1. Section "G" (below) discusses 500 million gallons – the remand of part of the 2016 RFS final rule. EPA determined that this was in the scope of the 2020 RFS rulemaking and the Agency proposed to retain the 2016 total renewable fuel standard.
2. This proposal has not reduced demand for ethanol. This is explained below (after "G").

[AFPM comments to EPA on the Agency's proposal for the 2020 RFS, August 30, 2019 pp 18-21]
footnotes are renumbered for this document

## G. EPA HAS MULTIPLE AVENUES TO ADDRESS REMAND OF THE 2016 RFS

In ruling on EPA's 2016 RFS, the U.S. Court of Appeals for the D.C. Circuit vacated EPA's use of the CAA §211(o)(7)(A) general waiver to address inadequate domestic supply based upon the "supply of renewable fuel to consumers for use in their vehicles."[1] The court remanded the 2016 rule to EPA for further consideration in light of the court's decision.[2] Thus, the decision affects 500 million RINs for total renewable fuels for the 2016 RFS compliance year.[3]

AFPM supports EPA's proposal to retain the 2016 total renewable fuel standard in response to the remand.[4] In addition to the rationale EPA relies on to reach this result, we discuss additional rationale that compels this result.

### 1. EPA's Proposed Response to the Remand

EPA proposes to respond to the vacatur and remand of EPA's decision to invoke its general waiver authority for inadequate domestic supply by retaining the original required volumes.[5] This decision would avoid imposing new, retroactive RIN requirements on obligated parties through the 2020 RFS rule or any other mechanism. EPA bases its response to the remand on several factors:

- Any requirements imposed now or at some point in the future cannot alter either the production or use of renewable fuel in 2016;
- Reopening the 2016 RFS compliance year could have cascading effects on compliance for subsequent compliance years[6];
- Compliance with an "additional standard" in 2020 would result in a drawdown of the carryover RIN bank, which is already lower than 2019 projections; and
- Any retroactive liability must be balanced against the burden on obligated parties.[7]

[1] *ACE*, 864 F.3d at 707.
[2] *Id.* at 703.
[3] 80 Fed. Reg. 77,420, 77439 (Dec. 14, 2015); 84 Fed. Reg. at 36,765.
[4] 84 Fed. Reg. at 36,789.
[5] 84 Fed. Reg. at 36,763.
[6] *Id.* at 36,789.
[7] *Id.* at 36,788.

AFPM supports EPA's decision to avoid the imposition of unlawful retroactive standards on obligated parties. Imposing a retroactive standard for 2016 total renewable fuel production in 2020 would be beyond EPA's statutory authority, a violation of due process, and highly punitive given that obligated parties fully complied with EPA's 2016 standard, as promulgated, at the time that compliance was required.[8]

Prior case law that allowed retroactive RFS standards to be applied in 2010 is also inapposite. Unlike in *National Petrochemical & Refiners Ass'n v. EPA,* 630 F.3d 145 (2010), where the court cited a 2009 proposed rule as putting obligated parties on notice of possible requirements in advance of the compliance year, obligated parties in 2016 had no notice of what the D.C. Circuit would decide in 2017. The D.C. Circuit's determination that EPA exceeded its statutory authority in using its general waiver authority came well over a year after obligated parties had already complied with 2016 RFS standards. It would have been impossible for obligated parties to plan for the court's decision and resulting vacatur of the 2016 RFS.

EPA also correctly noted the cascading effect of reopening not only the 2016 RFS, but also the 2017 and 2018 RFS. Within the statutory structure of the RFS, which imposes annual compliance obligations, Congress clearly did not authorize the shifting of obligations from one year to the next apart from one explicit provision that allows obligated parties to carryover a RIN deficit from one year to the next.[9]

2. <u>When EPA responds to the court's remand in *ACE*, it must consider all its RFS authority and statutory obligations.</u>

In *ACE,* as in the majority of decisions by D.C. Circuit, the court did not direct the manner in which EPA must respond to the court's remand, or the time by which it must do so. But if EPA exerts its RFS authority to impose new standards on obligated parties, it must do so in compliance with CAA §211(o). Therefore, at the time EPA responds to the *ACE* remand, the Agency must consider the effect of any "new" 2016 volume mandate on its consideration of waiver authorities available to the EPA in 2016. This means that EPA must consider both the extent to which it needs to exert its cellulosic biofuel waiver authority as well as general waiver authorities.

In the 2014-2016 RFS rule, there was a need to waive X gallons of total renewable fuel. EPA chose to use a combination of its cellulosic and general waiver. To ensure that EPA's decision to waive X is given its maximum effect, EPA should apply the full amount of the cellulosic waiver to the total renewable fuel category, which would account for 380 million of the 500 million RINs implicated by the DC Circuit remand. The court upheld EPA's use of the cellulosic waiver authority to reduce the total renewable fuel requirement.[10] But had EPA understood the limitations that would later be placed on its use of the general waiver for inadequate domestic supply by the D.C. Circuit, it could have considered extending the *full amount* of the cellulosic waiver volume to the total renewable fuel category. This would have accounted for 380 million additional RINs. On remand, EPA may reconsider this policy decision

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[8] *Monroe Energy LLC v. EPA*, 750 F. 3d 909 (D.C. Cir. 2014); *NPRA v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).
[9] *See* CAA §211(o)(5)(C),(D).
[10] 80 Fed. Reg. at 77,439.

based on its new understanding of the limits of its general waiver authority and waive an additional 380 million RIN-gallons of the total renewable fuel requirement for 2016.[11]

To address the remand of 500 million 2016 RINs (or 120 million 2016 RINs for total renewable fuel that would remain after full exertion of its cellulosic waiver authority), EPA may also consider a general waiver based on severe economic harm. There is abundant evidence to support this determination. For example, within weeks of the final rule for 2018 RFS, Philadelphia Energy Solutions declared bankruptcy and cited the compliance burden of the RFS.[12] In addition, EPA recently granted 31 petitions for small refinery RFS exemptions based on the harm that would be imposed by requiring compliance with 2018 RFS percentage standards.[13] This followed the granting of 38 small refinery exemptions in 2017.[14]

When responding to remand, EPA must give maximum effect to its 2016 decision to waive "X" million gallons. To the extent that any response to the remand would affect compliance with current RFS rules, EPA may also consider use of its general waiver authority in current or future compliance years to address an inadequate domestic supply and/or severe economic harm.

EPA also should determine that since there are no 2015 or 2016 gallons of ethanol available to be blended, there is an inadequate domestic supply that justifies the use of the general waiver, even under the DC Circuit's narrow reading of that provision.

3. EPA must account for the impact of 2016 RINs in whatever year they are imposed.

The court did not instruct EPA to address the remand by shifting the 500-million-gallon requirement to a subsequent year. Indeed, the Clean Air Act provides no such authority. EPA may properly consider the impact of these requirements during the timeframe in which they would be imposed. EPA must not exceed reasonably attainable levels of the RFS if it requires RIN retirements in 2020 or another compliance year as a response to the remand in *ACE*.

Specifically, if EPA took such action in the context of this rule, the Agency would need to correspondingly reduce the 2020 standards to account for the requirement to comply with 2016 RFS standards. EPA lacks statutory authority to simply "tack on" 500 million RINs to EPA's estimate of the reasonable level for the RFS in 2020.

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[11] It is worth noting that in *ACE*, the D.C. Circuit explicitly upheld EPA's broad discretion over the factors it may consider in utilizing its cellulosic waiver authority. Citing *Monroe Energy*, the court reiterated that "[t]he cellulosic waiver provision grants EPA 'broad discretion' to consider a variety of factors – including constraints on the demand for advanced biofuel – when determining 'whether and in what circumstances' to reduce the advanced biofuel requirement." *ACE*, 864 F.3d at 733. "That same reasoning controls here: EPA had discretion to consider a 'range of factors' in determining whether to exercise its cellulosic waiver authority, including demand side constraints that affect 'the ability' of advanced biofuels 'to be consumed.'" *Id.* at 734.
[12] Matt Egan, *Largest East Coast oil refinery goes bankrupt, blaming 'broken' EPA rules*, CNN (Jan. 22, 2018), [ HYPERLINK "https://money.cnn.com/2018/01/22/investing/oil-refinery-bankruptcy-philadelphia-energy-solutions/index.html" ].
[13] *See* RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated August 15, 2019).
[14] *Id.*

* * *

EIA market data demonstrate that ethanol's market penetration has not been impacted.

The Energy Information Administration (EIA) reports ethanol production in the U.S.. Domestic ethanol production has increased annually.

| | Billion gallons |
|---|---|
| 2012 | 13.2 |
| 2013 | 13.3 |
| 2014 | 14.3 |
| 2015 | 14.8 |
| 2016 | 15.4 |
| 2017 | 15.9 |
| 2018 | 16.1 |

EIA has reported ethanol exports since 2010. The volume of ethanol exports in 2018 is a record.

| | Billion gallons |
|---|---|
| 2010 | 0.40 |
| 2011 | 1.20 |
| 2012 | 0.74 |
| 2013 | 0.61 |
| 2014 | 0.83 |
| 2015 | 0.83 |
| 2016 | 1.17 |
| 2017 | 1.38 |
| 2018 | 1.72 |