

February 10, 2023

Mr. David Korotney  
Office of Transportation and Air Quality, Assessment and Standards Division  
Environmental Protection Agency  
2000 Traverwood Drive  
Ann Arbor, MI 48105

*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

Dear Mr. Korotney:

The undersigned organizations appreciate this opportunity to provide comments on the Environmental Protection Agency’s (EPA) proposed rule on the Renewable Fuel Standard (RFS).

The proposed rule is arbitrary and capricious and fatally flawed in many respects, from the unreasonably short comment period to the agency creating a new regulatory program (eRINs) that is clearly unauthorized by law. Our comments touch on some of these major problems.<sup>1</sup>

**Unreasonable Comment Period.** The EPA has provided the public fewer than 45 days to submit comments on the proposed rule.<sup>2</sup> In addition, the proposed rule was published in the Federal Register during the holidays.<sup>3</sup> This is an unreasonable amount of time given the complexity of the rule.

The EPA is no longer guided by statutorily established volume targets, which represents a major change in the implementation of the RFS. 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.”<sup>4</sup> By itself, this new phase would necessitate far more than 45 days to submit comments.

The EPA further complicates the proposed rule by “introducing a new regulatory program governing renewable electricity,” which the agency calls eRINs.<sup>5</sup> This novel new program, by itself, would also warrant more than 45 days for comments. Taken together, the “Set Rule” and eRINs certainly require far more than 45 days, and likely 60 additional days, at a minimum.

**eRINs are Unauthorized by Existing Law.** The EPA has repeatedly ignored clear and express

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<sup>1</sup> For a more in-depth discussion of the problems with the proposed rule, see e.g., Daren Bakst and Rachael Wilfong, “Comment to the EPA Regarding Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes,” Docket ID No. EPA-HQ-OAR-2021-0427.

<sup>2</sup> *Federal Register*, Vol. 87, No. 250 (December 30, 2022), p. 80582, <https://www.govinfo.gov/content/pkg/FR-2022-12-30/pdf/2022-26499.pdf> (accessed February 9, 2023).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, p. 80584.

<sup>5</sup> *Ibid.*

statutory language in proposing the eRINs program. In Section 206 of the Energy Independence and Security Act of 2007 (EISA), Congress contemplated the feasibility of a credits system connected to renewable electricity for electric vehicles (EVs) as an adjunct program to the RFS.<sup>6</sup> Congress chose not to authorize a credit program, but instead directed the EPA to study the issue and to submit a report. Congress asked the EPA to consider issues such as alternatives for designing a pilot program, without even authorizing a pilot program.<sup>7</sup> Yet the EPA is proposing the eRINs program as if Section 206 does not exist. Further, based on the EPA's own statements, the agency never even conducted the study or submitted the report that was required under Section 206.<sup>8</sup>

Section 202 of the EISA also makes it clear that eRINs are unauthorized.<sup>9</sup> This section, which helped to create the RFS, requires that specific renewable fuels (not renewable electricity) be blended into transportation fuel. The section is focused on liquid fuel, using language such as “volumes” and gallons.”<sup>10</sup> Trying to equate electrons with renewable fuels is nonsensical. There are not volumes or gallons of electrons to blend into transportation fuel.

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.”<sup>11</sup>

The eRINs program is also inconsistent with another critical statutory objective: energy security. Congress wanted to, as the EPA explained, “move the United States toward greater energy independence and security.”<sup>12</sup> Through the RFS, Congress chose a specific approach to reduce

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<sup>6</sup> Energy Independence and Security Act of 2007, Public Law 110-140, §206, <https://www.govinfo.gov/content/pkg/BILLS-110hr6enr/pdf/BILLS-110hr6enr.pdf> (accessed February 9, 2023).

<sup>7</sup> Ibid.

<sup>8</sup> 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.

<sup>9</sup> Energy Independence and Security Act of 2007, §202.

<sup>10</sup> Ibid.

<sup>11</sup> 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](https://d35t1syewk4d42.cloudfront.net/file/2394/RFA_2023-25%20RVO%20hearing%20testimony.pdf) (accessed February 9, 2023).

<sup>12</sup> 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).

reliance on imported oil,<sup>13</sup> which was to blend renewable fuels into transportation fuel.<sup>14</sup> 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 because EVs are so dependent on foreign imports, including from China.<sup>15</sup>

**The Flaws of the “Set Rule.”** The EPA has also improperly applied Clean Air Act Section 211(o)(2)(B)(ii), which lists the specific factors the EPA must analyze in setting the new volume targets.<sup>16</sup> The proposed volume targets are informed by the unauthorized eRINs program. This alone makes the volume targets arbitrary and capricious.

There are many other problems in the EPA’s application of Section 211, including the agency’s consideration of 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.<sup>17</sup> Applying the 3 percent discount rate, the EPA found fuel costs of \$29.5 billion and energy security benefits of \$634 million.<sup>18</sup> Moving forward with a rule whose identified costs are 47 times greater than the identified benefits is unreasonable.

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In this flawed proposed rule, the EPA discusses its desire, through eRINs, to reshape the renewable electricity market and vehicle fleet. The agency is seeking to make these enormous decisions of economic and political significance on its own without Congressional authorization. The proposed rule runs counter to both the plain language of the law and the objectives of the RFS program and is arbitrary and capricious. We therefore urge the EPA to withdraw the rule and craft a new rule that is consistent with the statute.

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<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> See e.g., 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); U.S. Geological Survey, *Mineral Commodity Summaries*, January 2023, <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023-rare-earths.pdf> (accessed February 9, 2023); 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); and 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/GlobalSupplyChainsofEV Batteries .pdf> (accessed February 9, 2023).

<sup>16</sup> 42 U.S. Code § 7545 (o)(2)(B)(ii), <https://www.law.cornell.edu/uscode/text/42/7545>, (accessed February 9, 2023).

<sup>17</sup> *Federal Register*, Vol. 87, No. 250, p. 80586; and U.S. Environmental Protection Agency, *Draft Regulatory Impact Analysis: RFS Standards for 2023-2025 and Other Changes*, November 2022, p. 323, Table ES-1 <https://www.epa.gov/system/files/documents/2022-12/420d22003.pdf> (accessed January 30, 2023)

<sup>18</sup> *Federal Register*, Vol. 87, No. 250, p. 80586; and Environmental Protection Agency, Assessment and Standards Division, p. iv, Table ES-1.

Sincerely,

Heritage Action

America First Policy Institute

Americans for Prosperity

CFACT

Competitive Enterprise Institute

E&E Legal

Independent Women's Voice

John Locke Foundation

Project 21

Taxpayers Protection Alliance