the applicable fuels, with no mention of electricity. As stated previously, in Section 206, Congress spoke of renewable electricity being adjunct to the RFS. This characterization was necessary because renewable electricity is necessarily distinct from and unrelated to the fuel requirements under Section 202.

In fact, trying to equate electrons with renewable fuels is nonsensical. There are not volumes or gallons of electrons to blend into transportation fuel. The definition of "renewable fuels" requires that the fuel "is used to replace or reduce the quantity of fossil fuel present in a transportation fuel."[16] This focus is on replacing or reducing *fossil fuel* present in transportation fuel, not to reduce or replace *transportation fuel*. The "present" language further indicates that the requirement is to change the physical makeup of transportation fuel with more renewable fuel contained within the overall volume of transportation fuel, not to change the volume of transportation fuel or substitute electricity for fuel.

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[10] Energy Independence and Security Act of 2007, § 206.
[11] *Federal Register*, Vol. 87, No. 250, p. 80637.
[12] U.S. Energy Information Administration, "Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source?" updated November 8, 2022, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (accessed February 9, 2023).
[13] Energy Independence and Security Act of 2007, § 202.
[14] Ibid.
[15] Ibid.
[16] 42 U.S. Code § 7545(o)(1)(J), https://www.law.cornell.edu/uscode/text/42/7545 (accessed February 9, 2023).

Yet, the eRINs program is an attempt to shift away from transportation fuel towards renewable electricity for transportation, which is in direct contradiction with the statutory language. In the proposed rule, the agency explains:

> We intend and expect the incentives created by the new regulations governing the generation of eRINs to result in increased volumes of renewable electricity being used for transportation in the United States. We also expect that the incentive to use qualifying renewable electricity in electric vehicles would, in turn, incentivize increased vehicle electrification that would continue to allow for increased generation of qualifying renewable electricity.[17]

The RFS, including Section 202, is intended to promote renewable fuels, not to promote renewable electricity or to promote other possible end uses of renewable fuels. It is also not designed to be a means for the EPA to increase the use of renewable electricity in order to change transportation in the country, including promoting electric vehicles. As the Renewable Fuels Association explained in recent testimony, "EPA's eRIN proposal may also be viewed as inconsistent with the statutory purpose of the RFS, which is to support the production of renewable fuels, not the production and sale of certain vehicle technologies."[18] The proposed rule, as demonstrated by its express language, is seeking to use eRINs to achieve these transportation (and transformational) objectives inconsistent with the statute.

This effort to electrify the fleet and reshape the transportation sector would reduce the amount of transportation fuel that is currently used. In doing so, the eRIN proposal would likely reduce those renewable fuels, including ethanol, which are used to meet the RFS requirements.[19] This result would run directly counter to the RFS objective of promoting the specific renewable fuels listed within the statute.

This is not the only way that the eRINs program would run directly counter to the objectives of the EISA and the RFS. Congress wanted to, as the EPA explained, "move the United States toward greater energy independence and security."[20] Through the RFS, Congress chose a specific approach to reduce reliance on imported oil,[21] which was to blend renewable fuels into

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[17] *Federal Register*, Vol. 87, No. 250, p. 80633.
[18] Renewable Fuels Association, "RFA Testimony to EPA Virtual Public Hearing on Proposed Renewable Fuel Standards for 2023, 2024, and 2025," testimony before the Environmental Protection Agency, January 10, 2023, https://d35t1syewk4d42.cloudfront.net/file/2394/RFA_2023-25%20RVO%20hearing%20testimony.pdf (accessed February 9, 2023).
[19] Kelsi Bracmort, "The Renewable Fuel Standard (RFS): An Overview," Congressional Research Service *Report for Congress*, updated August 10, 2022, p. 12, https://sgp.fas.org/crs/misc/R43325.pdf (accessed February 9, 2023).
[20] Environmental Protection Agency, "Summary of the Energy Independence and Security Act: Public Law 110-140 (2007)," updated May 12, 2022, https://www.epa.gov/laws-regulations/summary-energy-independence-and-security-act (accessed February 9, 2023).
[21] Environmental Protection Agency, "Renewable Fuel Standard Program," updated September 27, 2022, https://www.epa.gov/renewable-fuel-standard-program#:~:text=Congress%20created%20the%20renewable%20fuel,and%20Security%20Act%20of%202007 (accessed February 9, 2023).

transportation fuel.[22] As the name of the statute itself indicates, Congress was concerned with energy independence and security.

Through the proposed eRINs program and promoting EVs, the EPA would be undermining energy independence and security. EV batteries depend on critical minerals.[23] Unfortunately, the U.S. relies heavily on critical mineral imports. In fact, between 2018-2021, the U.S. imported over 90 percent of rare earth minerals from other countries, with 74 percent coming from China alone.[24] Globally, China refines 35 percent of nickel, 50-70 percent of lithium and cobalt, and nearly 90 percent of rare earth elements.[25] Beyond the minerals themselves, China also produces three quarters of all lithium-ion batteries in the world.[26]

There are also problems with the EPA's interpretation of who can generate credits. Clean Air Act Section 211(o)(5), which was amended by Section 202 of the EISA, is unambiguous as to who may generate credits (i.e. RINs) under the RFS and it does not include OEMs.[27] However, the EPA asserts that it is not limited by the language in Clean Air Act Section 211(o)(5)(A)[28] and therefore can allow OEMs to generate eRINs under the proposed rule.[29] If Congress wanted to allow for more parties to generate credits or for credits to be generated for purposes beyond what is listed in Section 211(o)(5)(A) it would have simply stated this. In fact, it did. In Section 211(o)(5)(E), Congress stated that the EPA may issue regulations allowing for the generation of credits for additional renewable fuels "by any person that refines, blends, or imports additional

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[22] See e.g., Environmental Protection Agency, "Overview for Renewable Fuel Standard," updated February 22, 2022, https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard (accessed February 9, 2023); and U.S. Department of Energy, "Alternative Fuels Data Center: Renewable Fuel Standard," https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard (accessed February 9, 2023).

[23] Brandon S. Tracy, "Critical Minerals in Electric Vehicle Batteries," Congressional Research Service *Report for Congress*, August 29, 2022, https://crsreports.congress.gov/product/pdf/R/R47227 (accessed February 9, 2023).

[24] U.S. Geological Survey, *Mineral Commodity Summaries*, January 2023, https://pubs.usgs.gov/periodicals/mcs2023/mcs2023-rare-earths.pdf (accessed February 9, 2023).

[25] Derrick Morgan, "California Dreamin'—A No-Choice Nightmare That Benefits China," The Daily Signal, August 29, 2022, https://www.dailysignal.com/2022/08/29/california-dreamin-a-no-choice-nightmare-that-benefits-china/ (accessed February 9, 2023).

[26] International Energy Agency, *Global Supply Chains of EV Batteries*, July 2022, p. 2, https://iea.blob.core.windows.net/assets/961cfc6c-6a8c-42bb-a3ef-57f3657b7aca/GlobalSupplyChainsofEVBatteries.pdf (accessed February 9, 2023).

[27] 42 U.S. Code § 7545 (o)(5).

[28] In the proposed rule, the EPA argues: "Clean Air Act Section 211(o)(5)(A) directs EPA to provide for the generation of credits under the RFS program by refiners, blenders, importers, and small refineries, and of biodiesel, but does not limit credit generation to those parties and provides no additional guidance relevant to the generation of RINs." The EPA similarly argues: "Although the credit system must provide 'for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than' the statutory volume, as well as for the generation of credits for biodiesel and by small refineries, the statute does not limit credit generation to these parties, nor does it specify the mechanics of credit generation, transfer, or disposition." *Federal Register*, Vol. 87, No. 250, p. 80659; and *Federal Register*, Vol. 87, No. 250, p. 80634.

[29] From the proposed rule: "Our proposed approach, detailed below, would permit vehicle original equipment manufacturers (OEMs) to generate eRINs based on the light-duty electric vehicles they sell by establishing contracts with parties that produce electricity from qualifying biogas (renewable electricity generators)." *Federal Register*, Vol. 87, No. 250, p. 80633.

renewable fuels." Section 211(o)(5)(E) covers the credit system and nowhere does it say that the EPA can go beyond its express and exhaustive list of when credits shall or may be generated.[30]

Finally, the proposed eRINs program is in effect a massive tax on obligated parties (those who have to meet renewable volume obligations) because they have no choice but to purchase the eRINs and a massive regressive wealth transfer from gasoline consumers to vehicle manufacturers (OEMs). It is yet another subsidy to these manufacturers, a subsidy that did not make it into the IRA or another law. These OEMs are not obligated parties and would have no compliance requirements, yet, under the proposal, they would be able to reap undeserved and unauthorized rewards simply for establishing contracts with renewable electricity producers. These contracts and the benefits flowing to the OEMs would have nothing to do with meeting the statutory requirements of the RFS and run counter to the compliance and subsidy scheme established by Congress.

In terms of the sheer scope of this subsidy, the EPA would require that obligated parties pay OEMs an estimated $3 per eRIN (this is a conservative number, and very well could go higher).[31] Based on EPA's data, this payment requirement would mean that the cost for buying these eRINs, which will likely be passed on to gasoline consumers (at least in part), would be $1.8 billion in 2024 and $3.6 billion in 2025.[32] Those costs would account for 42 percent and 56 percent of the cellulosic totals in those years.[33] Congress never authorized such a massive subsidy and wealth transfer scheme.

Major Questions. The eRINs program has major questions doctrine implications. The EPA, not only without clear statutory authorization, but also in direct conflict with multiple statutory provisions, is trying to turn the RFS into a renewable electricity promotion program. It is also trying to use the program to change the way Americans drive, and to use eRINs as a way to reshape almost every part of the renewable electricity market. The EPA makes these objectives clear in the proposed rule:

> The renewable electricity market has many interrelated components, including the biogas production (e.g., landfills and agricultural digesters), biogas and natural gas pipelines, the renewable electricity generating units, the electricity transmission and distribution grid, EV charge stations, EV manufacturing, and EV ownership and use. The design of the eRIN program has the ability to direct the incentives to the market components that can

[30] The language in Section 211(o)(5)(E) language came from Section 202 of the EISA, which was an amendment to the existing Clean Air Act Section 211(o)(5) language. This suggests that Congress itself even recognized that additional means of generating credits had to be added to the statute because it was not already authorized.
[31] Environmental Protection Agency, Assessment and Standards Division, Office of Transportation and Air Quality, *Draft Regulatory Impact Analysis: RFS Standards for 2023-2025 and Other Changes*, November 2022, p. 339, https://www.epa.gov/system/files/documents/2022-12/420d22003.pdf (accessed February 9, 2023).
[32] Ibid., Table 6.1.4.1.2-3.
[33] Environmental Protection Agency, Assessment and Standards Division, p. 350, Table 6.1.5-1. To determine what percentage cost eRINs account for regarding projected volumes of cellulosic biofuel, we multiplied the projected total volume of cellulosic biofuel for the years 2024 and 2025 by 3 (EPA's estimated cost for D3 RINs). We then multiplied the projected volume for eRINs by 3 for the years 2024 and 2025. We then divided the cost of the eRINs in 2024 and 2025 by the projected total cost of cellulosic biofuel in those years. We then multiplied by 100 to get the percentage values of 42 percent and 56 percent respectively.

> have the greatest impact on growing the use of renewable electricity for transportation purposes.[34]

The EPA is intent on using the eRINs program as a way to change the entire vehicle fleet in the U.S.:

> A second significant constraint on increasing renewable electricity used as renewable fuel is the composition of the existing vehicle fleet…without growth in the vehicle fleet that can consume renewable electricity, growth in the use of such electricity as renewable fuel will be constrained. In designing an eRINs program, it is thus also important to consider whether and how it can support increased electrification of the transportation sector. An eRINs program can help ensure that the increased use of renewable fuel is not limited by the size of the EV fleet.[35]

The EPA further explains how it is seeking to make EVs more economically attractive "relative to their internal combustion engine counterparts," and "to incentivize activities that can increase electrification of the fleet."[36] In addition, this entire proposal is in direct conflict with the national security concerns connected to energy that Congress sought to address with the EISA.

Quite simply, the EPA on its own through these actions, is trying to make sweeping decisions on matters of enormous economic and political significance for the nation. In *West Virginia v. EPA*,[37] the U.S. Supreme Court explained:

> Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[38]

Congress did not confer authority for eRINs, an attempt by the agency to create a program that is novel and of immense economic and political significance. The major questions doctrine requires a clear statutory statement of authority when such major questions arise.[39] Not only is there no clear statement of authority when it comes to eRINs, the statutory language is clear that there is no authority.

If Congress sought to provide the EPA such unprecedented authority to create eRINs, use the RFS to create a massive new subsidy for OEMs, reshape both the national vehicle fleet and the renewable electricity market, and undermine energy security, Congress would have granted such awesome authority in clear and unmistakable terms. As the Court has explained, "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or

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[34] *Federal Register*, Vol. 87, No. 250, p. 80639.
[35] Ibid.
[36] Ibid., p. 80640.
[37] *West Virginia v. Environmental Protection Agency*, 597 U.S. (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/case.pdf (accessed February 9, 2023).
[38] Ibid., p. 17.
[39] *West Virginia v. Environmental Protection Agency*.

'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[40]

Congress would also not provide this authority to the EPA, which has no traditional expertise in shaping and regulating electricity markets. The situation involved with the eRIN proposal raises questions similar to those addressed by the Supreme Court in *West Virginia v. EPA*, where the Court struck down the EPA's proposed Clean Power Plan and its effort to reshape the electricity sector in part because the management and regulation of energy markets was not within the EPA's area of expertise.[41] When it comes to eRINs, the EPA is also trying to change how electricity is used, as well as to influence what vehicles people drive. Such a reach would call for much broader expertise than the agency possesses—even broader than the expertise contemplated by the EPA's Clean Power Plan.

The Court in *West Virginia v. EPA* held that the EPA had attempted to adopt a program "that Congress had conspicuously and repeatedly declined to enact itself."[42] When it comes to eRINs, Congress has not just declined to enact the proposed eRINs program, it has made it clear that such a program is unauthorized. Congress also just passed legislation, the Infrastructure Investment & Jobs Act (IIJA)[43] and the Inflation Reduction Act (IRA),[44] both of which include numerous policies, including subsidies, seeking to promote renewable electricity and EVs. There was nothing within this massive and sweeping legislation that authorized eRINs. The EPA apparently is seeking to create a revolutionary program out of whole cloth—a complete end-run around Congress.

2) The agency has failed properly to apply Clean Air Act Section 211(o)(2)(B)(ii)

The agency is correct that it is afforded "considerable discretion" under Section 211(o)(2)(B)(ii).[45] In fact, this statutory section[46] confers so much open-ended legislative discretion that it presents genuine non-delegation concerns. Regardless, the scope of this discretion still does not mean the agency can do whatever it wants. To the extent that analysis is required (including the analysis of the listed factors), the EPA must conduct the analysis in a reasonable manner. Analysis that is unreasonably incomplete or flawed would fail to meet the requirements of the section. That is precisely what has happened in the proposed rule.

eRINs. By incorporating the unauthorized eRINs into the analysis of setting the volume targets, the EPA has undermined the entire analysis. In the Draft RIA, the EPA states:

[40] Ibid., p. 18.
[41] *West Virginia v. Environmental Protection Agency*.
[42] Ibid., p. 5.
[43] Infrastructure Investment and Jobs Act, Public Law 117-58, https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf (accessed February 9, 2023).
[44] Inflation Reduction Act of 2022, Public Law 117-169, https://www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf (accessed February 9, 2023).
[45] *Federal Register*, Vol. 87, No. 250, p. 80588
[46] 42 U.S. Code § 7545 (o)(2)(B)(ii), https://www.law.cornell.edu/uscode/text/42/7545, (accessed February 9, 2023).

> Significantly, in this rule we are proposing regulations that would allow for the generation of cellulosic biofuel RINs from electricity used as transportation fuel (eRINs) beginning in 2024. This section therefore includes a projection of eRIN generation for 2024 and 2025. These assessments address our obligation to analyze the rate of production of renewable fuel in these years under our reset authority, CAA section 211(o)(2)(B)(ii)(III).[47]

There is no severing the eRINs from this analysis. Because, as we showed above, the eRINs program is unlawful, the agency relied on a factor that Congress never intended it to consider when setting the volume targets. Those volume targets accordingly would be arbitrary and capricious.

Costs and Benefits. The EPA was only able to quantify and monetize the effects of two of the statutorily listed factors: fuel costs and energy security benefits.[48] This lack of data is further evidence of the agency needing more time to properly assess the effect of the rule and to have a longer comment period to receive much-needed feedback.

Applying the 3 percent discount rate, the EPA found fuel costs of $29.5 billion and energy security benefits of $634 million.[49] The EPA can claim that it has considerable discretion under Section 211, but moving forward with a rule whose identified costs are 47 times greater than the identified benefits is unreasonable. Congress may not have provided proper statutory guidance under Section 211(o)(2)(B)(ii), such as how to weigh the various factors, but this hardly means that the agency should establish volume targets that would do far greater harm than good. If the EPA does not have to consider properly the benefits and costs, then there is little purpose to the required analyses. It is one thing to weigh some factors more heavily than other factors. It is quite another thing to in effect give the factors no weight at all.

Current Inflation. Congress tasked the EPA with regularly updating the RFS requirements. In this proposed rule, the EPA once again is setting standards that will require a review in a couple of years. This regular review process allows for the agency to consider current conditions and evaluate how things are operating in practice.

Certainly, in this analysis, the EPA should at least recognize current inflation rates that, based on the 2022 annual average, were at levels not seen in over 40 years.[50] Yet, amazingly, the EPA does not discuss or even mention the current inflation situation in the proposed rule or Draft RIA.[51]

Not to mention or consider the current inflation situation is unreasonable, to say the least—especially when inflation has a direct effect on several of the factors listed under Section 211,

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[47] Environmental Protection Agency, Assessment and Standards Division, p. 305.
[48] *Federal Register*, Vol. 87, No. 250, p. 80586.
[49] See e.g. *Federal Register*, Vol. 87, No. 250, p. 80586; and Environmental Protection Agency, Assessment and Standards Division, p. iv, Table ES-1.
[50] U.S. Bureau of Labor Statistics, CPI for All Urban Consumers (CPI-U) Data Series, 1980 to 2022, https://data.bls.gov/cgi-bin/srgate (accessed February 9, 2023).
[51] We have done an extensive review of both the proposed rule and the RIA for a discussion of current inflation and found nothing.

including transportation fuel prices for consumers and food prices.

Regular retail gas prices are $3.44, which is 44 percent higher than when President Joe Biden took office.[52] Diesel prices are $4.54 and 67 percent higher than when President Biden took office.[53] Year-over-year food prices increased 10.4 percent, comparing December 2022 prices to the previous December.[54] This level of food price inflation has been persistent. A year-over-year food price increase of four percent or higher is unusual, based on past data.[55] For the last 16 months (from September 2021 to December 2022), the year-over-year food prices have been at or above four percent.[56]

It is one thing for the EPA to consider these numbers and then dismiss them, which would be bad enough, but the agency does not even consider or reference current inflation. The EPA also does not consider how its actions would exacerbate overall inflation at the same time that Federal Reserve is raising the federal fund rates. Due to the Fed's actions, consumers face higher interest rates on auto loans, credit cards, and mortgages, and must reduce consumption of other goods, slowing GDP growth. The EPA proposed rule would worsen inflation.

Environmental Justice. The EPA analyzes "environmental justice" in the proposed rule. The EPA unwittingly makes the argument that doing so is inappropriate under the statute:

> Although the statute identifies a number of environmental factors that we must analyze as described in Section I, environmental justice is not explicitly included in those factors. However, Executive Order 12898 (59 FR 7629; February 16, 1994) establishes federal executive policy on environmental justice.[57]

The EPA then goes on to discuss Executive Order 12898.[58] Congress did not direct the EPA to analyze environmental justice as a distinct factor, even as it expressly listed "a number of environmental factors." The statutory language requires the agency to consider the impact of renewable fuel on the environment, and then lists the express factors: "air quality, climate

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[52] U.S. Energy Information Administration, "Weekly U.S. Regular All Formulations Retail Gasoline Prices (Dollars per Gallon)," released February 6, 2023, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMM_EPMR_PTE_NUS_DPG&f=W (accessed February 9, 2023).
[53] U.S. Energy Information Administration, "Weekly U.S. No. 2 Diesel Retail Prices (Dollars per Gallon)," released February 6, 2023, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMD_EPD2D_PTE_NUS_DPG&f=W (accessed February 9, 2023).
[54] News release, "Consumer Price Index – December 2022," U.S. Bureau of Labor Statistics, January 12, 2023, https://www.bls.gov/news.release/pdf/cpi.pdf (accessed February 9, 2023).
[55] U.S. Bureau of Labor Statistics, "Consumer Price Index Archived News Releases," modified January 13, 2023, https://www.bls.gov/bls/news-release/cpi.htm (accessed February 9, 2023).
[56] U.S. Bureau of Labor Statistics, "Consumer Price Index Archived News Releases."
[57] *Federal Register*, Vol. 87, No. 250, p. 80615.
[58] Ibid.; See also: Bill Clinton, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Executive Order 12898, February 11, 1994, https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf (accessed February 9, 2023); and Joe Biden, "Tackling the Climate Crisis at Home and Abroad," Executive Order 14008, January 27, 2021, https://www.energy.gov/sites/default/files/2021/02/f83/eo-14008-tackling-climate-crisis-home-abroad.pdf (accessed February 9, 2023).

change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply."[59] While these factors are not exhaustive, they are all connected to the physical environment itself.

As it is, the EPA does not even make the case for why it has statutory authority to analyze environmental justice. Instead, it simply relies upon Executive Order 12898 for its actions. As the EPA knows, it needs to explain why the statute authorizes consideration of environmental justice as a distinct factor, and not simply point to an executive order.

For the sake of argument, assuming that environmental justice could be considered as a distinct factor, the EPA has failed properly to analyze environmental justice issues in the proposed rule. While "environmental justice" is an amorphous term, it should certainly be expected that the proposed rule itself will not hurt low- income households.

Through this proposed rule, the EPA is seeking to promote EVs. This is a give-away to wealthier households. EVs are generally more expensive than comparable gas-powered vehicles[60] and people who purchase them tend to be high-income.[61] Meanwhile, the costs associated with eRINs will likely be borne by gasoline consumers. To the extent that the introduction of eRINs would lead to higher gas prices at the pump, eRINs would have a disproportionate effect on lower-income Americans, since they spend a greater share of their after-tax income on motor fuel.[62] That result could not be environmental justice by any reasonable definition of the term.

If environmental justice is relevant, then this effect of the eRINs proposal on lower-income American households is pertinent. Yet the EPA did not consider this issue.[63] That is arbitrary and capricious under the Administrative Procedure Act.

In the environmental justice sections of both the proposed rule and draft RIA, there is no discussion or consideration of how eRINs would affect low-income households. Nor is there any discussion of how seeking to change the vehicle fleet or reshape the electricity market would affect low-income households.[64]

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[59] 42 U.S. Code § 7545(o)(2)(B)(ii)(I).
[60] David T. Stevenson, "RE: Electric Vehicles v. Internal Combustion Engines," Ceasar Rodney Institute *Inside Energy*, October 5, 2019, Table 1, https://www.caesarrodney.org/pdfs/EV_v_ICE2.pdf (accessed February 9, 2023).
[61] Jianwei Xing, Benjamin Leard, and Shanjun Li, "What does an Electric Vehicle Replace?" working paper, National Bureau of Economic Research, revised February 2021, p. 5, https://www.nber.org/system/files/working_papers/w25771/w25771.pdf (accessed February 9, 2023).
[62] U.S. Bureau of Labor Statistics, "Table 1101: Quintiles of Income Before Taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Surveys, 2021," September 2022, https://www.bls.gov/cex/tables/calendar-year/mean-item-share-average-standard-error/cu-income-quintiles-before-taxes-2021.pdf (accessed February 10, 2023). After-tax data can also be can be calculated from this table; See also, Daren Bakst and Patrick Tyrrell, "Big Government Policies that Hurt the Poor and How to Address Them," Heritage Foundation *Special Report* No. 176, April 5, 2017, https://www.heritage.org/sites/default/files/2017-04/SR176.pdf (accessed February 9, 2023).
[63] The environmental justice sections in the proposed rule and RIA do include a discussion on how the "candidate volumes" would impact the fuel and food prices for low-income households. However, there is nothing specific regarding the disproportionate impact connected to eRINs, changing the vehicle fleet, or reshaping the electricity market.
[64] Ibid.

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In our request for extension, we stated that this rule is a mess of the EPA's own making—a point worth emphasizing again. The proposed rule is fatally flawed in many respects. The agency had an opportunity to establish carefully-considered volume targets, but instead it has used this proposed rule as a means to create a new and unauthorized regulatory program (eRINs). That misstep will serve to sabotage the entire proposed rule. Therefore, we urge the agency to withdraw the proposal and craft a new rule that is consistent with the statute.

Sincerely,

Daren Bakst
Senior Research Fellow, Environmental Policy and Regulation
Center for Energy, Climate, and Environment
The Heritage Foundation

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Research Assistant
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The Heritage Foundation

Attachment: Request for Extension

January 31, 2023

Mr. David Korotney
Office of Transportation and Air Quality, Assessment and Standards Division
Environmental Protection Agency
2000 Traverwood Drive, Ann Arbor, MI

Submitted via Regulations.gov

RE: Request for Extension Regarding "Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes," Docket ID No. EPA-HQ-OAR-2021-0427

Mr. Korotney,

We are respectfully requesting that the Environmental Protection Agency (EPA) extend the comment period for the proposed rule by at least 60 days, and more appropriately 90 days.[1]

The proposed rule was published in the Federal Register on December 30, 2022, with comments due no later than February 10, 2023.[2] This gives the public fewer than 45 days to submit comments on a proposed rule that warrants significantly more time.

Further, the rule was published during the middle of the holidays, on the last weekday of the 2022 calendar year. Many individuals likely to submit comments on the rule would not have been back at work until January 3, 2023, which is the same day that EPA employees, subject to the federal holidays schedule, would have returned to work.[3] This effectively makes the comment period fewer than 40 days.

Regarding the RFS, the EPA is no longer informed by statutorily established volume targets, thus presenting major challenges for the agency and for parties seeking to submit comments. As the EPA explains in the proposed rule, "This 'Set rule' proposal marks a new phase for the program, one which takes place following the period for which the Clean Air Act enumerates specific volume targets."[4]

By itself, this new phase for the program easily warrants a comment period much longer than 45 days. Besides bringing about new challenges and issues, the EPA must analyze this new phase under Clean Air Act Section 211(o)(2)(B)(ii), which as the EPA has acknowledged provides very little guidance in assessing various factors. This complicates matters even more.

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[1] The views we have expressed in this comment are our own and should not be construed as representing any official position of The Heritage Foundation.
[2] *Federal Register*, Vol. 87, No. 250 (December 30, 2022), pp. 80582—80756, https://www.federalregister.gov/documents/2022/12/30/2022-26499/renewable-fuel-standard-rfs-program-standards-for-2023-2025-and-other-changes (accessed January 30, 2023).
[3] U.S. Office of Personnel Management, "Federal Holidays: 2023 Holiday Schedule," https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=2023 (accessed January 30, 2023).
[4] *Federal Register*, p. 80584.

Yet, not only did the EPA not provide a reasonable amount of time to submit comments on this new phase, but also further complicated the proposed rule by "introducing a new regulatory program governing renewable electricity" that the agency calls eRINs.[5]

As the agency explains in the Draft Regulatory Impact Analysis, "The incorporation of renewable electricity into the RFS program as part of this proposal necessitated the development of a *novel* means of calculating eRIN generation and forecasting volumes for renewable electricity in the program."[6] [Emphasis added]

The proposed new program certainly presents novel issues beyond just calculating generation and forecasting volumes. This includes issues connected to statutory authority and the impact such a proposal has on the existing and already complicated RFS program.

If the EPA had proposed either a set rule or eRINs rule by itself, then there should have been far more than 45 days to submit comments. Therefore, it is completely unreasonable to propose a rule containing both a "set rule" and this novel new regulatory eRINs program, while giving the public fewer than 45 days to submit comments.

We are aware that the EPA recently denied requests for an extension, by asserting that the comment period may not be extended due to a sue and settle case in which the EPA agreed to a deadline of June 14, 2023 to finalize the 2023 standards.[7] According to the agency, "Extending the current comment period deadline would not allow EPA sufficient time to review and respond to comments, draft a final rule, and complete the rulemaking process by EPA's deadline."[8]

As it is, the EPA has already created a comment process that is insufficient. While the agency would have more time to review the comments by not extending the deadline,[9] the agency will do so at the expense of not providing enough time for the public to submit comments. Either way, the agency has created a flawed process that should prove fatal to any final rule. It is also worth noting that in the EPA's letters, the agency did not dispute that the time for submitting comments was insufficient. It solely relied on the June 14 deadline in denying the requests.

This situation is yet another example of how an agency binds itself to an unreasonable timeline through a so-called "deadline suit" thereby undermining a final rule. Regardless, the EPA's poor decision does not change the unreasonably short timeline afforded the public to submit comments.

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[5] Ibid.
[6] U.S. Environmental Protection Agency, *Draft Regulatory Impact Analysis: RFS Standards for 2023-2025 and Other Changes*, November 2022, p. 323, https://www.epa.gov/system/files/documents/2022-12/420d22003.pdf (accessed January 30, 2023).
[7] Joseph Goffman, Principal Deputy Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, letter to Mr. Patrick Kelly, January 20, 2023, https://www.epa.gov/system/files/documents/2023-01/rfs-req-comment-ext-nprm-2023-2025-afpm-epa-response-2023-01-20.pdf (accessed January 30, 2023); see also Joseph Goffman, Principal Deputy Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, letter to Mr. Johannes Escudero, January 20, 2023, https://www.epa.gov/system/files/documents/2023-01/rfs-req-comment-ext-nprm-2023-2025-crng-epa-response-2023-01-20.pdf (accessed January 30, 2023).
[8] Ibid.
[9] The review process is still very short and likely to be rushed, even with a February 10, 2023 comment deadline.

Fortunately for the agency, the consent decree provides a way to extend the deadline for the final rule:

> (a) by written stipulation of the Parties with notice to the Court, or (b) by the Court following motion of EPA for good cause shown. Any other provision of this consent decree also may be modified by the Court following motion of an undersigned party for good cause shown.[10]

Even if the parties do not mutually agree to an extension, there is certainly good cause that can be shown.

In addition, the consent decree only requires a final rule establishing "the applicable volumes of renewable fuel for calendar year 2023."[11] The EPA could have proposed a rule limited to what was covered in the consent decree. Unfortunately, the EPA went way beyond what was required in the decree and included proposals, such as the eRINs, which will not be severable from the proposed rule.[12]

This is a mess of the EPA's own making. However, for purposes of this comment process, one thing is perfectly clear: the amount of time being afforded the public to submit comments is insufficient and unreasonable. Therefore, it is incumbent upon the agency to extend the comment period by at least 60 days.

Thank you for considering this request, and we look forward to submitting comments on the rule.

Sincerely,

Daren Bakst
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[10] Growth Energy v. Regan, No. 22-cv-01191-RC (D.D.C.), Document No. 12, http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220726_docket-122-cv-01191_order.pdf (accessed January 30, 2023).

[11] Ibid.

[12] In addition, severing parts of the rule for public comment purposes is infeasible as the EPA explained when denying the request to "extend the comment period for only the Biogas Regulatory Reform portion of the rule." Specifically, the EPA stated, "this is not something we are able to do given it is not feasible for EPA to extend the comment period for only a portion of the rulemaking." Joseph Goffman, Principal Deputy Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, letter to Mr. Johannes Escudero, January 20, 2023, https://www.epa.gov/system/files/documents/2023-01/rfs-req-comment-ext-nprm-2023-2025-crng-epa-response-2023-01-20.pdf (accessed January 30, 2023).