

COMMENTS OF THE NATIONAL BIODIESEL BOARD

ON

RENEWABLE FUEL STANDARD PROGRAM:
STANDARDS FOR 2018 AND BIOMASS-BASED DIESEL VOLUME FOR 2019

Proposed Rule, 82 Fed. Reg. 34,206 (July 21, 2017)
Dkt No. EPA-HQ-OAR-2017-0091

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The National Biodiesel Board (“NBB”) appreciates the extensive efforts of EPA in administering the RFS program. NBB also particularly appreciates the timeliness of this proposed rule, which will help maintain the continued stability of the RFS. But NBB is extremely concerned with the proposed rule’s unprecedented cut to the advanced biofuel volume and freeze in the biomass-based diesel volume. Both of these proposals run counter to Congress’s objective to promote the growth of biofuels that provide American jobs, reduce emissions, and enhance U.S. energy security. NBB respectfully urges EPA to raise the 2018 advanced biofuel volume to at least 4.75 billion gallons and the 2019 biomass-based diesel volume to at least 2.5 billion gallons—volumes that the biomass-based diesel industry has ample current capacity and infrastructure to meet and even exceed.

The purpose of the RFS is to promote growth in the biofuel supply of the United States. In his 2007 State of the Union Address, President Bush called on Congress to “increase the supply of alternative fuels by setting a mandatory fuels standard” that will drive “technological breakthroughs.” President George W. Bush, State of the Union Address (Jan. 23, 2007). Congress responded by passing the Energy Independence and Security Act of 2007 (EISA), with the express goals of “mov[ing] the United States toward greater energy independence and security” and “increas[ing] the production of clean renewable fuels.” Pub. L. No. 110–140, 121 Stat. 1492 (2007). The EISA established mandatory annual volumes of renewable fuels to be blended into the nation’s gasoline and diesel fuel supply, while providing EPA with limited authority to adjust them only if certain unforeseen circumstances prevent the volumes from being met. Congress sought in particular to promote advanced biofuels, creating separate volumes for advanced biofuels that grow steadily until 2022.

Biomass-based diesel has been a great success story of the RFS. It has routinely surpassed the annual biomass-based diesel volumes and currently comprises the vast majority of advanced biofuel production. Assisted in its development by the market incentive from both the biomass-based diesel volume and the advanced biofuel volume, the biomass-based diesel industry has grown to support more than 64,000 jobs throughout its supply chain. The industry also provides benefits to American farmers and livestock producers by creating demand for the surplus oils from commodity crops. Biomass-based diesel can be made from a diverse set of feedstocks, including recycled oils and greases, which reduces greenhouse gas emissions and enhances our country’s energy security. And biomass-based diesel is primed to expand further. The industry has the production capacity, distribution networks, and blending equipment necessary to provide additional clean, renewable fuel and can quickly add additional infrastructure.

EPA’s proposed rule would halt the progress of the biomass-based diesel industry and thwart Congress’s intent to increase advanced biofuel production. For the first time, the proposed rule lowers the advanced biofuel volume from the previous year and does not increase the biomass-based diesel volume. Both volumes are below what the industry has

*already achieved.*¹ The proposed rule therefore sends a chilling message that EPA is not interested in promoting growth in biofuels in accordance with the RFS, which will discourage any future investment and cause a contraction in the industry. It will result in a blow to our country's energy security, a loss of jobs and wages of employees concentrated in rural areas, and a reduction in the income that American farmers receive for their crops and livestock products.

The proposed rule's unprecedented changes to the RFS program are based on several impermissible or mistaken premises:

- First, the proposed rule lowers the 2018 advanced biofuel volume *below* the level EPA has determined to be "reasonably attainable" and does so solely because of concerns about costs. This is a fundamental departure from the RFS's purpose of increasing production of renewable fuels. It is also a reversal of EPA's established methodology, which will punish those who have made significant investments in biomass-based diesel capacity and infrastructure in reliance on EPA's prior rules.
- Second, EPA's assessment of the "reasonably attainable" advanced biofuel volume is based on two unwarranted concerns: the potential for diversion of feedstocks and the expiration of the biodiesel tax credit. Diversion of feedstocks is not an issue with respect to biomass-based diesel because biomass-based diesel is largely produced from surplus oils and fats that are co-products of the primary uses of crops. Rather than competing with the meal components of crops such as soybeans and corn or with livestock products, biomass-based diesel enhances the value of those commodities by providing a market for the oils and fats. Similarly, the expiration of the biodiesel tax credit is not an obstacle to biomass-based diesel production because the RFS provides an independent market mechanism sufficient to drive higher volumes. It is also inappropriate to assume that the biomass-based diesel tax credit will not be renewed, given that it has previously been renewed four times and legislation has already been introduced to extend it again.
- Third, the proposed rule sets the 2019 biomass-based diesel volume at the same level as 2018 based on EPA's belief that biomass-based diesel production is driven only by the advanced biofuel volume. That premise is wrong because the biomass-based diesel volume provides a floor for production, providing certainty that fuels investment. Moreover, EPA's approach ignores the statutory factors EPA must consider when setting the biomass-based diesel volume.

¹ Data from EPA's EMTS site show net RIN generation of approximately 4.29 billion gallons of advanced biofuel and 2.62 billion gallons of biomass-based diesel in 2016. Using 2016 data that remove RINs retired for non-compliance purposes gives a 2016 advanced biofuel volume that is slightly lower than the 4.24 billion gallons proposed for 2018. But, even using that more restrictive measure, the industry has the capacity to produce significantly more than 4.24 billion gallons of advanced biofuel by 2018.

EPA also seeks comment on whether it should reduce volumes further, either based on its concern with increasing imports in recent years or through using its general waiver authority. Neither warrants any decrease. With respect to imports, decreasing the renewable volume obligations would primarily hurt domestic producers because importers can ship biomass-based diesel to the United States at heavily subsidized prices. EPA should leave trade regulation to the Department of Commerce, which is currently conducting two investigations related to biomass-based diesel imports. Likewise, EPA cannot use its general waiver authority because there are no statutory grounds to do so—there is not an inadequate domestic supply of renewable fuels, nor is there any indication that the RFS is causing severe economic or environmental harm.

EPA can and must increase the advanced biofuel volume for 2018 to at least 4.75 billion gallons and the biomass-based diesel volume for 2019 to at least 2.5 billion gallons. In fact, the biomass-based diesel industry is capable of attaining even higher volumes. EPA acknowledges that there is existing registered capacity in the United States alone to produce 4.2 billion gallons of biomass-based diesel (about 6.5 billion ethanol-equivalent gallons), as well as significant additional capacity for imported biomass-based diesel and other advanced biofuels. EPA also recognizes that there are no constraints to distributing and using higher volumes of biomass-based diesel. As the D.C. Circuit put it, there is “no great obstacle to the production of advanced biofuel.” *API v. EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013). The only obstacle is that EPA has proposed volumes that retreat from the RFS’s intent to increase the U.S. advanced biofuel supply.

Increasing the advanced biofuel and biomass-based diesel volumes in the final rule will have concrete benefits, now and into the future. For example, for every additional 500 million gallons of domestic production, the U.S. biomass-based diesel industry would support an additional 16,000 jobs. Such an expansion would also provide \$2.9 billion in economic impacts, primarily in rural areas, and add significant value to the crops and livestock products sold by American farmers. And because biomass-based diesel is produced from variety of feedstocks, growth in biomass-based diesel production would significantly improve our energy security by further diversifying our nation’s fuel supply.

EPA must follow Congress’s intent to “create incentives to increase renewable fuel supplies and overcome constraints in the market.” *Americans for Clean Energy v. Evtl. Prot. Agency*, 864 F.3d 691 (D.C. Cir. 2017) (quoting 80 Fed. Reg. at 77,423). As Administrator Pruitt has explained, EPA “must be committed to using its expertise in environmental issues not to end run Congress, but rather to implement its direction, so that Congress may decide the proper policies for our Nation.” Opening Statement of Scott Pruitt, Senate Confirmation Hearing (Jan. 18, 2017). In the RFS, Congress has expressly and clearly stated its policy of increasing renewable fuel use in order to enhance our nation’s energy security, environment, and economy. EPA cannot enact its own policy when Congress has spoken.

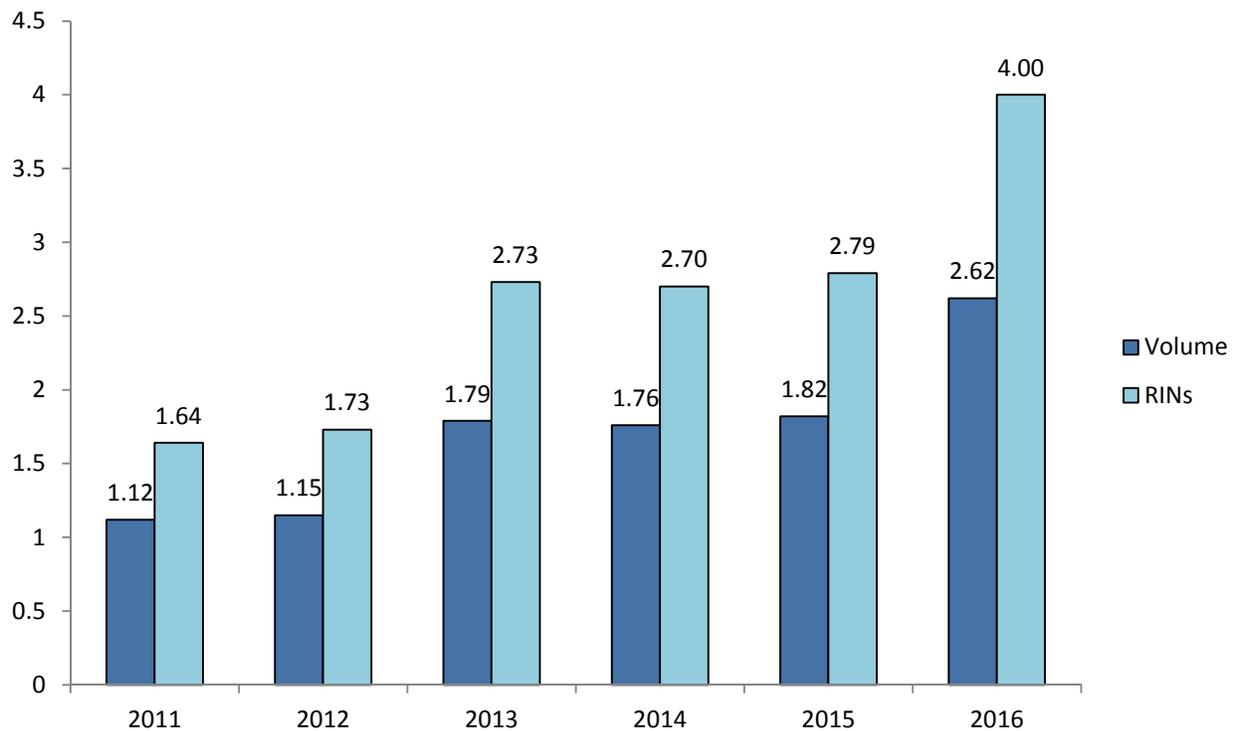
II. THE PROPOSED RULE IGNORES THE SUCCESS OF BIOMASS-BASED DIESEL AND OTHER ADVANCED BIOFUELS.

EPA's decision to stop increasing the advanced biofuel and biomass-based diesel volumes is particularly unwarranted given the continued success of biomass-based diesel and other advanced biofuels. Both volumes have been met year after year. While EPA has reduced the advanced biofuel volume in 2014–2017 from the statutory levels based on projected shortfalls in cellulosic biofuel production, EPA has always increased the volume from one year to the next and advanced biofuel production has continually exceeded those volumes. Most recently, over 4.29 billion ethanol-equivalent gallons of advanced biofuel were produced in 2016, when EPA set the volume at 3.61 billion gallons. See Environmental Protection Agency, *Public Data for the Renewable Fuel Standard* (last accessed Aug. 15, 2017), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/public-data-renewable-fuel-standard> ("EPA EMTS site").² Biomass-based diesel in particular has been a dramatic success. Indeed, the more than 4 billion ethanol-equivalent gallons from biomass-based diesel production alone in 2016 was enough to satisfy the 2016 advanced biofuel volume. *Id.* And even in 2014 and 2015, when the volumes were retroactively set, biomass-based diesel composed the majority of the advanced biofuel volumes, reaching over 93% of the advanced biofuel volume in 2014 and over 92% in 2015. *Id.*

As shown in Figure 1 below, biomass-based diesel production flourishes when given appropriate incentives by the RFS. After little growth in 2014 and 2015 due to the lack of an established volume, production leaped to over 2.6 billion gallons as soon as the volumes were in place before the compliance year began. See EPA EMTS site. With continued support from an increasing advanced biofuel volume and biomass-based diesel volume, biomass-based diesel production would continue to grow. Because the biomass-based diesel industry and other advanced biofuel producers have more than enough capacity for higher volumes, see Section III.D., *infra*, the industry can easily respond to sufficient market incentives by rapidly ramping up its production.

² In the historical data presented in EPA's proposed rule, EPA adjusts the advanced biofuel and biomass-based diesel volumes downwards from the EMTS net RIN generation data by subtracting RINs retired for reasons other than demonstrating compliance with the RFS. NBB presents the total RINs produced (minus error corrections) in these comments, as it is a more appropriate measure of what the industry has already demonstrated the ability to produce. Nevertheless, even using EPA's measure, the advanced biofuel generated in 2016 substantially exceeded the 3.61 billion gallon advanced biofuel volume set by EPA for that year.

Figure 1. U.S. Annual D4 Biomass-Based Diesel Production 2011-2016 (in billions).³



The past success in biomass-based diesel production is a result of extensive investments made by the industry, made possible in large part by the RFS. As EPA has previously recognized, such investments are exactly what Congress intended. Given that “the advanced volumes continue to grow through 2022” under the RFS “[i]t is apparent, therefore, that Congress intended changes in the extent and pace of growth of renewable fuel use that would be unlikely to occur absent the new program.” 80 Fed. Reg. at 77,432. And the biomass-based diesel industry’s growth has been accompanied by the policy outcomes that Congress sought. To highlight just a few of these benefits, the biomass-based diesel industry has:

- **Provided jobs.** The biomass-based diesel industry currently supports 64,000 U.S. jobs throughout its supply chain. See NBB, *Made in the USA Biodiesel Supports Jobs, Fourth of July Values* (Jun. 29, 2017), <http://biodiesel.org/news/news-display/2017/06/29/made-in-the-usa-biodiesel-supports-jobs-fourth-of-july-values>. Due to the location of biomass-based diesel feedstocks and production facilities, these employment benefits are largely concentrated in the rural economies that Congress particularly intended to promote through the RFS. See S. Rep. No. 110-65 at 2-3 (2007).

³ Source: EPA EMTS Site. As explained in notes 1 and 2, these volumes represent error-corrected data for total RIN generation. Using data in which these volumes are reduced slightly based on RINs retired for non-compliance purposes demonstrates the same trends in annual growth.

- **Benefitted American farmers.** The biomass-based diesel industry has significantly benefitted 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. As another example, the use of animal fats in biomass-based diesel production has increased the value of those fats, providing \$16 per head of value to beef producers. *Id.*
- **Reduced emissions.** Biomass-based diesel reduces greenhouse gas emissions by approximately 81% compared to petroleum diesel fuel. *See* Testimony of Don Scott, National Biodiesel Board (June 9, 2016), EPA-HQ-OAR-2016-0004-0328. It also cuts emissions of other air pollutants, including air toxics.
- **Increased U.S. energy security.** The biomass-based diesel industry has increased our nation’s energy security through its use of diverse feedstocks, including waste feedstocks. In 2015, biomass-based diesel produced in the United States was made up of approximately 43% soybean oil, 17% used cooking oil, 17% animal fat, 15% distillers corn oil, 7% canola oil, and 1% other recycled feedstocks. *Id.* Biomass-based diesel production has enhanced the utility of many of these feedstocks, such as used cooking oil, which is a widely available resource that is now increasingly collected and used. And new feedstocks have been identified that could be developed with appropriate incentives from the RFS. *See* Section IV.C.2, *infra*. This feedstock diversity is furthered by industry investments that have enabled single production facilities to generate biomass-based diesel from multiple feedstocks. *See* David DeRamus, *RFS2 Biodiesel Volumes: Response to EPA’s Proposal for 2019* at 7–9 (Aug. 31, 2017) (“2017 DeRamus Study”) (attached as Attachment 2).

There has been no reduction in capacity or infrastructure that would indicate the biomass-based diesel industry cannot continue the sustained growth it has already achieved. *See* Section III.D, *infra*. To the contrary, the biomass-based diesel industry has demonstrated that it can rapidly innovate and grow when the volumes under the RFS provide a sufficient market incentive. Yet, EPA’s proposed rule focuses on what it argues are “constraints” to increasing advanced biofuel volumes, including diversion from other uses of feedstocks, the expiration of the biomass-based diesel tax credit, and the costs of advanced biofuels to obligated parties. As discussed below, these are not true constraints on increased advanced biofuel production. In addition, they are not new issues. There is nothing that has changed that would make any of those alleged constraints more present now than in the years when biomass-based diesel production rapidly grew. The only one of those factors that is a recent development is the expiration of the biomass-based diesel tax credit, and biomass-based diesel

production has met or exceeded volumes in past years even when the tax credit has not been renewed before the compliance year began. *See* Section III.C, *infra*.

Thus, EPA is not being forced to stop increasing the advanced biofuel volume or biomass-based diesel volume based on new developments suggesting that further increases are not possible. Instead, it is choosing to step away from the intent of the RFS based on its own preferences. There is no justification to do so when the biomass-based diesel industry has been consistently meeting annual volumes and furthering Congress's objectives in the RFS.

III. EPA MUST INCREASE THE 2018 ADVANCED BIOFUEL VOLUME IN THE FINAL RULE.

A. EPA's Proposal to Lower the Advanced Biofuel Volume Below the "Reasonably Attainable" Level Is Arbitrary and Contrary to the Purpose of the RFS.

In its 2014-2016 and 2017 rules, EPA used its cellulosic waiver authority to reduce advanced biofuel volumes to a "reasonably attainable" level. *See* 80 Fed. Reg. at 77,476; 81 Fed. Reg. at 89,762. As EPA explained in the 2017 rule, determining the advanced biofuel volume based on the level "reasonably attainable" would not result in waiving the entire volume possible under the cellulosic waiver authority. 81 Fed. Reg. at 89,763. Instead, recognizing the intent of the RFS to promote advanced biofuels, EPA used the reasonably attainable calculation to "partially backfill for missing cellulosic biofuel volumes." *Id.* EPA explained that "the statute concentrates all of the very substantial growth in the statutory targets for renewable fuel *on advanced biofuel* for years after 2014" and noted that advanced biofuels generate significant GHG reductions and enhance energy security. *Id.* (emphasis added).

The biomass-based diesel industry relied on EPA's methodology for using its cellulosic waiver authority that it applied for four compliance years. Indeed, because EPA had not used its cellulosic waiver authority to reduce advanced biofuel volumes prior to 2014, the "reasonably attainable" analysis is the only such methodology EPA has ever applied. Based on EPA's prior rules, the biomass-based diesel industry has made significant investments in capacity and infrastructure to generate more biomass-based diesel and provide it to consumers. *See* Sections III.D and IV.C.2, *infra*. The industry reasonably anticipated that EPA would recognize such investments as increasing production and distribution capacity and would therefore increase its assessment of the reasonably attainable volume of advanced biofuel in future years.⁴

⁴ NBB has contested EPA's application of reasonably attainable standard in the past, arguing that EPA applied the standard in a manner that was not sufficiently technology-forcing. *See Comments of the National Biodiesel Board on Renewable Fuel Standard Program: Standards for 2017 and Biomass-based Diesel Volume for 2018*, EPA-HQ-OAR-2016-0004-2904. But neither NBB nor individual biomass-based diesel producers contemplated that EPA might set the advanced biofuel level even lower than the level under its reasonably attainable methodology.

Now, for the first time, EPA proposes to set the advanced biofuel volumes below the level it has determined to be reasonably attainable. 82 Fed. Reg. at 34,228. While the proposed rule finds a volume of 4.27 billion gallons to be reasonably attainable, EPA nonetheless chooses to reduce the advanced biofuel volume based on the full extent of the estimated shortfall of cellulosic biofuel, thereby reducing the advanced biofuel volume to 4.24 billion gallons. *Id.* EPA acknowledges that this use of its cellulosic waiver authority departs from its past rules, noting it is ending its practice of “requiring a partial backfilling of missing cellulosic volumes with volumes of non-cellulosic biofuel.” *Id.*

That decision is arbitrary and contrary to the purpose of the RFS. EPA recognizes in the proposed rule that setting the advanced biofuel volumes higher “would be expected to result in GHG reduction and energy security benefits.” *Id.* It would also promote job growth in the domestic advanced biofuel industry. But EPA nonetheless determined to lower the advanced biofuel volume by the total amount of the shortfall in projected cellulosic biofuel production in order to “plac[e] a greater emphasis on cost considerations.” *Id.*

Determining the advanced biofuel volume solely based on costs at the expense renewable fuel development runs counter to the purpose of the RFS to promote increasing use of biofuels. As Congress explained when passing the EISA, “the nation must move forward *aggressively* to enhance its energy security.” S. Rep. No. 110-65 at 1 (2007) (emphasis added). And Congress particularly recognized the importance of advanced biofuels, creating statutorily mandated volumes for advanced biofuels that increase until 2022. 42 U.S.C. 7545(o)(2)(B)(i). The proportion of the RFS that Congress specified would consist of advanced biofuels demonstrates just how important Congress considered them; for 2022, Congress specified that the majority of fuels under the RFS would be advanced. *Id.* (providing for 21 billion gallons of advanced biofuel in 2022, out of 36 billion gallons of total renewable fuel).⁵ The proposed rule flies in the face of that mandate by decreasing the advanced biofuel volume even though a higher volume is attainable. While biomass-based diesel and other advanced biofuels place additional costs on obligated parties, they carry important benefits in terms of energy security, employment, farm income, and environmental protection that Congress sought to incentivize. The very purpose of the RFS is to provide incentives for renewable fuel production to help overcome any price discrepancy. And Congress built a specific mechanism into the RFS for EPA to address costs if they become too high: EPA can waive volumes under its general waiver authority if it determines that the program would cause *severe* harm to the economy. But EPA has not found that higher volumes would severely harm the economy, nor can it—to the contrary, it has found that a higher volume is “reasonably attainable.” EPA cannot simply choose to disregard the objectives of the RFS because it prefers to cut costs for obligated parties.

⁵ From 2015 on, the statutory volumes for total renewable fuel stay at a constant 15 billion gallons above the advanced biofuel volumes. Thus, Congress anticipated that *all* of the growth under the program after 2015 would be growth in advanced biofuels.

While the D.C. Circuit recently held in *Americans for Clean Energy v. Env'tl. Prot. Agency*, No. 16-1005, 2017 WL 3202630, at *33 (D.C. Cir. July 28, 2017) (“ACEI”) that EPA has “broad discretion” under its cellulosic waiver authority, that discretion is not limitless. In *ACEI*, the D.C. Circuit addressed EPA’s previous methodology—the “reasonably attainable” standard—and concluded that EPA could consider demand-side constraints in addition to supply-side ones under its cellulosic waiver authority. *Id.* at *32. EPA’s current methodology is much different; EPA now pays no attention to demand-side constraints, supply side constraints, or any factors relevant to the advanced biofuels market. It simply notes that advanced biofuels are currently more expensive than petroleum fuels in the absence of the RFS. Despite the “broad discretion” recognized in *ACEI*, there are still two constraints on EPA’s authority that the proposed rule ignores:

- First, as discussed above, EPA may not depart from the purposes of the RFS by reducing the advanced biofuel volumes when the industry is readily capable of producing and distributing more. As EPA itself has recognized, “the ‘fundamental objective’ of the Renewable Fuel Program ‘is clear: [t]o increase the use of renewable fuels in the U.S. transportation system every year through at least 2022.’” *Id.* (quoting 80 U.S.C. at 77,421). And it is vital that EPA “respect the statutory framework put forth by Congress.” Statement of Scott Pruitt, EPA Administrator, at CERAWeek Houston (Mar. 9, 2017).
- Second, the Administrative Procedure Act prevents EPA from acting arbitrarily and capriciously. As the D.C. Circuit recognized in *ACEI*, EPA’s use of its cellulosic waiver authority must be “reasonable and reasonably explained” to survive arbitrary and capricious review. 2017 WL 3202630 at *35. The proposed rule is neither—it recognizes concrete benefits in terms of energy security and environmental protection that would be provided by higher standards, but disregards them in the name of costs. EPA makes no attempt to explain how lowering costs for obligated parties is more consistent with the RFS than enhancing the energy security and environment of the United States. EPA also ignores the costs that its proposed rule imposes. While the proposed rule would cut costs for obligated parties, it would cause a loss of jobs in the biomass-based diesel industry and hurt farmers by reducing agricultural income. It would likewise eliminate cost benefits provided by the pro-competitive effect of biomass-based diesel production on the price of diesel fuel, which lowers the cost to fuel vehicles and correspondingly lowers the cost to transport goods. *See* Section IV.C.2, *infra*.

Moreover, EPA has reversed its 2014-2016 and 2017 rulemakings without sufficient justification, particularly given the substantial reliance interests of advanced biofuel producers. EPA asserts that it may overrule its prior rules based on *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). 82 Fed. Reg. at 34,220. Yet, while the Supreme Court recognized in *Fox* that an agency may change its prior regulations, it also noted that the agency “must show that there are good reasons for the new policy.” 556 U.S. at 515. And the Supreme Court noted that there is a higher burden to provide “detailed justification” for a change in policy when the

prior policy “has engendered serious reliance interests.” *Id.* Given that advanced biofuel producers have relied on and invested based on EPA’s prior methodology for years, EPA’s “greater emphasis on costs” is not a sufficient justification for completely diverging from its prior rules. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (vacating the Department of Labor’s change in overtime pay requirements in part because of “industry reliance on the Department’s prior policy”). EPA’s proposed eradication of the “reasonably attainable” standard would harm advanced biofuel producers this year and into the future, punishing their recent efforts to invest in capacity and distribution infrastructure. Placing a greater emphasis on obligated parties’ costs does not justify that outcome.

B. Displacement of Feedstocks Does Not Justify Decreasing the Advanced Biofuel Volume.

In addition to ultimately lowering the advanced biofuel standard below the “reasonably attainable” level, EPA also imports inappropriate and inaccurate considerations into its determination of the volume of advanced biofuel that is reasonably attainable. One such consideration is EPA’s concern with “diverting volumes of advanced biodiesel and renewable diesel (or the feedstocks used to produce these fuels) from existing markets.” 82 Fed. Reg. at 34226. That concern is unwarranted for several reasons, particularly with respect to biomass-based diesel.

First and foremost, the oils used as feedstocks for biomass-based diesel do not compete directly with the non-oil portions of crops used to produce animal feed and food for human consumption. As EPA acknowledges in the proposed rule, many crops that supply feedstock for biomass-based diesel are “primarily grown as livestock feed with the oil as a co-product or by-product.” *Id.* An increase in the advanced biofuel standards would actually drive *down* the price of the meal portion of such commodity crops, thereby also causing a decrease in the cost of animal feed and a corresponding decrease in the cost of livestock products.

Soybean oil is great example of a biomass-based diesel feedstock that provides additional value to its co-products. Soybean oil has traditionally existed in surplus because soybean demand is primarily driven by the market for its protein meal. *See* Comments of American Soybean Association to the Proposed 2014–2016 RFS Rule, EPA-HQ-OAR-2015-0111-1818. The market for soybean oil for human consumption in the United States has been driven further downwards by approximately 3.7 billion pounds between 2005 and 2014 as a result of the FDA’s labeling requirements for trans fats in food. *Id.* This market will only continue to decline based on concern with the health risks of trans fats and another recent action by the FDA requiring the elimination of partially hydrogenated oils, which create trans fats, by 2018. *Id.* Thus, biomass-based diesel demand is essential to replacing lost demand for soybean oil and helping to support availability of protein meal, which is not used in biomass-based diesel production. By providing demand for surplus oils, biomass-based diesel production makes soybean meal a more cost-effective protein source for human consumption and lowers the cost of soy-based animal feed for American farmers—indeed, the financial benefits of biomass-based diesel production have saved U.S. livestock farmers between \$5.9 and \$11.8 billion from

2006–2015. *Id.* (citing Informa Economics, *Impact of the U.S. Biodiesel Industry on the U.S. Soybean Complex and Livestock* (March 2015)). By lowering the advanced biofuel volumes, the proposed rule disincentivizes biomass-based diesel production and removes some of these benefits, driving up livestock feed prices for meat production and harming America’s farmers.

The same benefits exist with other biomass-based diesel feedstocks. For example, the animal fat used in biomass-based diesel production is a co-product of the meat marketed for human consumption. Just as soybean oil provides a benefit to farmers who grow soybeans and helps keep prices of soybean meal down, production of biomass-based diesel from animal fat assists both livestock farmers and the consumers who purchase meat products. Additionally, biomass-based diesel produced from waste streams, including used cooking oils and greases, are by definition by-products that do not compete with the primary uses of agricultural products. Biomass-based diesel produced from used cooking oil (“UCO”) has thus provided a significant benefit to restaurants—UCO buyers will remove used cooking oil from restaurants for free or even provide compensation in exchange for UCO. See EnviroTekUSA Inc., *Boost Your Restaurant’s Earnings with Waste Vegetable Oil*, <http://www.envirotekusa.com/living-green/boost-your-restaurant-s-earnings-with-waste-vegetable-oil.html> (last visited August 28, 2017); Blue Honey Biofuels, *We Pay You for Used Cooking Oil*, <http://bluehoneybiofuels.com/whatyouget.php> (last visited August 28, 2017).

To the extent increased advanced biofuel standards would displace some other uses of oils and fats used in biomass-based diesel production in the short term, they would provide a higher-value use that is more consistent with the goals of the RFS. While surplus vegetable oils created as a by-product of crops grown for food or animal feed will be used in *some* capacity, they are often put to lower-value uses. For example, as demand for soybean oil for human consumption continues to decline, soybean oil produced in the United States may simply be exported. Indeed, countries such as Brazil, Indonesia, and Malaysia have increased their own biomass-based diesel blend requirements in response to their perception of a glut of cheap, available feedstocks on the global market. WAEES, *Implications of Higher Biodiesel Volume Obligations for Global Agriculture and Biofuels* (July 2016) (“2016 WAEES Study”) (Attachment 13 to NBB Comments on 2017 RFS Rule, EPA-HQ-OAR-2016-0004-2904). Raising the U.S. advanced biofuel standards would provide incentive to create domestic biodiesel in the United States, benefitting both U.S. farmers and those employed in the U.S. biomass-based diesel industry. See *id.* A 2016 report by LMC International illustrates the economic impact of increasing domestic biomass-based diesel production: using the 2015 biomass-based diesel volume of approximately 2.1 billion gallons,⁶ the industry would have supported *21,000 more jobs* and generated an *additional \$4 billion in economic impact* had all of the production occurred in the United States. LMC International, *The Economic Impact of the Biodiesel Industry on the U.S. Economy* (June 2016) at 1, tables 4 and 6 (“LMC Jobs Study”), available at http://biodiesel.org/docs/default-source/policy--federal/lmc-study-for-nbb_economic-impact-

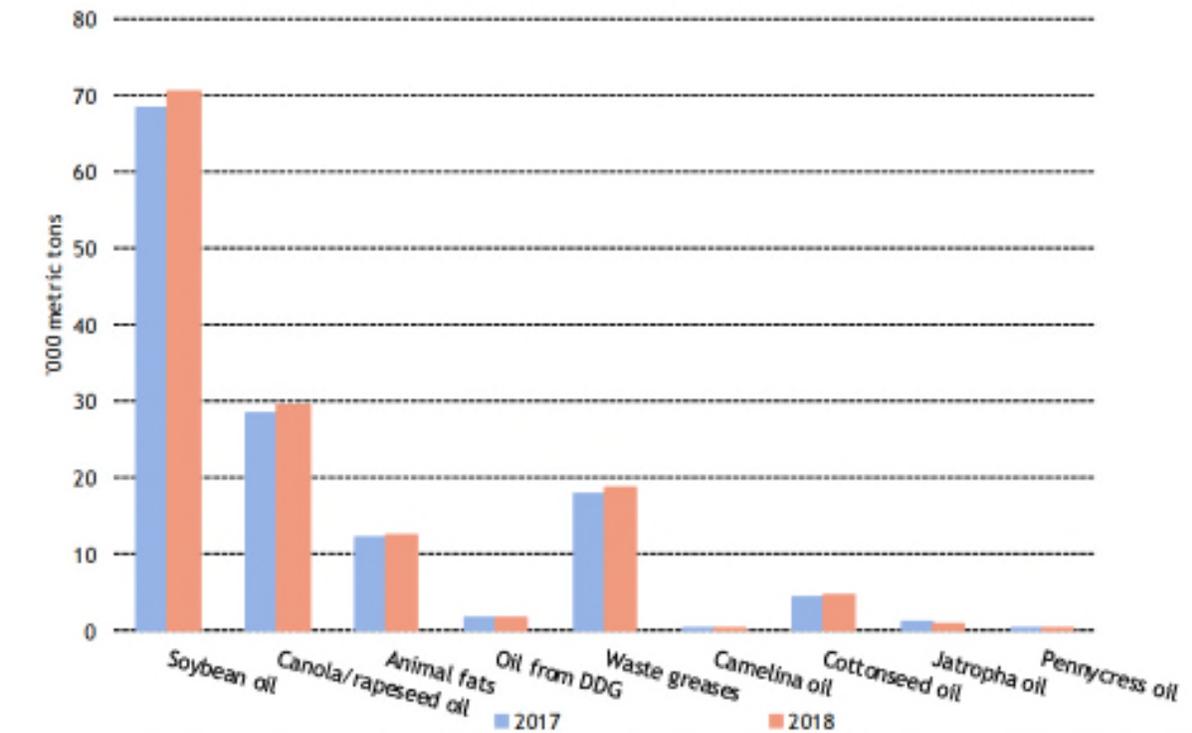
⁶ This calculation would show an even *more* dramatic effect with the larger biomass-based diesel production that occurred in 2016.

of-biodiesel_june-2016-final.pdf?sfvrsn=2. To view it another way, for every additional 500 million gallons of domestic production, the U.S. biomass-based diesel industry would provide an additional 16,000 jobs and \$2.9 billion in economic impact. *Id.* Thus, any incentives that shift the industry towards using feedstocks to produce biomass-based diesel in the U.S. will have a significant positive impact on the U.S. economy and employment.

The widespread availability of feedstocks for biomass-based diesel is corroborated by another 2016 report published by LMC International. LMC International, *Current and Future Supply of Biodiesel Feedstocks* (June 2016) (“LMC Feedstock Study”) (Attachment 14 to NBB’s comments on the 2017 RFS Rule, EPA-HQ-OAR-2016-0004-2904). That report found that growth in the supply of feedstocks that could be used to create biomass-based diesel continues to outpace growth in demand. LMC estimated that the supply of eligible feedstocks would be 139.1 metric tons in 2018, while global demand for other uses of such feedstocks would be 108.4 million metric tons, leaving enough feedstock to create 9.2 billion gallons of biomass-based diesel. *Id.* at 4; *see also* Figure 2 (showing global supply of qualifying biomass-based diesel feedstocks). LMC estimated that this discrepancy would continue to grow in the future, with enough surplus feedstocks to create 9.8 billion gallons of biomass-based diesel by 2020. LMC Feedstock Study at 4. The proposed rule acknowledges the import of the LMC study when assessing the supply of advanced biofuels, noting that the study helps “demonstrate that sufficient feedstocks will be available in 2018” to produce 2.9 billion gallons of biomass-based diesel. 82 Fed. Reg. at 34,234 n.99. But EPA inexplicably asserts that LMC includes “overly optimistic” assumptions, despite the fact that the OECD-FAO Agricultural Outline for 2015-2016 includes a *higher* estimate of 9.3 billion gallons of biomass-based diesel production in 2018. *Id.*⁷ The LMC study provides a sound estimate of the available global supply of biomass-based diesel, based on comparing a forecast of the total supply of feedstocks with aggregate demand for meal and edible oils. *See* LMC Feedstock Study at 1, 11. EPA also asserts, with no support, that the U.S. could only absorb a “marginal” increase in the share of the global biomass-based diesel. 82 Fed. Reg. at 34,234 n.99. To the contrary, the global availability of biomass-based diesel feedstocks, combined with the U.S. biomass-based diesel industry’s investments in capacity and distribution infrastructure, would allow for significantly higher U.S. production.

⁷ EPA does not explain why it thinks the LMC assumptions were overly optimistic, nor does it provide its own estimate of global feedstock supply. Moreover, LMC International is an internationally respected research organization, with a particular expertise in agricultural commodities and biofuels.

Figure 2. Projected Global Supply of Biomass-Based Diesel Feedstocks in 2017 and 2018⁸



Finally, the supply of vegetable oils and other biomass-based diesel feedstocks is not a static, zero-sum market. Even if higher advanced biofuel volumes could temporarily displace some other uses of biomass-based diesel feedstocks, this would provide an opportunity for growth in the feedstock supply. While most of the production of crops that create biomass-based diesel feedstocks is driven by demand for the meal, increases in demand for oils for biomass-based diesel production would create added incentives for improvements throughout the supply chain. Areas with potential for growth include:

- **Crop yields.** As one example, the soybean industry is capable of expanding and improving efficiency—U.S. soybean growers have almost doubled production since 1980 while decreasing land use, energy usage, and greenhouse gas emissions. U.S. Soybean Export Council, U.S. Soybean Sustainability Assurance Protocol (2013), available at <https://soygrowers.com/wp-content/uploads/2013/02/US-Sustainability-Assurance-Protocol-March-2013.pdf>. Similarly, U.S. corn production has grown 61 percent in the last 20 years, with average yields growing by nearly 36 percent. WAEES, *Implications of an Alternative Advanced and Biomass Based Diesel Volume Obligation for Global*

⁸ LMC Feedstock Study at 3. Some feedstocks depicted in this chart, including cottonseed, jatropha oil, and pennycress oil, are not currently registered as RFS-qualifying feedstocks. The existence of these feedstocks, however, represents yet another avenue for potential expansion: new feedstocks may soon qualify under the RFS that will further supplement the global supply of feedstocks available to help meet renewable volume obligations under the program.

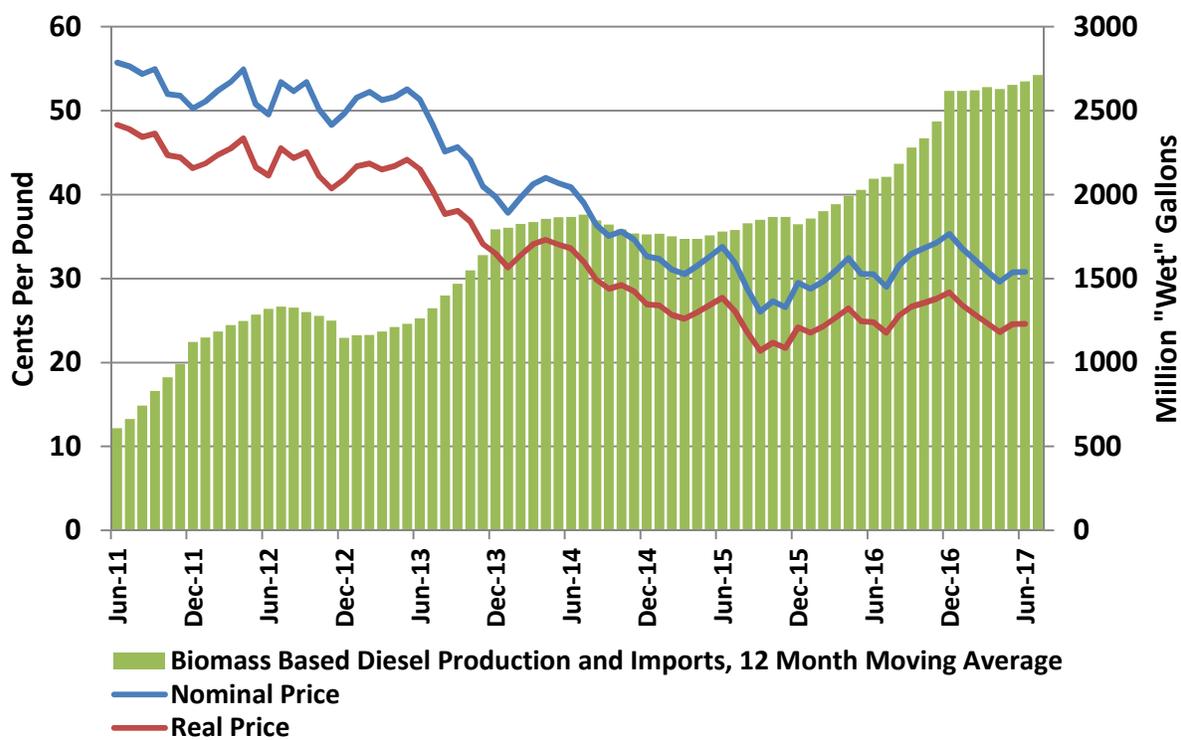
Agriculture and Biofuels at 30 (Aug. 21, 2017) (“2017 WAEES Study”) (attached as Attachment 3). These yields are poised to grow in the future thanks to continued technological developments, such as products offering enhanced disease protection and new soybean varieties that are more resistant to insects. *Id.* at 9.

- **Vegetable oil extraction.** Higher advanced biofuel volumes could also lead to improvements in technology to extract biomass-based diesel feedstocks from crops. For example, demonstrated technology is available that could improve the rate of extraction of corn oil from distillers grains. 2016 WAEES Study at 33.
- **Waste oil and grease collection.** Additionally, collection of waste oils is currently expanding and poised to grow further. Waste oil supplies primarily are limited not by the amount of waste oils available but by the incentives to collect and process them. LMC International, *Global Waste Grease Supply* (Aug. 2017) (“LMC Waste Grease Study”) (Attached as Attachment 1). Demand for biomass-based diesel production therefore largely drives the waste oil market, and the market is growing as global demand has incentivized collection of waste oils in additional countries. *Id.* In particular, processing of used cooking oil (“UCO”) has seen rapid growth in recent years. *Id.* LMC international projects that the global waste oil supply will grow from 29.0 million metric tons in 2017 to 31.9 million metric tons in 2020. *Id.* 31.9 million metric tons of waste oil would be enough to create 9.6 billion gallons of biomass-based diesel.

Thus, increasing advanced biofuel volumes would lead to technological innovation and economic growth over the long term rather than the “market disruptions and increased burden” EPA describes. 82 Fed. Reg. at 32,441.

In fact, trends in feedstock prices demonstrate that growth in yields and extraction rates have more than exceeded any price impacts from increased biomass-diesel demand under the RFS. As shown in Figure 3 below, the soybean oil price has declined significantly since 2011, despite some of the largest increases in biomass-based diesel production occurring during that period. While biomass-based diesel production more than doubled during those years from about 1.1 billion gallons in 2011 to over 2.6 billion gallons in 2016, soybean oil prices declined steadily. See Figure 3; EPA EMTS site. The same is true of other biomass-based diesel feedstocks—the prices of tallow, yellow grease, and distillers corn oil have all declined since 2011 despite the rapid growth of biomass-based diesel production. 2017 DeRamus Study at 7. These continuing price decreases show that biomass-based diesel production is nowhere close to causing problematic shortages in the feedstock markets. Indeed, the soybean oil price of 24.6 cents per pound in June 2017 was less than the 26 cents per pound price in June 2005—before the RFS program began. 2017 WAEES Study at 30. WAEES’s modeling, discussed further in Section III.E, shows that these feedstock prices would remain low even with higher volumes.

Figure 3: Soybean Oil Price (Crude De-gummed, Central Illinois) from June 2011 to June 2017, Compared with Biomass-Based Diesel Production.⁹



C. Expiration of the Biodiesel Tax Credit Does Not Justify Decreasing the Advanced Biofuel Volume.

The proposed rule also lowers the assessment of the reasonably attainable advanced biofuel volume in part because of concern that the biodiesel tax credit has expired and may not be renewed. 82 Fed. Reg. at 34,225. As a preliminary matter, such concern is premature because the biodiesel tax credit may very well be renewed. A bipartisan bill introduced on April 26, 2017 would extend the \$1-per-gallon tax credit for three years and convert that credit from a credit to blenders to a credit to producers. See American Renewable Fuel and Job Creation Act of 2017, S.944 (115th Cong. 2017). It would also provide an additional 10-cent-per-gallon credit to small producers. *Id.* EPA cannot properly assess the impact of the biodiesel tax credit now when it may be applied retroactively, as it was in 2012 and 2014–2015.

EPA also asserts that the proposed legislation’s shift from a blender’s tax credit to a producer’s credit adds “uncertainty.” 82 Fed. Reg. 34,221. But shifting to a producer’s tax

⁹ 2017 WAEES Study at 31 (source: *Soybean Oil Price, Crude De-Gummed, Central Illinois*, The Jacobsen, July 2017). Real prices were calculated using the consumer price index for all urban consumers for the Federal Reserve Bank of St. Louis. Biomass-based diesel production and imports data are based on annualized monthly data for D4 RIN generation from EMTS.

credit would be beneficial to U.S. biomass-based diesel producers. By providing the credit only to U.S. producers, the new credit would remove unfair competitive advantages for importers who can import biodiesel produced at costs subsidized by foreign governments and still receive a tax credit by blending it in the United States. See NBB, *National Biodiesel Board Applauds New Biodiesel Tax Credit Bill* (Apr. 26, 2017) available at <http://biodiesel.org/news/news-display/2017/04/26/national-biodiesel-board-applauds-new-biodiesel-tax-credit-bill>. This change in the tax credit would encourage U.S. production of biomass-based diesel by leveling the playing field for U.S. producers who compete with foreign producers receiving heavy subsidies from their own governments. *Id.* While imports would likely continue despite the change, the shift in the tax credit under the proposed legislation would incentivize greater U.S. production, providing more U.S. jobs and enabling higher overall levels of advanced biofuels available to meet renewable volume obligations under the RFS.

Moreover, even if the biodiesel tax credit is not renewed, its absence would not be a reason to reduce the advanced biofuel volumes. The tax credit is one incentive to produce biomass-based diesel, but the advanced biofuel volume is another, independent incentive sufficient to spur production on its own. If the advanced biofuel volume is set high enough, there will be a sufficient demand to drive additional production of biomass-based diesel, and producers already have the capacity to increase volumes quickly. Indeed, thanks in part to the RFS, 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. EPA appears to acknowledge these incentives, observing that “the loss of the tax credit could be offset, in whole or in part, by rising RIN values.” 82 Fed. Reg. at 34,233. But EPA nonetheless lowers its projection of the reasonably attainable advanced biofuel volume in part based on “uncertainty” regarding the tax credit. Instead, to comply with the goals of the RFS to increase production of biofuels, EPA must increase the advanced biofuel volume to a level that would be attainable regardless of any concern with the tax credit. The very purpose of the RFS is to provide an incentive for the creation of biofuels, and EPA must continue to be guided by Congress’s intent.

D. EPA Underestimates the Capacity for Growth in the Advanced Biofuel Supply.

EPA’s decision to lower its assessment of the reasonably attainable advanced biofuel volume for 2018 is driven in part by its prediction that less sugarcane ethanol will be imported in 2018 based on low import volumes from 2014–2016. 82 Fed. Reg. at 34,226. In reaching that conclusion, EPA assumes that (1) a higher advanced biofuel volume would not incentivize greater sugarcane ethanol imports, and (2) in the event of a shortfall in sugarcane ethanol, other advanced biofuels could not expand to make up the difference. Both assumptions are wrong.

First, significantly higher sugarcane ethanol imports are possible if market conditions, including sufficient advanced biofuel volumes, warrant them. The volumes of sugarcane ethanol imported in 2014 and 2015 were likely low in part because no advanced biofuel standard was in place during those compliance years. As EPA notes, “higher import volumes” of advanced sugarcane ethanol “are clearly possible, and could potentially be achieved under

the influence of a higher RFS standard.” *Id.* And state programs such as California’s Low Carbon Fuel Standard (“LCFS”) may provide additional incentive for increased imports of sugarcane ethanol going forward, due to sugarcane ethanol’s low carbon intensity score under that program.

Second, even if sugarcane ethanol imports are lower than projected, biomass-based diesel production can easily fill in to meet higher advanced biofuel standards. That is exactly what happened in 2016, when EPA notes that sugarcane ethanol imports were lower than anticipated even though the 2016 RFS volumes were finalized in late 2015. That year, the more than 4 billion RINs generated by biomass-based diesel alone more than made up for any shortfall in sugarcane ethanol. Biomass-based diesel can easily make up any such shortfall in the future.

The proposed rule projects a 100 million gallon increase in biomass-based diesel production in 2018 when setting the advanced biofuel volumes, but the industry could support much more. 82 Fed. Reg. at 34,226. To begin with, while EPA’s projection of 2.5 billion gallons represents a 100 million gallon increase in biomass-based diesel production from EPA’s projected volume for 2017, it is still less than the over 2.6 billion gallons that were *actually produced* in 2016.¹⁰ There is no reason why the biomass-based diesel industry cannot achieve what it has already done.

Moreover, EPA itself acknowledges that greater annual increases in biomass-based production are possible. Later in the proposed rule, when calculating the total renewable fuel volume, EPA observes that the average increase in biomass-based diesel production between 2011 and 2017 has been 319 million gallons per year. *Id.* at Figure V.B.2-1. Yet EPA fails to explain why it predicts, only when calculating the advanced biofuels volume, that the 2018 increase in biomass-based diesel production must be less than a third of the average annual growth. While EPA’s chart in its discussion of total renewable fuels included all biodiesel and renewable diesel (regardless of its status as advanced), the same trend holds true when looking specifically at advanced biomass-based diesel. According to EMTS data, biomass-based diesel grew from generating about 1.6 billion D4 RINs in 2011 to generating over 4 billion D4 RINs in 2016, for an annual growth rate of about 471 million RINs—equivalent to about 304 million gallons of advanced biomass-based diesel.¹¹ See EPA EMTS Site.

¹⁰ Using data that removes RINs retired for non-compliance purposes results in a 2016 biomass-based diesel volume of approximately 2.46 billion gallons, which is slightly lower than the 2.5 billion EPA projects for 2018. See 82 Fed. Reg. 34,224, tbl. IV.B.2-1. As explained above, 2.62 billion gallons is a more accurate measure for assessing the capability of the industry given that it accounts for all RINs produced. Either way, the point remains that the past growth of the industry demonstrates that higher volumes can be achieved.

¹¹ This calculation uses an equivalence value for biomass-based diesel of 1.55 RINs per gallon, based on a combination of the equivalence values for biomass-based diesel and renewable diesel.

In fact, the biomass-based diesel industry is primed to rapidly increase production above and beyond historical averages if sufficient incentives are in place. As discussed above, neither feedstock limitations nor the expiration of the biodiesel tax credit are constraints on additional growth of U.S. biomass-based diesel production. In addition, the biomass-based diesel industry has demonstrated that it has the capacity, distribution infrastructure, and available demand for far greater expansion. Specifically, biomass-based diesel has the potential for rapid growth because:

- ***Biomass-based diesel can be used in higher blends.*** Biodiesel can legally be used in motor vehicle engines in any concentration, including B100. 77 Fed. Reg. at 59,466. It can also be used in any concentration in nonroad vehicles and as heating oil. *Id.* Renewable diesel likewise can be used as a “drop-in” fuel in any concentration. While some Original Equipment Manufacturers (“OEMs”) include limitations in warranties based on certain biodiesel blend levels, biodiesel can often be used in higher concentrations with no modifications to engines. And OEMs are increasingly recognizing that engines are compatible with higher biodiesel blends, particularly B20. Indeed, more than 90% of the OEMs in the medium- and heavy-duty truck market (which accounts for approximately 92% of diesel fuel consumption) support use of B20 biodiesel blends.
- ***Biodiesel is subject to demanding specifications and performs well in cold weather.*** All biodiesel must meet a rigid ASTM specification (D6751) that was created with input from expert scientists and engineers, including those from obligated parties and OEMs. In the past, EPA has raised issues with the performance of biodiesel, including its suitability for cold weather use. See 81 Fed. Reg. at 34,793. But ASTM specifications were updated in 2012 to provide stronger cold soak filtration and monoglyceride requirements in order to address earlier issues with cold weather performance. Based on these updated standards, users have not reported continued issues with use of biodiesel blends in cold weather. See, e.g., Minnesota Department of Agriculture, *Report to the Legislature: Annual Report on Biodiesel*, at 8 (2016), available at <http://www.mda.state.mn.us/news/government/~media/Files/news/govrelations/legrpt-biodiesel16.pdf>. (“[N]o additional issues due to the use of biodiesel in #2 diesel fuel have been reported due to cold weather.”). In fact, public fleets, including the diesel fleets of Harvard University and the City of New York, have successfully been using biodiesel year-round in cold areas. See NBB, *Biodiesel Stands Up to the Cold*, http://biodiesel.org/docs/default-source/ffs-performance_usage/biodiesel-stands-up-to-the-cold.pdf?sfvrsn=4.
- ***There is a strong market for biomass-based diesel in on-road diesel vehicles.*** NBB’s analysis of data provided by IHS Automotive on the currently registered diesel vehicles in operation in the U.S. demonstrates a strong market for growth in biomass-based diesel use. Despite the recent controversy surrounding the Volkswagen diesel emissions scandal, the U.S. diesel vehicle market has

continued to grow, in part because light-duty passenger vehicles make up only 1% of on-road diesel vehicles (and use far less than 1% of diesel fuel). In contrast, medium- and heavy-duty trucks, which are not affected by the emissions issues, are responsible for over 92% of diesel fuel consumption in the U.S. NBB's analysis¹² estimates that on-road diesel fuel consumption will be approximately 42 billion gallons in 2017. Because biodiesel and renewable diesel can be used in any blend, biomass-based diesel could be incorporated in any amount into that market. Even to the extent that some users do not wish to exceed biodiesel recommendations by OEMs, given that 90% of the OEMs in the medium- and heavy-duty truck market support use of B20 biodiesel blends, biodiesel can be blended into the current diesel supply in much higher volumes.

- ***Biomass-based diesel is increasingly being used in non-road applications, including heating oil and jet fuel.*** Biodiesel blends are increasingly being used in heating oil, which is an approximately 8 billion gallon-per-year market. Heating fuel customers in the Northeast have specifically sought to increase use of biodiesel through higher blends due to efforts to improve air quality. See National Oilheat Research Alliance, *Developing a Renewable Biofuel Option for the Home Heating Sector*, at 40 (2015), available at <https://noraweb.org/wp-content/uploads/2015/06/Developing-a-Renewable-Biofuel-Option-May-2015-R2.pdf>; see also Maine Governor's Energy Office, *Heating Fuel Information*, http://www.maine.gov/energy/fuel_prices/fuel-info.html (last visited Aug. 28, 2017). The Department of Energy and the Federal Aviation Administration have both promoted use of renewable jet fuel, including jet fuel from biomass-based diesel. EPA's EMTS site reports that nearly 2 million gallons of biomass-based diesel jet fuel were generated in 2016. See EPA EMTS site. While that number is still small compared to the overall biomass-based diesel market, it shows that biomass-based jet fuels are starting to be generated and have capacity for growth.
- ***Existing infrastructure allows for greater distribution.*** There are no infrastructure bottlenecks that would prevent the distribution of larger volumes of biomass-based diesel in the United States because of the way that biomass-based diesel is blended and distributed. Unlike ethanol, which is typically blended at large terminals, biomass-based diesel can be blended during any stage of the supply chain. For example, a large amount of biomass-based diesel is sold directly to end users such as truck stops. See David W. DeRamus and Collin Cain, Bates White Economic Consulting, *Biodiesel Distribution in the U.S. and Implications for RFS2 Volume Mandates* (July 2016) ("2016 Deramus Study")(Attachment 6 to NBB's comments on 2017 RFS rule, EPA-HQ-OAR-2016-

¹² NBB's analysis of IHS data accounts for the number of vehicles in operation by gross vehicle weight, as well as their average vehicle miles traveled, average fuel economy, and average fuel consumption in diesel gallon equivalents.

0004-2904). Because of this distribution system, additional volumes of biomass-based diesel can easily be supplied to end users without the need for additional costly investments in terminals or storage facilities.

- ***It is easy to add additional biomass-based diesel distribution infrastructure.*** While significant infrastructure already exists, biomass-based diesel infrastructure can also be expanded quickly to cover even broader markets if sufficient incentives are present. For example, a retail station can add a new pump to offer a new blend of biomass-based diesel for approximately \$4,000 to \$26,000. 2016 DeRamus Study at 21. And, while the cost to add blending infrastructure can be around \$100,000, that investment could be recouped quickly for high-volume retailers who can recover the value of a large number of RINs. *Id.* Additionally, pipelines are increasingly being used to distribute biomass-based diesel. Biomass-based diesel has been distributed for years on pipelines not containing jet fuel, but a new process has also been developed to allow biomass-based diesel blends and jet fuel to be transmitted on the same pipelines. See Ron Kotrba, *Moving biodiesel in the pipeline: sequencing matters*, *Biodiesel Magazine* (Jan. 27, 2015), <http://biodieselmagazine.com/articles/290143/moving-biodiesel-in-the-pipeline-sequencingmatters>. The ASTM standard for jet fuel (D1655) has also recently been updated to allow for up to 50 ppm of biodiesel, which allows companies to move biodiesel through pipelines with jet fuel much more easily using these methods. Thus, if advanced biofuel volumes are set sufficiently high, additional investments and innovation in biomass-based diesel distribution can readily be made to match an increased supply of biomass-based diesel with its demand.

EPA's proposal to decrease the advanced biofuel volumes for the first time would halt the significant progress made by advanced biofuels and biomass-based diesel in particular. It would not only stifle future expansion but would punish recent investments made by biomass-based diesel producers that reasonably anticipated continued growth in the advanced biofuel volumes. Creating a roadblock to the progress of a successful biofuel goes directly against the goal of the RFS program to promote increasing biofuel production and use.

E. The Industry Is Prepared to Produce a Significantly Higher Advanced Biofuel Volume in 2018.

NBB has previously testified that the industry can achieve an advanced biofuel volume of 5.25 billion gallons in 2018. See Testimony of Anne Steckel at EPA Public Hearing on Renewable Fuel Standard (Aug. 1, 2017). Given existing production capacity and the ability of the industry to increase production quickly, that volume is certainly "reasonably attainable." EPA acknowledges that there is currently 4.2 billion gallons of registered capacity for biomass-based diesel in the U.S. alone, enough for approximately 6.5 billion gallons of advanced biofuel in ethanol-equivalent gallons. On top of that, there is capacity for billions of additional gallons of imported biomass-based diesel, as well as significant amounts of imported sugarcane

ethanol and other advanced biofuels. And given the ample existing infrastructure for biomass-based diesel, “the ability for the market to distribute and use biodiesel and renewable diesel” is not a “constraining factor.” 82 Fed. Reg. at 34,224. Thus, when EPA’s concerns with diversion of feedstocks and the expiration of the biodiesel tax credit are removed for the reasons discussed above, it becomes evident that a significantly higher volume can be achieved. Considering that about 4.29 billion gallons of advanced biofuels were already produced in 2016, ramping up to 5.25 billion gallons could be readily accomplished in 2018.

NBB recognizes that EPA has a certain amount of discretion in determining the degree to which it exercises its cellulosic waiver authority and that there is a range of permissible interpretations of what may be considered reasonably attainable. But, in order to respect Congressional intent and EPA’s methodology from its own past rules, EPA must raise the advanced biofuel volume to *at least* 4.75 billion gallons.¹³ Anything below that volume would both disregard Congress’s express objective of promoting growth in advanced biofuels and significantly harm those who have relied on EPA’s prior rules that set the advanced biofuel volume based on “reasonably attainable” levels. 4.75 billion gallons of advanced biofuel is an increase that could be achieved so easily by the industry that there is no non-arbitrary justification for EPA to set the volumes lower. In fact, an agricultural and biofuels model¹⁴ designed by World Agricultural, Economic, and Environmental Services (“WAEES”) demonstrates that a 4.75 billion gallon volume could be readily achieved with minimal effects on RIN prices and feedstock prices, the two primary potential impacts EPA has described in its proposed rule. 2017 WAEES Study at 42. For example, the model forecasts that biomass-based diesel feedstock prices would increase slightly under a 4.75 billion gallon advanced biofuel volume but remain in the mid-30 cent range.¹⁵ *Id.* Those feedstock prices would be about 30% lower than they were from 2010–2013. *Id.* The model also demonstrates that, as discussed above, the cost of the meal portion of crops used in biomass-based diesel production would *decline* due to the added value from demand for biomass-based diesel feedstocks.

Moreover, obligated parties have a significant bank of “carryover” RINs available to meet their 2018 compliance obligations. 82 Fed. Reg. at 34,213–14. These prior-year RINs give obligated parties additional flexibility with which to meet the renewable volume obligations. By suggesting that it must set volumes sufficiently low to avoid an “intentional drawdown of the carryover RIN bank,” EPA essentially ignores these available RINs. *See id.* But the availability of

¹³ EPA should also increase the total renewable fuel volume by a corresponding amount.

¹⁴ WAEES employs a global partial equilibrium agricultural and biofuels model, which is comprised of a set of multiple global econometric models emulating the behavior of the global agricultural sector. 2017 WAEES Study at 46. The model covers 46 countries or regions, with an additional 12 regional aggregates. *Id.* It operates through solving iteratively to find equilibrium by balancing global supply and demand. *Id.* at 48.

¹⁵ The WAEES model also assumed an increase to a 2.5 billion gallon biomass-based diesel volume.

prior-year RINs eligible to be used in 2018 demonstrates both that biofuel producers have been easily exceeding past volumes and that obligated parties would be able to meet a substantially higher 2018 advanced biofuel volume.

Any increase in the advanced biofuel volumes from the proposed rule would have significant and concrete benefits. To begin with, LMC International's analysis shows that volumes resulting in a 500 million gallon increase in U.S. biomass-based diesel production would provide 16,000 new jobs. LMC Jobs Study at 10. WAEES's modeling also demonstrates that an advanced biofuel volume of 4.75 billion gallons would increase income for farmers. 2017 WAEES Study at 42. And any additional volume would also reduce greenhouse gas emissions by displacing petroleum fuels and enhance the nation's energy security by increasing production of renewable fuels that can be made in the United States from a variety of feedstocks.

IV. EPA MUST INCREASE THE 2019 BIOMASS-BASED DIESEL VOLUME IN THE FINAL RULE.

A. The Proposed Rule's Freeze of the Biomass-Based Diesel Volume Is Contrary to Congress's Objective of Promoting Growth.

Congress recognized the importance of biomass-based diesel by establishing a nested biomass-based diesel category within advanced biofuels. Congress could have simply created a single category for advanced biofuels, but it instead chose to emphasize future development in biomass-based diesel because of its particular utility and potential for expansion. See 153 Cong. Rec. H2233-02, H2233 (Mar. 6, 2007) (statement of Rep. King) ("And so our approach here needs to be the expansion and the continued promotion of these energy supplies that we have that we can develop here in the United States. The most obvious of those are the biodiesel components, which have been expanding rapidly here in the United States . . ."). Yet, EPA proposes to stop incentivizing further development of biomass-based diesel through the biomass-diesel volume because it believes that the biomass-based diesel production is entirely driven by the advanced biofuel volume. 82 Fed. Reg. at 34,240. That proposal contradicts Congress's intent by rendering the biomass-based diesel volume meaningless. EPA must set the biomass-based diesel volume at a level at which it "move[s] the United States toward greater energy independence and security" and "increase[s] the production of clean renewable fuels." Pub. L. No. 110-140, 121 Stat. 1492 (2007). If EPA concludes that the biomass-based diesel volume is not driving increased production, that demonstrates that it must be set *higher*.

The biomass-based diesel volume has an important function for incentivizing biomass-based diesel production in addition to the advanced biofuel volume. 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. Like all industries, the biomass-based diesel industry needs certainty in order to make capital investments, and the biomass-based diesel volume provides that certainty. *C.f.*

Statement of Scott Pruitt, EPA Administrator, at CERAWEEK Houston (Mar. 9, 2017) (“We need to provide certainty in the marketplace so that investments can be made to encourage growth and respect the rule of law.”). EPA acknowledges this function in a supplemental docket memorandum included with the proposed rule, 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.” 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”); *see also* 82 Fed. Reg. at 34,240 (noting that it is “appropriate to continue to support the BBD industry through a guaranteed volume of BBD...”). But EPA then proceeds to disregard its own astute observation by setting biomass-based diesel volumes solely based on its prediction that “the 2019 advanced volume requirement, when set next year, will determine the level of BBD production and imports that occur in 2019.” 82 Fed. Reg. at 34,240.

What EPA misses is that, even if advanced biofuel volumes are a large incentive for biomass-based diesel production this year or next, the certainty provided by the biomass-based diesel volumes is essential for the future growth of the program. Without a consistent, increasing biomass-based diesel volume, the industry cannot plan for substantial, long-term investments that will take time to recoup. By ignoring the biomass-based diesel volumes, EPA ignores Congressional intent and its own recognition that “the objectives of the Act ... support the continued growth in production and use of renewable fuels.” BBD Docket Memorandum at 6.

That Congress specifically contemplated increasing biomass-based diesel volumes is further evident from the statutory scheme. While there is no set statutory volume for biomass-based diesel after 2012, it is part of the broader advanced biofuel standard that Congress set to increase annually. As EPA has previously pointed out, “[g]iven that all biomass-based diesel counts towards the advanced biofuel requirement, and that the statute requires annual increases in advanced biofuel through 2022, ... it is appropriate that biomass-based diesel play an *increasing* role in supplying advanced biofuels to the market between 2012 and 2022.” 77 Fed. Reg. at 59,460 (emphasis added); *see also* BBD Docket Memorandum at 6 (discussing the value of biomass-based diesel standards in “meeting the (anticipated) higher advanced volume requirement” in future years). If Congress had wished the biomass-based diesel volumes to stay stagnant after 2012, it could simply have provided for no further increases. Instead, it left EPA to determine the biomass-based diesel volumes consistent with the purpose of the statute and six specific statutory factors. EPA must consider Congress’s intent to have more advanced biofuels each year and increase the biomass-based diesel standards where possible in accordance with that goal. To be sure, EPA would not be required to increase the biomass-based diesel volume if there was some indication that an increase was not possible or the statutory factors weighed against it. But EPA cannot, as it has done here, simply decide that the biomass-based diesel volumes are irrelevant and neglect to encourage further growth in biomass-based diesel production.

B. EPA Marginalizes the Statutory Factors for Determining the Biomass-Based Diesel Volume.

Congress laid out six specific factors that EPA must consider when determining the biomass-based diesel volumes after 2012.¹⁶ While EPA discusses these statutory factors in a separate memorandum included in the proposed rule's docket, the proposed rule itself makes clear that the statutory factors are not driving EPA's decision. Instead, EPA's decision to keep biomass-based diesel levels stagnant is based on its determination that, due to the impact of the advanced biofuel volumes, "the same overall volume of BBD would likely be supplied in 2019 regardless of the BBD volume we mandate for 2019." 82 Fed. Reg. at 34,240. In addition to being incorrect that the biomass-based diesel volumes have no function, EPA is effectively ignoring the statutory factors it is required to consider. EPA itself notes in the docket that its views on the relative impacts of the advanced biofuel and biomass-based diesel volume are its "primary assessment," while its analysis of the statutory factors in the docket memorandum is an "additional supplemental assessment." *Id.* But EPA must set the biomass-based diesel volume based on all of the statutory factors, not consider them after the fact.

EPA attempts to ground its analysis of the effects of the advanced biofuel volumes in the statute's additional requirement to review and consider the implementation of the RFS in certain past years of the program. *Id.*; see 42 U.S.C. §7545(o)(2)(B)(ii)(noting that the volumes for years after the specific statutory volumes "shall be determined by the Administrator . . . based on a review of the implementation of the program during calendar years specified in the tables"). But EPA's analysis does not fit within that factor. To begin with, with respect to biomass-based diesel, the "years specified in the tables" that EPA must review are 2009 through 2012. EPA's primary consideration in determining the level of biomass-based diesel volumes is that 2019 biomass-based diesel production will be driven by the advanced biofuel volumes, based largely on EPA's analysis of data from 2016. BBD Docket Memo at 2. More

¹⁶ These 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).

importantly, nothing about the term “review of the implementation of the program” suggests a weighing of the relative production impacts of the advanced biofuel volumes compared with the biomass-based diesel volumes. To the contrary, the plain language “review of the implementation” suggests an examination of the performance of past years of the program. And, as EPA acknowledges, biomass-based diesel has been highly successful in past years, repeatedly exceeding the required volumes; there is no reason based on a review of past years to suggest that higher future volumes cannot be met. Essentially, EPA attempts to squeeze its own, preferred analysis into an unrelated statutory factor. EPA cannot do so when Congress has spoken specifically to what factors must be considered. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (when Congress dictates factors with a high “level of specificity,” EPA may not import its own criteria).

Moreover, even if EPA could consider its analysis as part of its “review of the implementation of the program,” it cannot base biomass-based diesel volumes solely on that factor to the exclusion of the six other specific statutory factors. While EPA has discretion regarding how to weigh the statutory factors, it cannot ignore Congress’s commands. EPA’s acknowledgement that the statutory factors it discusses in its separate docket memorandum do not affect its decision does just that.

C. EPA Misapplies the Statutory Factors in Its Supplemental Analysis.

1. Promoting Competition Among Advanced Biofuels Is Not a Purpose of the Statute.

Even in its supplemental memorandum discussing the statutory factors for determining biomass-based diesel volumes, EPA adds an extraneous consideration: promoting competition among advanced biofuels. BBD Docket Memorandum at 5. That concern has no relationship to the purposes of the RFS. To the contrary, the intent of the RFS is promote renewable fuels by providing them the means with which to effectively compete with petroleum-based fuels. Indeed, each of the six statutory factors refers to “the impact of renewable fuels” or “production of renewable fuels.” See 42 U.S.C. §7545(o)(2)(B)(ii). That phrasing, rather than suggesting EPA should consider the merits of one type of renewable fuel over another, indicates that EPA should consider setting the volumes for a renewable fuel based on its merits as a replacement for petroleum fuels.

Indeed, nowhere in the RFS is EPA given the authority to set biomass-based diesel volumes artificially low so that various advanced biofuels may compete with each other. EPA must set the biomass-based diesel volumes at a level sufficient to meet the goals of the program in accordance with the statutory factors in 42 U.S.C. §7545(o)(2)(B)(ii). Instead of creating a system in which various advanced biofuels compete with each other for a decreasing share of the overall market, EPA must set both the advanced biofuel volumes and biomass-based diesel volumes high enough that all advanced biofuels can grow.

EPA’s flawed competition analysis pervades its analysis of the statutory factors. The supplemental memorandum’s analysis of the statutory factors largely concludes that the

statutory factors are a wash because other advanced biofuels could have the same benefits as biomass-based diesel. In part, this analysis ignores some of the unique benefits of biomass-based diesel. For example, because biomass-based diesel is an established fuel with an extensive infrastructure network, increases in biomass-based diesel volumes are more likely to be available to be readily brought to market and be used in transportation fuels. But more fundamentally, EPA's analysis is flawed because it pits the benefits of certain advanced biofuels against others. The statutory factors should be considered from the perspective of assessing biomass-based diesel as compared to petroleum diesel. When considered through that framework, each statutory factor weighs in favor of increasing the statutory volumes of biomass-based diesel.

2. The Statutory Factors Require Increasing the Biomass-Based Diesel Volume.

Biomass-based diesel demonstrates significant improvements over petroleum-based diesel in each of the six statutory factors:

- ***Impact on the environment.*** Biomass-based diesel provides for significant greenhouse-gas reductions when compared to petroleum diesel. By definition, biomass-based diesel must lower GHG emissions by at least 50%, but much of the biomass-based diesel on the market today significantly exceeds that minimum requirement. Indeed, based on data from the EIA and EMTS in 2015, the weighted average GHG emissions reduction for biomass-based diesel in the aggregate is 81%. See Testimony of Don Scott, National Biodiesel Board (Jun. 9, 2016), EPA-HQ-OAR-2016-0004-0328 (based on a biomass-based diesel feedstock composition of 43% soybean oil, 17% recycled cooking oil and grease, 17% animal fat, 15% distillers corn oil, 7% canola oil, and 1% other recycled feedstocks). These emissions reductions will only continue to grow if the RFS continues to incentivize biomass-based diesel production, which will in turn lead to greater development and diversification of feedstocks.
- ***Impact on the energy security of the United States.*** Promoting biomass-based diesel production in the United States will enhance energy security and reduce the need for petroleum imports. These energy security benefits are enhanced by the wide array of feedstocks available to create biomass-based diesel, as greater diversity in feedstocks provides for less possibility of disruption. See EPA, Response to Petitions of the American Fuel & Petrochemical Manufacturers (AFPM) and the American Petroleum Institute (API) for Reconsideration of the September 27, 2012 RFS Rule (Aug. 2013) (recognizing that “creating a new fuel supply that has a different, and likely reduced, probability of disruptions provides an energy security benefit”). Significant quantities of biomass-based diesel are already produced from a variety of feedstocks, including soybean oil, canola oil, recycled cooking oil, animal fats, and distillers corn oil, and newer feedstocks, such as camelina sativa oil, pennycress oil, and carinata oil could

become increasingly available with appropriate market signals. Moreover, even when improperly compared to other advanced biofuels, biomass-based diesel has significant energy security advantages due to its particular feedstock diversity. And some other advanced biofuels are not yet well-developed enough to provide a reliable source of energy for U.S. transportation fuel.

- ***Future commercial production.*** There is significant capacity for future biodiesel production in the U.S., as well as the potential to add more. EPA recognizes this in its memorandum, observing that currently registered capacity in the U.S. is double that of EPA's proposed volume, and that there is additional capacity when imports are included. Yet, EPA concludes that this factor does not weigh in favor of increasing biomass-based diesel volumes because its "approach does not limit additional BBD production." That is not the appropriate standard; instead, the much greater capacity for biomass-based diesel production, and domestic production in particular, warrants raising the biomass-based diesel volumes.

- ***Impact on the infrastructure of the United States.*** There is well-developed infrastructure in the U.S. for producing and distributing biomass-based diesel, including production facilities distributed across the country (see Figure 4), blending capacity, and distribution networks by rail, truck, boat, and pipeline. EPA acknowledges that "we do not believe infrastructure to be a constraint" to higher biomass-based diesel production. BBD Docket Memorandum at 13. It also observes that increased biomass-based diesel production would not "have any significant impacts on deliverability of materials other than renewable fuels." *Id.* at 12. But EPA again refuses to recognize that the absence of infrastructure constraints weighs in favor of increasing the volumes of biomass-based diesel. Not only is infrastructure not a constraint, but the infrastructure for biomass-based diesel is a significant advantage when compared to less established advanced biofuels.

Figure 4. Production Facilities and Offices of NBB Members (Plants in Green, Offices in Red)



- o **Impact on the cost of transportation fuel and on the cost to transport goods.** Due to the value of RINs, biomass-based diesel blends can be offered at a cost lower than that of 100% petroleum diesel fuel. See 81 Fed. Reg. at 34,794. Thus, when compared to petroleum fuel, biomass-based diesel production lowers the costs for end users, as well as the cost to transport goods. See 2017 DeRamus study at 13–15. This is illustrated by the facts that truck stops, which are discretionary blenders, offer biomass-based diesel at their locations across the country. Truck stops choose to blend biodiesel because it is cost-effective for them. For example, Love’s Travel Stops & Country Stores currently offers biodiesel at over 300 of its 430 locations around the country. See Love’s, *Fuel and Price Search*, <https://www.loves.com/en/location-and-fuel-price-search/locationsearchresults#> (last visited Aug. 28, 2017). Additionally, obligated parties do not pass along the costs of RFS compliance to consumers in the form of the higher diesel prices at the pump. Instead, the supply-increasing effect of adding biomass-based diesel to the pool of transportation fuels *reduces* the cost of petroleum diesel to consumers. EPA’s 2010 regulatory impact analysis predicted that “[t]he addition of biodiesel, renewable and cellulosic diesel fuel is estimated to reduce the cost of diesel fuel by \$8.5 billion in the year 2022, or save 12.0 cents per gallon.” EPA, *Renewable Fuel Standard Program*

(RFS2) Regulatory Impact Analysis (Feb. 2010), EPA-420-R-10-006, available at <https://www.epa.gov/sites/production/files/2015-08/documents/420r10006.pdf>.

- **Impact on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.** The biomass-based diesel industry currently supports 64,000 U.S. jobs throughout the supply chain, and any increases in the biomass-based diesel volume will add more. See NBB, *Made in the USA Biodiesel Supports Jobs, Fourth of July Values* (Jun. 29, 2017), <http://biodiesel.org/news/news-display/2017/06/29/made-in-the-usa-biodiesel-supports-jobs-fourth-of-july-values>. Biomass-based diesel also provides support to U.S. farmers; as discussed above, biomass-based diesel production is a key source of demand for soybean oil. Moreover, because biomass-based diesel feedstocks are co-products of the meal portion of crops used for food, biomass-based diesel volumes lower input prices for food production by increasing demand for surplus oils. Any increases in the biomass-based diesel volumes will enhance these benefits to U.S. employment, agriculture, and rural development.

D. A Significantly Higher Volume of Biomass-based Diesel Can Be Produced and Distributed in 2019.

NBB has previously testified that the industry can achieve a biomass-based diesel volume of 2.75 billion gallons in 2018. See Testimony of Anne Steckel at EPA Public Hearing on Renewable Fuel Standard (Aug. 1, 2017). Given the existing capacity for biomass-based diesel production, the ability of the industry to increase production quickly, and the strong demand for diesel fuel, a 2019 biomass-based biofuel volume of up to 2.75 billion could be readily achieved. EPA acknowledges that there is 4.2 billion gallons of capacity for biomass-based diesel in the United States alone, and there is also capacity for billions of additional gallons of imported biomass-based diesel. EPA does not contend that there is any obstacle to biomass-based diesel production greater than 2.1 billion gallons; to the contrary, it concedes that greater production is possible. 82 Fed. Reg. at 34,240. The industry can easily ramp up to produce a volume of 2.75 billion gallons by 2019, which would represent a less than 5% increase in volume from the 2.62 billion gallons it achieved in 2016. See EPA EMTS data.

NBB recognizes that EPA has a certain amount of discretion in weighing the statutory factors to determine the biomass-based diesel volumes. But, in order to respect Congress's intent to continue the growth of biomass-based diesel, EPA must raise the biomass-based diesel volume to *at least* 2.5 billion gallons. This is the amount that EPA acknowledges is "reasonably attainable" in its analysis of advanced biofuels, even with EPA's flawed concerns regarding diversion of feedstocks and the expiration of the biomass-based diesel tax credit. 82 Fed. Reg. at 34,227. In fact, the achievability of 2.5 billion gallons has already been demonstrated in practice because the industry has already *exceeded* that volume in 2016. See

EPA EMTS data.¹⁷ Moreover, as discussed in further detail above, an agricultural and biofuels model designed by World Agricultural, Economic, and Environmental Services (“WAEES”) demonstrates that a 2.5 billion gallon volume would be easily achievable with minimal effects on RIN prices and feedstock prices.¹⁸ See Section III.E, *supra*. And the likely availability of carryover RINs from prior compliance years will make compliance even easier for obligated parties.

Just as with the necessary increase in the advanced biofuel volume discussed above, any increase in the biomass-based diesel volume from the proposed rule would have significant and concrete benefits in terms of jobs, agricultural income, and energy security. When the benefits that Congress sought can be achieved by the industry, EPA cannot choose to ignore them based on its own policy preferences.

V. EPA CANNOT FURTHER DECREASE VOLUMES BASED ON IMPORTS OR ITS GENERAL WAIVER AUTHORITY.

In its proposed rule, EPA also seeks comment on whether it may further reduce volumes based on: (1) the level of imports in recent years, or (2) grounds under its general waiver authority.^{19,20} The answer to both is no.

¹⁷ As described above, removing RINs retired for non-compliance purposes results in a volume of approximately 2.46 billion gallons of biomass-based diesel in 2016. But even using that volume, which is a less appropriate measure, the industry would only need to grow by about 1.6% to reach 2.5 billion gallons. That increase is still far below what the industry can achieve.

¹⁸ The WAEES model also assumes an increase in the advanced biofuel volume to 4.75 billion gallons.

¹⁹ EPA also seeks comment on the possibility for market manipulation in the RIN trading program. 82 Fed. Reg. 34,211. NBB supports a well-functioning RIN market free of manipulation or fraud. While NBB does not have specific recommendations regarding market manipulation, NBB notes that concern regarding the potential for RIN market manipulation is not a valid basis for reducing volume obligations under the statute.

²⁰ EPA further notes in the proposed rule that it is planning to initiate a separate “reset” proceeding of statutory volumes pursuant to 45 U.S.C. 7545(o)(7)(F). 82 Fed. Reg. 34,211. Because EPA explicitly notes that it is not seeking comments on that proceeding, NBB will not comment at this time other than to note that the reset provision does not apply to the biomass-based diesel volume. NBB reserves its rights to comment on EPA’s separate rulemaking regarding the “reset” provision when it is promulgated.

A. The Availability of Imports Warrants an Increase in Volumes from the Proposed Rule, Not a Decrease.

The proposed rule asks whether the advanced biofuel volume or the biomass-based diesel volume should be reduced based on “increasing volumes of renewable fuels [that] have been imported and used” in recent years. 82 Fed. Reg. at 34,212. That is the wrong question. If anything, the availability of imports warrants an increase in renewable volume obligations to ensure that the RFS program continues to incentivize growth in production of biofuels.

As a preliminary matter, EPA lacks the authority to reduce the advanced biofuel volume further than it already has done in the proposed rule. EPA has waived the advanced biofuel to the maximum extent of its cellulosic waiver authority and, as discussed further in Section V.B below, there are no grounds for EPA to use its general waiver authority.

Additionally, decreasing the renewable volume obligations due to a recent increase in imports would be counterproductive. Because imported biofuels from countries like Argentina and Indonesia are heavily subsidized by those countries’ governments, imported biofuels are often sold to the U.S. market at artificially suppressed prices. Thus, if EPA further reduced the advanced biofuel volumes or biomass-based diesel volumes, these imports would continue to come in, while the burden of the decrease would fall primarily on domestic producers. Just as a decrease in the renewable volume obligations would primarily harm domestic producers, an increase would assist them—any increase in volumes would be met mostly by domestic production, as most available imports are already being absorbed by the U.S. market as a result of their subsidized price. EPA must set the advanced biofuel and biomass-based diesel volumes at levels that both account for the availability of imports and continue to incentivize production of biofuels in the United States.

Moreover, regulating international trade is not in EPA’s purview. That is the role of the Department of Commerce. Indeed, at the request of NBB and a group of U.S. biodiesel producers, the Department of Commerce has already instituted countervailing duty and anti-dumping investigations regarding subsidized and dumped imports of biodiesel. The Secretary of Commerce announced the Department’s preliminary determination in the countervailing duty investigation on August 22, 2017, finding that Argentinian biodiesel exports have received countervailable subsidies of 50.29% to 64.17% and Indonesian exporters have received countervailable subsidies of 41.06% to 68.28%. See Department of Commerce, *U.S. Department of Commerce Issues Affirmative Preliminary Countervailing Duty Determinations on Biodiesel from Argentina and Indonesia* (Aug. 22, 2017), <https://www.commerce.gov/news/press-releases/2017/08/us-department-commerce-issues-affirmative-preliminary-countervailing-1>. These trade proceedings are a much more targeted and appropriate means of addressing concerns with imported biomass-based diesel than reducing the renewable volume obligations under the RFS.

If the Department of Commerce’s preliminary findings on the countervailing duty investigation are finalized, imports of biomass-based diesel to the United States would not

cease. Instead, there would be a rebalancing of imported and domestic biofuels based on a level playing field between domestic and foreign producers. To the extent that imports would be reduced, it would be because they would be replaced by domestic biomass-based diesel that would become more cost-competitive. The global supply of biomass-based diesel would not necessarily be reduced because countries like Argentina and Indonesia would continue to generate biomass-based diesel as a result of their existing capacity and the extensive global supply of feedstocks. And the supply available in the United States for compliance with the RFS would not be reduced but simply shifted between foreign and domestic production based on a new balance of competition.

B. There Are No Grounds for EPA to Use Its General Waiver Authority.

EPA also seeks comment on “whether it would be appropriate to exercise the general waiver authority in the final rule.” 82 Fed. Reg. at 34,209. EPA may only exercise its general waiver authority to reduce statutory volumes when one of two statutory factors is present: (1) severe harm to the economy or the environment; or (2) inadequate domestic supply. 42 U.S.C. 7545(o)(7)(A). Neither of those factors is present here.

As the D.C. Circuit explained just last month in *Americans for Clean Energy v. Env'tl. Prot. Agency*, No. 16-1005, 2017 WL 3202630, at *11 (D.C. Cir. July 28, 2017) (“*ACEI*”), the “inadequate domestic supply” prong cannot be used based on demand-side constraints or concerns with the provision of renewable fuels to end users. In *ACEI*, EPA had lowered the renewable fuel volumes in its 2014–2016 RFS rule based on its concerns with alleged distribution constraints that EPA believed could prevent end users from accessing sufficient volumes of renewable fuel, as well as demand factors such as “pricing of renewable fuel, prevalence of vehicle engines that can use renewable fuel, and marketing efforts of those promoting renewable fuel products.” *Id.* at *10–*12. EPA argued that all of those considerations could be fit within its “inadequate domestic supply” waiver authority because the statute was ambiguous with respect to the definition of “supply.” The D.C. Circuit disagreed, finding that the statutory definition of supply refers to “the supply of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements.” *Id.* at *11. The court noted that EPA’s interpretation would “in effect amend[] ‘inadequate domestic supply’ to read ‘inadequate domestic supply and demand.’” *Id.* at *12. It also reiterated that the purpose of the RFS is to incentivize development of renewable fuels, observing that a scheme under which “the demand for renewable fuel largely dictates the volume requirements” would “turn[] the Renewable Fuel Program’s ‘market forcing’ provisions on their head.” *Id.* at *15.

EPA cannot use its general waiver authority under the proper interpretation of “inadequate domestic supply” outlined by the D.C. Circuit. Nothing has changed since the 2014–2016 rule to reduce domestic supply—instead, further investments in capacity and infrastructure have occurred that have increased the available supply of renewable fuels. EPA acknowledges in its proposed rule that there is sufficient capacity to meet both the advanced biofuel volumes and the total renewable fuel volumes. See 82 Fed. Reg. at 34,228 (“[T]here will be adequate supply of total renewable fuel in 2018 to meet a total renewable fuel volume

requirement of 19.24 billion gallons.”); *id.* at 34,234 (“[W]e believe that the market is capable of producing, distributing, and using 2.9 billion gallons of biodiesel and renewable diesel in 2018.”); *id.* at 34,224 (“Production capacity and the ability for the market to distribute and use biodiesel and renewable diesel are therefore not constraining factors.”). In fact, the advanced biofuel volumes and total renewable fuel volumes could both be significantly raised without causing domestic supplies to be inadequate. As EPA acknowledges, the capacity for biomass-based diesel production just in the U.S. is far greater than the levels EPA has set in the proposed rule. *Id.* at 34,234 (recognizing that “biodiesel and renewable diesel production capacity at registered facilities in the United States was approximately 4.2 billion gallons”).

Additionally, renewable fuels that are imported also form part of the domestic supply. See EPA, *Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,474 (defining “domestic supply” as “domestic production plus imports, less exports and corrections”). While the “inadequate domestic supply” prong uses the word “domestic,” that word refers to domestic *supply* as opposed to domestic production. Thus, a waiver based on inadequate domestic supply is warranted only when all renewable fuels that can be made available in the United States are inadequate to meet a particular renewable volume obligation. This is certainly not the case with respect to biomass-based diesel given that there is current global capacity for billions of additional gallons of annual biomass-based diesel that could be imported to the U.S., with the potential for that capacity to expand further.²¹

Nor would EPA’s volumes—or even higher volumes—cause severe harm to the environment or the economy. In terms of environmental harm, the renewable volume obligations help rather than harm the environment by providing significant greenhouse gas emissions reductions over petroleum-based fuels. Each gallon of biomass-based diesel used is a gallon of petroleum fuel that it is replaced, providing for average greenhouse gas emissions reductions of around 81%, or even higher for biomass-based diesel produced from certain feedstocks. See Section IV.C.2, *supra*. Biomass-based diesel production also stimulates the economy. As noted above, every additional 500 million gallons of production generates 16,000 jobs and provides 2.9 billion in economic impact. The jobs spurred by the biomass-based diesel industry are also high-paying; the same 500 million gallon production increase would provide an additional \$640 million in wages paid. See LMC Jobs Study at Table 8. Due to the location of many biomass-based diesel production facilities near agricultural areas, these economic impacts would be particularly strong in rural areas across the country. Moreover, biomass-based

²¹ In its comments on the proposed 2017 RFS Rule, NBB noted that there is *at least* 6.1 billion gallons of global biomass-based diesel capacity. NBB Comments on 2017 RFS Rule at 8, EPA-HQ-OAR-2016-0004. That estimate was based on facilities included on EPA’s list of Part 80 registered facilities in countries that have been the most active in importing to the United States in recent years. See EPA, *Registered Companies and Facilities in Fuel Programs*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/registered-companies-and-facilities-fuel-programs> (downloaded May 6, 2016). The maximum global capacity, when considering countries that could begin exporting and facilities that could register with EPA, is thus even higher.

diesel production provides millions of dollars of benefits to American farmers through increased income for their crops and livestock products. Thus, biomass-based diesel production is the opposite of a severe harm to the U.S. economy—it is a significant benefit. Instead of looking for ways to reduce production of biomass-based diesel and other renewable fuels, EPA must foster their growth.

VI. CONCLUSION

To bring its rule into line with Congress’s purpose in enacting the RFS, EPA must increase the advanced biofuel and biomass-based diesel volumes to levels that will drive continued growth—at least 4.75 billion gallons of advanced biofuel and at least 2.5 billion gallons of biomass-based diesel. Doing so will have significant and concrete benefits by providing jobs, supporting American farmers, and enhancing the energy security of the United States.