



COMMENTS OF THE NATIONAL BIODIESEL BOARD

ON

RENEWABLE FUEL STANDARD PROGRAM:
STANDARDS FOR 2018 AND BIOMASS-BASED DIESEL VOLUME FOR 2019; AVAILABILITY OF
SUPPLEMENTAL INFORMATION AND REQUEST FOR FURTHER COMMENT

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VIA ELECTRONIC FILING
October 19, 2017

Administrator Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

**RE: DOCKET ID No. EPA-HQ-OAR-2017-0091 — RENEWABLE FUEL STANDARD PROGRAM:
STANDARDS FOR 2018 AND BIOMASS-BASED DIESEL VOLUME FOR 2019; AVAILABILITY OF
SUPPLEMENTAL INFORMATION AND REQUEST FOR FURTHER COMMENT**

Dear Administrator Pruitt,

The National Biodiesel Board (“NBB”) appreciates the opportunity to submit comments on EPA’s Notice of Data Availability (“NODA”)¹ supplementing its July 21 proposed rule regarding the Renewable Fuel Standards for 2018 and biomass-based diesel volume for 2019. For the reasons discussed below, NBB urges EPA to reject each of the proposed courses of action described in the NODA and instead increase the advanced biofuel and biomass-based diesel volumes in the final rule.

I. Introduction

The renewable volume obligations in EPA’s July 21 proposed rule are so low that, if finalized, they will halt the growth of the biomass-based diesel industry. The additional reductions EPA has floated in the NODA would devastate the industry—costing thousands of jobs in rural areas and severely harming America’s farmers. NBB recognizes that those proposed reductions have merely been introduced for comment and are not the finalized policy of EPA. NBB therefore urges EPA to instead increase the advanced biofuel volume for 2018 in the final rule to at least 4.75 billion gallons and increase the biomass-based diesel volume for 2019 to at least 2.5 billion gallons.

In the NODA, EPA seeks comment on whether it may further reduce the advanced, total, and biomass-based diesel volumes based on what EPA characterizes as two recent developments: (1) the expiration of the biodiesel tax credit; and (2) the Department of Commerce’s preliminary determination to impose countervailing duties on imported

¹ In its pre-publication version, EPA referred to its supplemental publication as a Notice of Data Availability. EPA entitled the final version published in the Federal Register “Availability of Supplemental Information; Request for Further Comment.” While the latter title perhaps more accurately describes EPA’s supplemental publication, these comments refer to it as a NODA for simplicity.

Argentinian and Indonesian biodiesel that has been unfairly subsidized by foreign governments. Neither of those developments warrants a reduction of the renewable volume obligations.

Whether or not the biodiesel tax credit is extended, the RFS itself will provide sufficient and strong incentives for the advanced biofuel and biomass-based diesel volumes to be met, just as in past years when the biodiesel tax credit was not in place. Throughout this process, EPA has consistently underestimated the willingness and ability of the domestic biodiesel industry to step up. U.S. biomass-based diesel producers have existing registered capacity to produce 4.2 billion gallons per year and have 2.6 billion gallons of capacity just at plants currently operating—far more than enough to meet volumes significantly higher than those in the proposed rule.

Likewise, the Department of Commerce’s preliminary determination will not reduce biodiesel production or affect the availability of biodiesel for obligated parties. Any reductions in Argentinian or Indonesian imports will be replaced by increased domestic production or imports from other countries. At most, if the determination is finalized, it will level the playing field by ensuring that imports come in at a fair price.

The compliance costs to obligated parties that EPA suggests could occur are no license for EPA to waive volumes. For one thing, the impact of those costs on obligated parties would be far smaller than suggested by some commenters. Either way, those costs are no reason to back down from what Congress has demanded. Congress passed the RFS in order to enhance our nation’s energy security, rural economy, and environment by “increas[ing] the production of clean renewable fuels.” Pub. L. No. 110–140, 121 Stat. 1492 (2007). Congress did so knowing full well that it was “adopt[ing] a market forcing policy intended to overcome constraints in the market.” *Americans for Clean Energy v. Env’tl. Prot. Agency*, 864 F.3d 691, 710 (D.C. Cir. 2017). Congress’s objective cannot be achieved if EPA is reducing the volumes to minimize costs on obligated parties to the greatest extent possible. That is a sop to the status quo and won’t spur any development or change.

Congress tightly and narrowly cabined EPA’s authority to reduce the statutory volumes in the RFS. EPA already proposed to max out on its cellulosic waiver authority in the proposed rule.² In the NODA, EPA suggests that other legal authorities may allow it to reduce volumes even further. But none of the specific circumstances that would implicate EPA’s other waiver authorities are present here:

- First, EPA may not use its general waiver authority because there is neither an “inadequate domestic supply” of advanced biofuels nor a “severe[] harm [to]

² In fact, as described in NBB’s comments on the proposed rule, the proposed rule exceeds the scope of EPA’s cellulosic waiver authority. NBB continues to maintain that EPA’s application of its cellulosic waiver authority to reduce the advanced biofuel volumes by the entire projected shortfall in cellulosic production based solely on EPA’s objective of reducing costs to obligated parties is unlawful, arbitrary, and capricious.

the economy or environment of a State, a region, or the United States.” 42 U.S.C. (o)(7)(A). EPA cannot redefine “domestic supply” as “domestic production” and thus exclude imports. Such a redefinition is foreclosed by the statute, decisions of the D.C. Circuit, and EPA’s own regulations. And the ordinary compliance costs of obligated parties do not constitute “severe economic harm” to a “state, a region, or the United States.”

- Second, EPA may not use its biomass-based diesel waiver authority because there are no emergency circumstances constituting a “severe feedstock shortage or other market disruption” that would warrant a 60-day waiver in the biomass-based diesel volume. The concerns described in the NODA are not the type of major shocks to the biomass-based diesel supply for which the biomass-based diesel waiver provision was designed.
- Third, EPA may not further reduce the 2019 biomass-based diesel volume under the statutory factors in the RFS. Those statutory factors, which EPA fails to consider properly in either the proposed rule or the NODA, instead demonstrate that an increase in the biomass-based diesel volumes are warranted.

Tellingly, EPA fails to seek comment in the NODA on any one of the many factors that warrant higher advanced biofuel and biomass-based diesel volumes. Higher volumes are needed because the biomass-based diesel industry employs 64,000 people, primarily in rural areas. Higher volumes are needed because biomass-based diesel and other advanced biofuels enhance our country’s energy security and reduce our dependence on foreign oil. And higher volumes are needed because American farmers—both the growers of biomass-based diesel feedstocks and the livestock producers who use biomass-based diesel co-products—depend on them. The potential actions on which EPA seeks comment in the NODA would flout each of those important objectives that Congress intended through passing the RFS. So too would the proposal that EPA has discussed (but did not include in the NODA) to allow obligated parties to use RINs from exported biofuels to meet renewable volume obligations under the RFS.

EPA must bring its final rule in line with Congress’s commands by discarding each of the proposed reductions in the NODA and increasing the advanced biofuel and biomass-based diesel volume in the final rule.

II. None of the Concerns Described in the Notice of Data Availability Warrant Any Reductions in Volumes.

In the NODA, EPA asks whether it should reduce the renewable volume obligations in its final rule based on (1) concerns with the expiration of the biodiesel tax credit, or (2) concerns with the availability of imports. Neither issue warrants any decrease in volumes because neither will reduce the supply of biomass-based diesel and other advanced biofuels.

A. Biodiesel Tax Credit

The first concern EPA discusses in the NODA is the expiration of the biodiesel tax credit. 82 Fed. Reg. 46,174, 46,176 (Oct. 4, 2017). It is unclear why EPA describes the biodiesel tax credit as a new concern worthy of discussion in a supplemental notice, as the biodiesel credit had already expired and was already discussed significantly in EPA's July proposed rule. Regardless, as NBB explained in its comments to the proposed rule, the expiration of the biodiesel tax credit is not an obstacle to achieving volumes under the RFS. To begin with, a bill has already been introduced that would extend the \$1-per-gallon tax credit for three years. See American Renewable Fuel and Job Creation Act of 2017, S.944 (115th Cong. 2017). Discussions regarding extending the tax credit continue in Congress, where a bipartisan group of senators is actively working to include the tax credit as part of the budget negotiation process.

Moreover, even if the biodiesel tax credit is not renewed, its absence would not be a reason to reduce the advanced biofuel or biomass-based diesel volume. It would be a reason to raise the volumes. The tax credit is one incentive to produce biomass-based diesel. The RFS volumes are an independent incentive. If EPA sets the volumes high enough, the incentive will increase because there will be a sufficient demand to drive additional production of biomass-based diesel regardless of the tax credit. The expiration of the tax credit does not affect existing production capacity, which is more than sufficient to meet much higher volumes. See Section II.B., *infra*. Indeed, the advanced biofuel volumes have been met in past years even when the biodiesel tax credit has not been in place before the compliance year began. See 82 Fed. Reg. at 34,224 (showing biomass-based diesel production from 2011 to 2016). And blenders continue to blend biodiesel this year despite the lack of a tax credit—in fact, domestic consumption of biodiesel is up 11.6% over the period from January to July compared to last year. See U.S. Energy Information Administration, September 2017 Monthly Energy Review (Sept. 2017), available at <https://www.eia.gov/totalenergy/data/monthly/#renewable>.

B. Imports

The NODA next describes two concerns regarding imports. First, EPA seeks comment on whether it should reduce volumes because the Department of Commerce's recent preliminary determination could lower imports. 82 Fed. Reg. at 46,176. Second, EPA seeks comment on whether it should reduce volumes because of its view that the prevalence of imported advanced biofuels hinders the energy security benefits of the RFS. *Id.* at 46,177.

Those alleged concerns contradict each other and suggest EPA is searching for any justification to reduce the volumes. EPA may not rationally reduce volumes because it projects imports will be too low as a result of the Department of Commerce's decision while simultaneously reducing volumes because it believes that volumes of imports that are too high impact energy security. Moreover, neither concern is warranted.

The Department of Commerce's preliminary determination will not lead to any shortfall in the supply of biomass-based diesel. Instead, if finalized, it will merely level the economic

playing field between domestic and foreign producers. To the extent imports from Argentina and Indonesia are reduced, it will be because they are replaced by domestic production or imports from other countries. There is no shortage of capacity in the U.S. and other potential importers like Canada and the E.U.

In fact, domestic capacity for biomass-based diesel production alone is more than sufficient to meet volumes even higher than those in the proposed rule. An EPA assessment from 2016 described in the proposed rule found that there is registered capacity in the U.S. to produce 4.2 billion gallons per year. 82 Fed. Reg. at 34,234 n.100. 3.1 billion gallons of that capacity was from plants that had produced RINs in the past two years. *Id.* And the most recent report of the Energy Information Administration (“EIA”) on monthly biodiesel production shows that there is 2.3 billion gallons of capacity at the 97 plants that generated fuel in July 2017 alone. U.S. Energy Information Administration, Monthly Biodiesel Production Report with Data for July 2017 (Sept. 2017). Adding in the nearly 300 million gallons of capacity for generation of renewable diesel at currently operating plants results in a total biomass-based diesel production capacity of 2.6 billion gallons, which is also consistent with NBB’s own internal assessment.³ Thus, the U.S. biomass-based diesel industry can generate 2.6 billion gallons right now, and has the additional registered capacity to ramp up production even higher with sufficient continuing support from the RFS volumes.⁴ In other words, it is clear that domestic producers alone are immediately ready to generate substantially more than the 2.1 billion-gallon volume in EPA’s proposed rule. And, because each biomass-based diesel gallon generates on average approximately 1.55 RINs,⁵ biomass-based diesel production could make up the vast majority of EPA’s entire proposed advanced biofuel volume.

While domestic capacity is enough by itself to satisfy higher renewable volume obligations, imports from other countries will make compliance even easier for obligated parties. Countries including Canada, Germany, and South Korea have historically imported significant quantities of biomass-based diesel to the U.S. See USA Trade Online, Import Data by Tariff Code, available at <https://usatrade.census.gov/> (showing 2016 imports of about 107 million gallons of biodiesel from Canada, 25 million gallons from Germany, and 19 million gallons from South Korea). Imports from each of those countries to the U.S. is likely to increase

³ Currently operating domestic renewable diesel capacity includes capacity of 170 million gallons at the Diamond Green facility, 75 million gallons at the REG Geismar facility, and 40 million gallons at the AltAir facility.

⁴ In addition to being able to bring on line currently idle production facilities with greater volumes, the industry is also prepared to build out even more capacity. For example, the Diamond Green renewable diesel facility already has a 110-million-gallon planned expansion underway to be completed in 2018.

⁵ This number represents a weighted average estimate of the energy equivalence of all biomass-based diesel. It includes renewable diesel, which typically has an ethanol equivalency value higher than 1.5.

if those imports become more competitive due to countervailing duties placed on Argentinian and Indonesian biodiesel. Imports from E.U. countries in particular may be particularly likely to increase as those countries look to export to the U.S. market due to an influx of Argentinian biodiesel into Europe resulting from the World Trade Organization's recent determination regarding the E.U.'s anti-dumping measures. See World Trade Organization, DS473: European Union—Anti-Dumping Measures on Biodiesel from Argentina, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds473_e.htm (last visited Oct. 16, 2017); see also Maximillian Heath, Argentina Bets on European Biodiesel Market after U.S. Imposes Duties (Aug. 23, 2017), <https://www.reuters.com/article/us-argentina-biodiesel/argentina-bets-on-european-biodiesel-market-after-u-s-imposes-duties-idUSKCN1B32QL>. Moreover, imports from Indonesia and Argentina will not simply cease under the Department of Commerce's ruling—rather, imports are likely to continue to come in despite the duties. Imports from those countries will only be reduced to the extent that they are out-competed by domestic producers or producers from other countries. And the Department of Commerce's determination does not apply to imported renewable diesel, so imports of renewable diesel will continue at historical levels or higher.

EPA's concern that the prevalence of imports will reduce the energy security benefits of the RFS is likewise unfounded. Imported biofuels still enhance the diversity of fuels available in the United States and reduce our dependence on oil from the Middle East. More importantly, reducing RFS volumes would not reduce only imports, as EPA seems to believe. Until the Department of Commerce's determination is finalized, reducing volumes will primarily hurt domestic producers because unfairly subsidized imports will continue to come in at the expense of domestic production. And even if the Department of Commerce's preliminary determination is finalized, reducing volumes will still hurt domestic producers just as much as foreign ones—if all producers are on a level economic playing field, cuts in the renewable volume obligations will hurt producers and farmers everywhere.

If EPA is genuinely concerned about the harmful impacts of unfairly subsidized imports, there are more appropriate and targeted ways to address the issue. The primary method of counteracting such imports is exactly what the Department of Commerce has done: imposing countervailing duties. Additionally, EPA itself has also encouraged imports of biodiesel from Argentina to the United States and could help remedy that issue. As the agency no doubt remembers, just a few years ago it granted an approval to CARBIO, a coalition of Argentinian biodiesel producers, to use a novel satellite-based system to demonstrate compliance with the statute's land-use restrictions and tracking requirements. The approval of CARBIO's application clearly facilitates additional imports from Argentina by allowing producers there to avoid the typical, and more burdensome, "map and track" procedures for complying with the requirements of the RFS. As the Supreme Court taught in *Utility Air Regulatory Group v. EPA*, the agency lacks authority to change statutory requirements out of necessity when it has the option of altering a discretionary determination that contributes to the issue. 134 S. Ct. 2427, 2444 (2014) (holding that EPA could not fix the unintended consequences of its own application of the Clean Air Act by adjusting statutory thresholds). In other words, rather than reduce

volumes out of fear of excessive imports, a more prudent and necessary solution would be for EPA to undo the CARBIO approval.

III. EPA Lacks the Authority to Further Reduce the Advanced, Total, and Biomass-based Diesel Volumes.

Because the biodiesel tax credit and import concerns cited in the NODA will not cause any shortfall in the supply of biomass-based diesel or other advanced biofuels, EPA's factual basis for the NODA boils down to the concern that obligated parties may have to bear small additional compliance costs. Indeed, EPA seems to acknowledge that such costs are its key concern. See 82 Fed. Reg. at 46,177 ("EPA remains concerned about the high cost of advanced biofuels."). Compliance costs change all the time. Ordinary fluctuations in compliance costs do not rise to the level of satisfying any of the specific, limited waiver provisions in the RFS.⁶ None of EPA's proposals to squeeze reductions in volumes into its general waiver authority, biomass-based diesel waiver authority, and analysis of the statutory factors for setting biomass-based diesel volumes in 2019 are permitted under the detailed statutory scheme Congress established with the RFS.

A. EPA May Not Lower the 2018 Advanced Biofuel or Total Volumes through its General Waiver Authority.

EPA first proposes to reduce the 2018 advanced biofuel and total renewable fuel volumes using its general waiver authority. EPA must use its general waiver authority in order to waive those volumes beyond the reductions in the proposed rule because it has already proposed to use the maximum extent of its cellulosic waiver authority. But neither of the two statutory triggers for EPA's general waiver authority are triggered here.

⁶ In addition, EPA's final rule may not differ from its proposed rule unless the latter is a "logical outgrowth" of the former. *Env'tl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005). Yet, a variety of potential actions EPA offers in the NODA are unrelated to the proposed rule. For one, EPA concedes in the NODA itself that the proposed rule neither proposed nor sought comment on reducing the 2018 biomass-based diesel volume. 82 Fed. Reg. at 46,175. EPA also seeks comment for the first time in the NODA on whether it may depart from its prior regulations by redefining its interpretation of the "inadequate domestic supply" prong of its general waiver authority to exclude imports. *Id.* at 46,177-78. While EPA sought comment on using its general waiver authority in the proposed rule, it never suggested that it might redefine how it interprets that waiver authority. And EPA's use of the NODA does not give it cover to pursue any course it chooses. The 15-day comment period that EPA provided for comments on the NODA fails to give affected parties and the public an adequate opportunity to comment on the dramatic changes to the RFS program contemplated in the NODA.

1. There is not an inadequate domestic supply of advanced biofuels.

EPA may not consider the costs of RINs to obligated parties under the “inadequate domestic supply” prong of its general waiver authority. The D.C. Circuit’s recent decision in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017) (“ACEI”) made clear that “inadequate domestic supply” only authorizes EPA to consider supply-side constraints, not demand-side issues such as costs. *Id.* at 709 (noting that EPA’s attempt to import demand-side concerns would read the term “inadequate domestic supply” to mean “inadequate domestic supply and demand.”).

Acknowledging that it can no longer attempt to squeeze demand-side concepts into the inadequate domestic supply prong, EPA proposes to instead radically redefine the meaning of “domestic supply” to include only biofuels produced in the United States. 82 Fed. Reg. at 46,177-78. Doing so would exclude imported biofuels from the definition of supply, and thus allow EPA to characterize the available supply in the United States as lower than it actually is.

EPA’s proposed redefinition runs counter to the text of the statute. It would read the term “inadequate domestic supply” to mean “inadequate domestic production.” But the statute uses the word “supply” in several places to refer to the entire supply side of the biofuels market, while the statute uses the word “production” to refer to the generation of renewable fuels. For example, the cellulosic waiver provision authorizes EPA to waive volumes when “cellulosic biofuel production is less than the minimum applicable volume.” 42 U.S.C. 7545(o)(7)(D); see also *id.* at 7545(o)(2)(A) (requiring at least 20 percent reductions in greenhouse gas emissions for “renewable fuel produced from new facilities”); *id.* at (o)(2)(B)(ii) (setting volumes for calendar years after the statutory volumes end based in part on “the expected annual rate of future commercial production of renewable fuels”). Thus, if Congress had intended to exclude imports from the analysis for EPA’s general waiver authority, it would have used the word “production.” Or, as Congress did in the reformulated gasoline portion of the Clean Air Act’s regulation of fuels provision, it could have tied the waiver authority to “insufficient domestic capacity.” 42 U.S.C. 7545(k)(6)(A)(ii). But Congress did not refer to either domestic production or domestic capacity; instead it referred to the broader concept of supply because Congress understood that imports were part of the domestic supply.

The D.C. Circuit in ACEI explained that inadequate domestic supply “refers to the supply of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements.” 864 F.3d at 709 (emphasis added). Thus, the D.C. Circuit has defined supply to mean all of the fuels that can potentially be brought to the United States and used for compliance with the RFS, which includes imports. In the NODA, EPA latches onto a subsequent observation made by the D.C. Circuit that EPA’s analysis of domestic supply “may include ... the amount of renewable fuel available for import from foreign producers.” *Id.*; see 82 Fed. Reg. at 46,178. According to EPA, the D.C. Circuit’s statement that EPA may consider imports as part of domestic supply also means that EPA may choose not to consider them. 82 Fed. Reg. at 46,178. That interpretation ignores the D.C. Circuit’s explicit holding that domestic supply refers to the supply “available” to meet statutory volumes. 864 F.3d at 709; see also *id.* (“[W]e have already

established: (i) that the ‘resource or product’ is renewable fuel; (ii) that the ‘use’ is compliance with the statute; and (iii) that the ‘persons’ ‘at issue’ are refiners, blenders, and importers. Putting that together, ‘supply’ as used in the ‘inadequate domestic supply’ provision refers to the ‘amount’ of renewable fuel that is ‘available for use’ by refiners, blenders, and importers in meeting the statutory volume requirements.”) Because imported biofuels can be used to comply with the RFS, they are by definition available to meet statutory volumes.

Moreover, EPA’s proposal to redefine “inadequate domestic supply” to exclude imports is fundamentally at odds with EPA’s own regulations allowing the generation of RINs based on imports. EPA acknowledges as much in the NODA, explaining that its new definition of domestic supply “would not in any way limit the use of qualifying imported biofuel by obligated parties to ultimately comply with the annual percentage standards.” 82 Fed. Reg. at 46,178. That double standard would devastate the domestic biomass-based diesel industry and other renewable fuel producers—it would artificially lower the volumes EPA sets while still allowing obligated parties to comply with those volumes by choosing the cheapest options out of a supply of domestic and imported biofuels that is much larger. As long as imports generate RINs, EPA can’t ignore them when setting volumes. And if EPA were to propose eliminating RINs for imports, that would be a fundamental change to the contours of its RIN program that would require a separate notice-and-comment rulemaking.

EPA’s redefinition of “inadequate domestic supply” is also directly contradictory to EPA’s existing regulations, under which EPA has defined domestic supply to include “domestic production plus imports, less exports and corrections.” 80 Fed. Reg. 77,420. While EPA may revise its regulations, EPA has a heightened burden to justify a change in policy when the prior policy has “engendered serious reliance interests.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). Here, the purported benefits that EPA describes of changing the definition of inadequate domestic supply cannot overcome the significant harm that would befall biomass-based diesel producers and others who have relied on EPA’s prior methodology to invest in renewable fuel production capacity, distribution infrastructure, and feedstock production.

EPA suggests in the NODA that redefining inadequate domestic supply would be beneficial because it is difficult to “project” the volumes of imports for a given year due to fluctuations in imported volumes. 82 Fed. Reg. at 46,177. But that is not EPA’s role under the statute; the statute requires EPA to set volumes that will “increase the production of clean renewable fuels,” not merely predict what volumes would already be in the absence of the RFS. Pub. L. No. 110–140, 121 Stat. 1492 (2007). Thus, as long as there is adequate supply that could potentially be made available in the United States to meet renewable volume obligations, EPA may not use the inadequate domestic supply prong of its general waiver authority.

Indeed, determining whether there is an inadequate domestic supply of biomass-based diesel is not a difficult task. Readily available government data demonstrate that there is by far more than enough supply to meet the volumes in EPA’s proposed rule—or even higher volumes. As discussed above, there is 4.2 billion gallons of registered biomass-based diesel capacity in the United States alone, 2.6 billion gallons of which is at currently operating

facilities. See Section II.B, *supra*. On top of that, over 700 million gallons were imported in 2016. See U.S. Environmental Protection Agency, 2016 Renewable Fuel Standard Data, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2016-renewable-fuel-standard-data> (last visited Oct. 16, 2017). While it is possible that there will be some reductions in imports from Argentina and Indonesia as a result of the Department of Commerce's preliminary countervailing duties, those import volumes will only be reduced to the extent they are replaced by imports from other countries or domestic production. And Argentina and Indonesia will continue to produce biodiesel, which could potentially be imported to the U.S. if high renewable volume obligations warrant it. To look at it another way, there is sufficient global feedstock supply to generate 9.8 billion gallons of biomass-based diesel in 2018, even when accounting for demand of those feedstocks for other uses. See LMC International, *Current and Future Supply of Biodiesel Feedstocks* (June 2016) (Attachment 14 to NBB's comments on the 2017 RFS Rule, EPA-HQ-OAR-2016-0004-2904). Thus, EPA does not need to precisely determine the exact projected volume of imports in 2018 or future years, because it is clear that the supply vastly exceeds the volumes. If EPA needs any additional assistance in determining the supply of imported biofuels, it can consult the Departments of Agriculture and Energy, as it is required to do before exercising its waiver authority under 42 U.S.C. § 7545(o)(7)(A).

2. Advanced biofuels are not causing severe harm to the economy of a state, region, or the United States.

EPA also seeks comment on whether it may reduce the advanced biofuel and total biofuel volumes using the "severe economic harm" prong of its general waiver authority. 82 Fed. Reg. at 46,179. The complete language of that authority demonstrates why it does not apply here—that authority only allows EPA to reduce volumes if they will "severely harm the economy or environment of a State, a region, or the United States." There is no evidence in the NODA or the proposed rule—and none exists—that indicates that the advanced biofuel or other renewable volume obligations are causing severe economic harm to an entire state, region, or the country. In fact, the only potential costs EPA cites in the NODA are relatively small compliance costs of obligated parties. Such minor compliance costs cannot be grounds for waiving volumes, or the RFS could not function as a statute that is intended to drive production of renewable fuels. Indeed, as the D.C. Circuit has recognized, the RIN market is in part what drives the demand for renewable fuel that achieves the objectives of the RFS. *Am. Petroleum Inst. v. E.P.A.*, 706 F.3d 474, 481 (D.C. Cir. 2013) ("[T]here appears to be no great obstacle to the production of advanced biofuel generally; to the extent that estimates in the record are relatively low, that seems to be based on want of a market, which of course continued pressure will tend to solve."). Thus, allowing EPA to waive volumes until the RFS places essentially no burden on obligated parties would completely upend the statutory scheme. And Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001); *c.f. Minnesota Auto. Dealers Ass'n v. Stine*, No. 15-2045, 2016 WL 5660420, at *10 (D. Minn. Sept. 29, 2016) (rejecting AFPM's argument that "Congress's intent in creating the RFS was to establish a market-based

credit system in which obligated parties would have unfettered discretion and maximum compliance flexibility.”)

Even if RIN prices were to increase somewhat due to the concerns EPA discusses in the NODA, it will not harm consumers of transportation fuel. As EPA recognized in a 2015 study, increases in the price of RINs do not cause a corresponding increase in the price of transportation fuels. Dallas Burkholder, EPA office of Transportation and Air Quality, A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects, EPA-HQ-OAR-201-0111-0062, 2 (May 14, 2015) (“EPA RIN Market Study”). According to EPA, “this is because the RIN price, rather than acting as an additional cost, generally acts as a transfer payment between parties that blend renewable fuels and obligated parties who produce or import petroleum-based fuels and are required to obtain RINs for compliance purposes.” *Id.* In other words, the price paid by obligated parties and the price received by blenders cancel each other out, and consumers receive transportation fuel for approximately the same overall cost. While increased RIN prices would make higher biomass-based diesel blends cheaper and pure diesel fuel slightly more expensive, the overall cost of the pool of transportation fuel in the country will remain approximately the same. See *id.*

Moreover, despite their contentions to the contrary, refiners that purchase RINs for their compliance are not uniquely harmed by high RIN prices. Instead, such refiners are typically able to pass on these costs. As EPA has explained, merchant refiners “are not disadvantaged by higher RIN prices, as they are recovering these costs in the sale of their products.” *Id.* at 3. Even some of the parties within the oil and gas industry have noted that refiners can recoup their compliance costs. For example, Marathon Petroleum explained in its comments regarding the point of obligation that shifting the obligation to blenders would not save refiners money because “the cost of complying with the renewable volume obligation (RVO) is embedded in the refinery gate price of the regulated transportation fuel (gasoline and diesel)” and thus “refiners will have reduced their RVO costs, but the revenue for their products will be reduced by a similar amount.” Marathon Petroleum, Comments on the Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-HQ-OAR-2016-0544 (Feb. 21, 2017). Conversely, with higher RIN prices, refiners would have higher costs to comply with the renewable volume obligations but their revenues would increase by a similar amount.

Refiners also have alternative means with which to reduce the burden of compliance. To begin with, obligated parties may always “avail themselves of other compliance strategies such as contractual arrangements and investing in fuel blending and distribution infrastructure.” *Id.* And for small refiners that lack the ability or capital to do so, there is a small refinery exemption built into the statute. Small refineries may at any time petition EPA for an exemption from the requirements of the RFS based on “disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9)(B). EPA and the Department of Energy have developed detailed assessment techniques to ensure that any small refineries that are disproportionately affected by the RFS can obtain such an exemption. See EPA, Small Refinery Exemption Studies from the Department of Energy, <https://www.epa.gov/renewable-fuel-standard-program/small-refinery-exemption-studies-department-energy> (last visited Oct. 16, 2017).

In addition, any assessment of “severe economic harm” must consider the economic benefits of the advanced biofuel and total renewable fuel volumes. Advanced biofuels, and biomass-based diesel in particular, support jobs across the rural United States. As noted in NBB’s comments on the proposed rule, every additional 500 million gallons of biomass-based diesel production generates 16,000 jobs and provides \$2.9 billion in economic impact. See LMC International, *The Economic Impact of the Biodiesel Industry on the U.S. Economy* (June 2016) at tables 4-8, available at http://biodiesel.org/docs/default-source/policy--federal/lmc-study-for-nbb-economic-impact-of-biodiesel_june-2016-final.pdf?sfvrsn=2. The jobs spurred by the biomass-based diesel industry are high-paying; the same 500-million-gallon production increase would provide an additional \$640 million in wages paid. *Id.* The biomass-based diesel industry also significantly benefits farmers across the country by providing additional value for the oils produced as co-products of commodities such as soybean meal. This benefits not only the farmers who produce soybeans, but also livestock producers who use soybean meal for animal feed, as biomass-based diesel production has reduced soybean meal prices by approximately \$21 per ton. See Testimony of J. Alan Weber, Marc-IV Consulting at 2-3 (June 9, 2016) (Attachment 1 to NBB Comments on 2017 RFS Rule, EPA-HQ-OAR-2016-0004-2904). And the additional supply of biomass-based diesel and other biofuels in our country’s pool of transportation fuel provides concrete economic benefits in terms of competition and energy security. These benefits are particularly important in the wake of recent events such as this season’s hurricanes that have hindered the petroleum industry and driven up the price of petroleum fuels. Biofuels, particularly domestic biomass-based diesel and ethanol, have helped soften the impact of that price spike—indeed, EPA has recognized the additional need for biofuels as a result of Hurricane Harvey by waiving Reid Vapor Pressure requirements to allow higher blends of ethanol. See EPA, *EPA Approves Emergency Fuel Waivers for 38 States and Washington, DC* (Aug. 31, 2017), <https://www.epa.gov/newsreleases/epa-approves-emergency-fuel-waivers-38-states-and-washington-dc>; see also Nebraska Ethanol Board, *Hurricane Harvey Causes Fuel Changes* (Sept. 1, 2017), <http://ethanol.nebraska.gov/wordpress/hurricane-harvey-causes-fuel-changes/>.

Taking into account the lack of impact of an increase in RIN prices to consumers, the minimal effects on refiners, and the significant economic benefits of biofuels, it is evident that no part of our country is experiencing severe economic harm as a result of the RFS. EPA has already declined to find severe economic harm in analogous circumstances. For example, EPA declined to issue a waiver based on severe economic harm as a result of a drought in 2012 that increased feedstock prices. See 77 Fed. Reg. 70,752 (Nov. 20, 2012). As EPA explained, “severely harm” specifies a “high threshold for the nature and degree of harm,” and the evidence in that case did not demonstrate that the implementation of the RFS volumes would cause such harm even when considering the effects of the drought. *Id.* at 70,754; see also 73 Fed. Reg. 47,168 (Aug. 13, 2008) (declining to find severe economic harm from purported impacts of corn ethanol production in Texas). The concerns EPA highlights in the NODA are much the same—there is simply no evidence demonstrating that those factors mean that the 2018 advanced biofuel volume will cause a high degree of harm to our country’s economy or the economy of any state or region.

B. EPA May Not Lower the 2018 Biomass-Based Diesel Volume Using the Biomass-Based Diesel Waiver Authority.

EPA also seeks comment on whether it may employ a previously unused authority—its biomass-based diesel waiver authority under Section 211(o)(7)(E) of the Clean Air Act, 42 U.S.C. § 7545(o)(7)(E). 82 Fed. Reg. at 46,179. That authority allows EPA to reduce the biomass-based diesel volume for up to a 60-day waiver period in the event of “a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly.” *Id.* EPA may waive the volume under that authority by only up to “an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel.” *Id.* There is a good reason that EPA has never used the biomass-based diesel waiver authority: conditions warranting its use have not occurred and are not present now.

The 60-day time limitation on the biomass-based diesel waiver authority demonstrates the type of waiver Congress intended—a waiver for temporary, emergency circumstances such as a flood or drought that could cause a short-term shock to the biomass-based diesel supply. EPA’s concerns described in the NODA regarding imports and the biodiesel tax credit are different in kind. They are not short-term emergencies suitable for resolution with the biomass-based diesel waiver but rather are background conditions that could potentially have slight impacts on RIN prices. They are also different in magnitude; while the biomass-based diesel waiver authority refers to a “significant renewable feedstock disruption” causing a “significant” price increase, any impacts from the expiration of the biomass-based diesel tax credit or the Department of Commerce’s preliminary determination would be minor effects that are easily overcome by the demand driven by the RFS volumes themselves. As with the definition of “severe economic harm,” waivers based on a “significant feedstock disruption or other market circumstance” must be understood as imposing a high threshold. Otherwise, everyday costs to obligated parties would necessitate a waiver and the RFS could not function.

Additionally, while the biomass-based diesel waiver authority requires EPA to consult with the Secretary of Energy and the Secretary of Agriculture before determining that there is a significant renewable feedstock disruption or similar market circumstance, 42 U.S.C. 7545 § (o)(7)(E), there is no indication that EPA has done so. Instead, it has based its proposal in the NODA to use that authority solely on comments submitted by oil and refining interests.

Using the biomass-based diesel waiver authority to reduce the volume for 2018 would be particularly unwarranted given the retroactive impact that it will have on the biomass-based diesel industry and farmers. EPA has already established the 2018 biomass-based diesel volume in its December 2016 final rule. 81 Fed. Reg. 89,746 (Dec. 12, 2016). Biomass-based diesel producers have thus already started to plan for the 2018 volume, including through entering into binding contracts for the following year. Feedstock producers have also already relied on the demand that they reasonably anticipated would be created by the 2018 biomass-based diesel volume. Waiving the volumes now would thus needlessly pull the rug out from

under both the biomass-based diesel industry and American farmers and force them to reverse steps they have already taken to help achieve Congress's goals in the RFS.

C. EPA May Not Lower the 2019 Biomass-Based Diesel Volume under the Statutory Factors.

EPA also seeks comment on whether its concerns regarding imports or the biodiesel tax credit warrant further reductions in the 2019 biomass-based diesel volume. 82 Fed. Reg. 46,179-80. While the volumes for biomass-based diesel are not established by statute past 2012, EPA must consider a set of statutory factors in determining volumes in subsequent years. 42 U.S.C. § 7545 (o)(2)(B)(ii). EPA suggests that the Department of Commerce's preliminary determination and the expiration of the biodiesel tax credit may change its assessment of some of the statutory factors in the proposed rule. But, in the proposed rule, EPA largely ignored the statutory factors, analyzing them only in a supplemental docket memorandum that EPA acknowledged is not determinative of the biomass-based diesel volume. 82 Fed. Reg. at 34,240. Instead, EPA froze in place the biomass-based diesel volume from the previous year based on its mistaken belief that the only driver of biomass-based diesel production is the advanced biofuel volume. *Id.* (explaining EPA's view that the biomass-based diesel volume is unimportant because "the 2019 advanced volume requirement, when set next year, will determine the level of BBD production and imports that occur in 2019.") EPA must follow Congress's instructions and conduct a full assessment of all six statutory factors in a meaningful way. As discussed in NBB's comments on the proposed rule, that assessment will demonstrate that biomass-based diesel provides significant benefits over petroleum fuels. See NBB Comments on Proposed Rule at 23-25. An increased biomass-based diesel volume is warranted based on each of the six factors, as it would (1) benefit our environment, (2) enhance our energy security, (3) provide easily achievable increases in renewable fuel production, (4) improve our country's fuel infrastructure, (5) provide competition and cost benefits in the pool of transportation fuel, and (6) create jobs and benefit the rural economy. See *id.* at 25-30.⁷

⁷ The statutory factors are:

- (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.
- 42 U.S.C. §7545(o)(2)(B)(ii).

Even in its limited assessment of the statutory factors in the proposed rule, EPA's analysis was flawed because it pitted biomass-based diesel against other advanced biofuels instead of comparing it to petroleum fuels. See EPA, Memorandum to Docket: Draft Statutory Factors Assessment for the 2019 Biomass-Based Diesel (BBD) Applicable Volumes (2017), EPA-HQ-OAR-2017-0091-0108 ("BBD Docket Memorandum"). The NODA takes that inappropriate analysis one step further, asking whether it would be appropriate to lower the biomass-based diesel volume in order to "provid[e] additional encouragement for the growth of other types of advanced biofuels." 82 Fed. Reg. at 46,180. That proposal runs counter to the intent of the RFS, which was designed to generate growth in the production of any and all advanced biofuels. If advanced biofuels other than biomass-based diesel are not sufficiently incentivized, then EPA needs to increase the advanced biofuel volumes. In fact, Congress intended for the entirety of the growth under the program after 2015—from 20.5 billion gallons in 2015 to 36 billion gallons in 2022—to be growth in advanced biofuels.⁸ EPA cannot arbitrarily and unfairly lower the advanced biofuel volumes and then use that decision as a bootstrap to also lower biomass-based diesel volumes with the ostensible purpose of making room for other advanced biofuels. Instead, EPA must set volumes that both incentivize growth in biomass-based diesel production and incentivize growth in other advanced biofuels.

The NODA and the proposed rule also both ignore that the biomass-based diesel volume has a purpose. While the advanced biofuel volume gives biomass-based diesel a larger potential market to meet, the biomass-based diesel volume provides a baseline level of biomass-based diesel that must be met. That floor is important for the biomass-based diesel industry because the guaranteed volume of the biomass-based diesel category allows producers and distributors to better plan their investments. Congress recognized this purpose; otherwise, it would not have created the biomass-based diesel volume as a nested category within advanced biofuels. EPA has acknowledged this purpose in the past, noting that "the BBD volume requirement can still have a positive impact on the future development and marketing of BBD by providing a base guaranteed level for investment certainty." BBD Docket Memorandum. EPA must therefore promote increasing development and production of biomass-based diesel through the biomass-based diesel volume instead of freezing or reducing it.

IV. EPA May Not Allow RINs from Exported Biofuels to Be Used for Compliance with the RFS.

It has also come to NBB's attention that EPA has internally considered another possibility—authorizing RINs from exported fuel to be used for compliance with the RFS. While that possibility was not discussed in the NODA, it merits discussion here because such a proposal

⁸ From 2015 on, the statutory volumes for total renewable fuel volume stay at a constant 15 billion gallons above the advanced biofuel volumes. See 42 U.S.C. § 7545(o)(2)(B). Thus, Congress intended for all of the growth under the program after 2015 to be growth in advanced biofuels.

would amplify the harmful proposals that the NODA puts forward. The proposal to allow RINs for exports appears to have its roots in comments submitted by Valero on the proposed rule and an attached study authored by Charles River Associates. See Comments of Valero Energy Corporation on Proposed Rule, EPA-HQ-OAR-2017-0091-3677 at 18-27, Attachment 13. Valero's comments and the attached study make clear that obligated parties are asking EPA to allow them to export biofuels without retiring RINs while at the same time not increasing renewable volume obligations to account for those additional RINs. See generally *id.* at Attachment 13. Doing so would significantly harm domestic producers of biomass-based diesel, ethanol, and other biofuels. It would also dramatically reduce the energy security benefits of the RFS because the volumes exported would come at the expense of fuel available for domestic consumption.

Moreover, allowing RINs from exported fuels to be used for compliance with the RFS is inconsistent with both the statute and EPA's prior regulations. The RFS was designed in part to "move the United States toward greater energy independence and security." See Pub. L. 110-140, 121 Stat 1492 (2007). Recognizing the intent of Congress, EPA established a regulatory system that required RINs associated with exported biofuels to be retired in a manner that does not satisfy renewable volume obligations. 40 C.F.R. § 80.1430. The biomass-based diesel industry and other renewable fuel producers have relied on EPA's regulations for a decade to plan and invest in production capacity, distribution networks, and technological innovations. EPA has not presented any justification sufficient to meet its heightened burden for overturning its prior regulation given renewable fuels producers' significant reliance interests. *Fox Television Stations*, 556 U.S. at 502. And, because it is not a logical outgrowth of anything in the proposed rule, the RINs-for-exports proposal may not be included as part of the final 2018 RFS rule. *Env'tl. Integrity Project.*, 425 F.3d at 996.

V. Conclusion

EPA must follow the program Congress established through the RFS to provide jobs in rural America, support American farmers, and enhance our energy security and environment. Doing so requires EPA to discard each of the potential actions outlined in the NODA and instead increase the advanced biofuel and biomass-based diesel volumes in the final rule.