



**Appendix A**  
**to the**  
**Comments of the American Petroleum Institute**

*Renewable Fuel Standard Program: Standards for 2017  
and Biomass-Based Diesel Volume for 2018*

Docket ID No. EPA-HQ-OAR-2016-0004

**Legal Authority Supporting EPA’s Exercise of the Cellulosic and General Waiver in  
Connection with the 2017 RFS**

This Appendix analyzes EPA’s waiver authorities under the Renewable Fuel Standard. While this Appendix discusses the breadth of these powers, API notes that EPA must exercise its waiver authorities in accordance with procedural requirements contained in the CAA and with realistic projections of the amount of renewable fuel that may be consumed in transportation fuel in a given compliance year. We reiterate our objections concerning the inadequacy of the waiver proposed for 2017, based on the agency’s incorrect assumptions, which lead to aspirational estimates of the amount of renewable fuel that will be consumed.

**I. Introduction**

Section 211 of the Clean Air Act gives EPA broad authority to grant waivers of the otherwise-applicable annual volumetric requirements specified in the statute when circumstances merit. This authority includes both general waiver authority that may be exercised when implementation of a specific year’s volumetric requirement “would severely harm the economy or environment of a State, a region, or the United States” or when there is “an inadequate domestic supply,” and cellulosic biofuel waiver authority that may be exercised when production of cellulosic biofuels is expected to fall short of statutory volumes.

In giving meaning to the waiver provisions in section 211, EPA is bound by the statutory interpretation doctrine set forth in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Under *Chevron*, where the language of a statute is plain or clear, that language governs. Where the language is ambiguous, the agency charged by Congress with implementing the statute is authorized to interpret the ambiguous term, and its interpretation will be accorded deference so long as it is reasonable. *Id.* at 842-43.

Determining whether statutory language is plain requires reviewing it in its statutory context. This review is “not confined to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent

regulatory scheme.” *FDA v. Brown & Williamson*, 529 U.S. 120, 132 (2000) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). Where context lends a term such a plain meaning, that meaning must govern, as the duty of agencies and the courts is “to construe statutes, not isolated provisions.” *King v. Burwell*, 576 U.S. \_\_\_, 132 S. Ct. 2480, 2489 (2015) (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Here, read in context, EPA’s waiver authority is plainly intended to be broad and to cover an array of circumstances. True, *one* purpose of the EISA is to promote the consumption of renewable fuels. Another equally important purpose, however, embodied in section 211(o)(7)(A)’s general waiver provision, is to ensure that the promotion of renewable fuels does not lead to severe economic or environmental harm to any part of the Nation or to an “inadequate domestic supply” of transportation fuel. Since one purpose of the EISA is to promote the consumption of renewable fuel, and since the consumption of such renewable fuel is unavoidably limited by the ethanol saturation point and the amount of transportation fuel into which the renewable fuel is blended, a plain reading of the statute requires EPA to consider these external constraints on the *use* of renewable fuel when determining whether there is an “inadequate domestic supply” and thus whether to grant a waiver of the statutory renewable fuel volumes. Stated another way, compliance with the EISA is achieved through blending renewable fuel into the domestic transportation fuel supply, not merely producing it.

Therefore, the statute plainly requires EPA to adjust the volumetric obligations to account for reductions in, or declines in the expected growth of, those transportation fuel volumes. This requirement is reflected in EPA’s express authority to grant waivers of the statutory renewable fuel volumes where failing to do so would cause severe economic harm to any portion of the Nation or lead to transportation fuel supply issues. Given that the E10 blendwall discussed in depth in these comments and long acknowledged by EPA will, left unaddressed, cause just such severe economic harm and lead to the types of transportation fuel supply issues that the statute sought to avoid, EPA has an obligation to waive the otherwise-applicable volumetric requirements to stave off such harms.

Even if the statutory context did not *command* such a broad reading of EPA’s waiver authority and obligations, it would be reasonable under Step Two of the Chevron analysis to interpret section 211’s waiver provisions to encompass such broad waiver authority. As noted above, while the statute instructs that EPA may grant waivers based on, among other things, an “inadequate domestic supply,” it does not specifically define *which* supply it is referring to – the supply of blended fuels, the supply of RINs,<sup>1</sup> the supply of renewable fuels, or the supply of transportation fuels. Given the statute’s express command to base the annual renewable fuel

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<sup>1</sup> CAA section 211(o)(2)(A)(iii) provides for compliance by means that do not restrict geographic areas or impose per-gallon obligations. Under CAA section 211(o)(5), the Administrator is also directed to establish a credit program. The RIN system derives from these statutory authorities. Blending renewable fuels is the activity that enables a RIN to be used for compliance. See 40 C.F.R.1429. Because RINs operate as a license to sell transportation fuel, an inadequate supply of RINs will constrain the supply of transportation fuel.

obligations on, among other things, the EIA’s estimates “of the volumes of transportation fuel...projected to be sold or introduced into commerce in the United States” each year, at least *one* reasonable reading of the word “supply” as used in the general waiver provision is that it refers to the volumes of renewable fuels that can be blended into transportation fuel projected to be consumed in the United States consistent with existing vehicle and infrastructure constraints. *Another* possible reasonable reading is that it refers to *both* transportation fuels *and* renewable fuels, such that a shortfall in either compared to the statutory projections would be grounds for a waiver of renewable fuel volumes. Under either of these reasonable readings, EPA would have the authority to waive the volumetric requirements for the years covered by the proposed rule, as lower-than-expected transportation fuel demand, coupled with the E10 blendwall, make compliance with the statutory volume requirements impossible. In contrast, it would be patently unreasonable to interpret “inadequate domestic supply” to mean nothing more than the capacity to produce renewable fuel, because “supply” is not equivalent to “capacity” and such a reading would require EPA, in contravention of the statute, to ignore the very real constraints that prevent the consumption of those renewable fuels.

The remainder of this Appendix explores the various legal bases supporting EPA’s legal authority to grant a waiver under the present circumstances.

## **II. Analysis**

### **A. EPA Must Base RFS Requirements on Volumes of Renewable Fuel that Actually Will Be Blended into Transportation Fuel Projected to Be Sold or Introduced Into Commerce**

CAA section 211(o)(3)(B) requires EPA to determine applicable percentages of renewable fuels required to be used for each upcoming year “based on” EIA’s “estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.”

In the context of determining applicable volumes and percentage standards for cellulosic biofuel, the D.C. Circuit indicated in *American Petroleum Institute v. EPA* that the phrase ““based on” [requires] great respect but allow[s] deviation consistent with that respect.”<sup>2</sup> While *API* arose in the context of the statute’s cellulosic biofuel requirements and waiver mechanism, the D.C. Circuit also indicated in *API* that “a broad programmatic objective cannot trump specific instructions.”<sup>3</sup> The court’s reasoning in *API* applies with equal force here. In the context of the current rulemaking, EPA is specifically instructed in CAA section 211(o)(3)(B) to determine applicable percentages for total renewable fuel and advanced biofuel “*based on*” *EIA’s estimate of the overall volumes of transportation fuel projected to be sold or introduced into domestic commerce.* (Emphasis added.) To comply rationally with this statutory requirement, then, EPA must exercise its available waiver authority so that the specified applicable percentages for total

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<sup>2</sup> *American Petroleum Institute v. EPA* at 9.

<sup>3</sup> *Id.* at 10.

renewable fuel and advanced biofuel actually consumed for any year are consistent with EIA’s estimates of “transportation fuel . . . projected to be sold or introduced into commerce in the United States.” Otherwise, the specified volumes of renewable fuel and advanced biofuel to be used will be divorced from reality, akin to the cellulosic biofuel volumetric requirements that the court found to be arbitrary and capricious in *API*. Moreover, as noted above, a reading of section 211 that would not allow EPA to grant a waiver in such circumstances would run afoul of the Supreme Court’s instruction in *Brown & Williamson* that statutory provisions must be read in context – the context here being Congress’s instruction that volumes be set consistent with the EIA estimates of the volumes of transportation fuel projected to be sold or introduced into domestic commerce each year.

As already noted and as discussed in greater detail below, the RFS program focuses on volumes of renewable fuel and advanced biofuels to be consumed *in relation to* the projected volumes of “transportation fuel [projected to be] sold or introduced into commerce in the United States.”<sup>4</sup> Indeed, “renewable fuel” is defined as “fuel produced from renewable biomass and that is *used* to replace or reduce the quantity of fossil fuel present in a transportation fuel.”<sup>5</sup> By statute, RFS regulations may not restrict the geographic areas “in which renewable fuel may be used.”<sup>6</sup> Instead, required annual renewable fuel obligations are to be “expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce *in the United States*.”<sup>7</sup> Obligated parties are required to comply with percentage standards based on their overall annual production of gasoline and diesel for U.S. consumption, despite the fact that obligated parties have no control over demand for transportation fuel.<sup>8</sup>

Implementation of EPA’s general waiver authority regarding “inadequate domestic supply” must, according to *Brown & Williamson*, be informed by consideration of the statutory context in which that authority exists. That is, it must take into consideration the overarching focus of the RFS program on the volumes of transportation fuel projected to be used domestically and the constraints (*e.g.*, physical, operational, and consumer demand) on blending renewable fuels into that pool in a particular year.

## **B. EPA Reasonably and Appropriately Invokes Its Authority under the Cellulosic Waiver Provision**

### **1. EPA must waive cellulosic biofuel requirements when projections indicate that statutory volumes cannot be met.**

As EPA acknowledged in the 2014-2016 Final Rule, “[u]nder CAA Section 211(o)(7)(D)(i), if EPA determines that the projected volume of cellulosic biofuel production for the following year

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<sup>4</sup> CAA section 211(o)(2)(A).

<sup>5</sup> CAA section 211(o)(1)(J) (emphasis added).

<sup>6</sup> CAA section 211(o)(2)(A)(iii)(II)(aa).

<sup>7</sup> CAA section 211(o)(3)(B)(ii)(II) (emphasis added).

<sup>8</sup> 40 C.F.R. §80.1107.

is less than the applicable volume provided in the statute, then EPA *must* reduce the applicable volume of cellulosic biofuel to the projected volume available during that calendar year.”<sup>9</sup> In 2011 through 2016, EPA used this cellulosic waiver authority to reduce the statutorily-prescribed applicable volumes of cellulosic biofuel. The use of this waiver authority was dictated by EIA estimates that cellulosic biofuel production would fall far short of the statutory goals for those years.<sup>10</sup>

It is abundantly clear that cellulosic biofuel production will be just a tiny fraction of the statutory 2017 target of 5.5 billion ethanol equivalent gallons. EPA itself estimates that cellulosic biofuel production for 2017 will be 312 million gallons.<sup>11</sup> This estimate, together with the lack of any other information in the record for this rulemaking that would indicate that the statutorily applicable volumes can be met, *requires* the Agency to exercise its 211(o)(7)(D)(i) waiver authority to substantially reduce the cellulosic volumes otherwise required by statute.

## **2. EPA’s exercise of CAA section 211(o)(7)(D) authority does not require satisfaction of the waiver criteria contained in CAA section 211(o)(7)(A).**

Upon reducing the cellulosic biofuel mandate to account for reduced cellulosic biofuel production, EPA has the authority to further reduce the RFS mandates for that year. Specifically, CAA Section 211(o)(7)(D)(i) provides that, “[f]or any calendar year in which the Administrator makes such a reduction, the Administrator *may also reduce* the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.” (Emphasis added). The D.C. Circuit has affirmed that EPA “enjoys broad discretion regarding whether and in what circumstances to reduce the advanced biofuel and total renewable fuel volumes under the cellulosic biofuel waiver provision.”<sup>12</sup>

Some stakeholders have argued that the Agency may exercise this cellulosic biofuel waiver authority *only* in the circumstances described in CAA section 211(o)(7)(A) – that is, only where implementation of the volumetric requirement “would severely harm the economy or environment of a State, a region, or the United States; or [] based on a determination by the Administrator...that there is inadequate domestic supply.”<sup>13</sup> These same stakeholders also argue that EPA must consider the factors specified in CAA section 211(o)(2)(B)(ii) in the exercise of a cellulosic biofuel waiver.

There is no statutory basis for such purported limitations on EPA’s cellulosic waiver authority. First, the general waiver provision and cellulosic waiver provision are not linked to one another in the statute. Also, each waiver is governed by independent criteria. While, as EPA proposes, both may be utilized at the same time, each may be exercised independent of the other.

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<sup>9</sup> 80 Fed. Reg. at 77,433 (emphasis added).

<sup>10</sup> See, for example: [http://www.eia.gov/analysis/requests/epa/letter\\_grundler-050813.pdf](http://www.eia.gov/analysis/requests/epa/letter_grundler-050813.pdf). This letter was not transmitted to EPA in accordance with the statutory schedule, but EPA nonetheless relied on this letter with regard to establishing RFS standards for cellulosic biofuel in 2013.

<sup>11</sup> API does not agree with the Agency’s projection of API cellulosic biofuel production for 2017. This issue is addressed in detail in Appendix B.

<sup>12</sup> *Monroe Energy v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014).

<sup>13</sup> 80 Fed. Reg. at 33,110.

Second, the statutory factors in CAA section 211(o)(2)(B)(ii) are simply not applicable to this rulemaking. The statute specifies a cellulosic volume for 2017, and EPA is not employing its “reset” authority in CAA 211(o)(7)(F). If it were, that might then call for evaluation of the criteria in CAA section 211(o)(2)(B)(ii). But that is not the case. Thus, the criteria in CAA section 211(o)(2)(B)(ii) have no bearing on the grant of a cellulosic biofuel waiver in 2017.

EPA explained in its Response to Comments Document for the 2014-2016 RFS that: “A commenter contended that EPA must use the criteria in Section 211(o)(7)(A) to determine whether to reduce statutory volumes under Section 211(o)(7)(D). EPA disagrees with this interpretation and has support from the D.C. Circuit indicating that ‘[i]n the absence of any express or implied statutory directive to consider particular factors, EPA reasonably concluded that it enjoys broad discretion regarding whether and in what circumstances to reduce the advanced biofuel and total renewable fuel volumes under the cellulosic biofuel waiver provision.’ *Monroe v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014).”<sup>14</sup>

Moreover, and contrary to EPA’s assertion, once EPA exercises its cellulosic waiver authority, the Clean Air Act *does not* require any sort of “substantial justification” to reduce the total and advanced renewable fuel mandates by an equivalent amount. Indeed, absent affirmative evidence that total and advanced renewable fuel volumes can make up for shortfalls in cellulosic biofuel production, the fact that the cellulosic biofuel requirement is a nested component of the other two categories indicates that reducing the volumetric obligations for the other two categories by an equivalent amount is necessary.

### **C. EPA Proposes a Proper Exercise of the Agency’s General Waiver Authority**

In its proposal, EPA properly recognizes that it may exercise the general waiver authority in CAA section 211(o)(7)(A) under the circumstances that exist in 2017 for each of the four renewable fuel categories.<sup>15</sup> When read in context, the statutory waiver provisions clearly authorize the exercise by EPA of this general waiver authority in the present circumstances. Even if the statute is not clear, however, EPA’s interpretation of the general waiver provision to permit a waiver in the present circumstances is reasonable.

- 1. Read in context, the general waiver provision’s reference to “inadequate domestic supply” is plainly a reference to the renewable fuels blended and actually consumed within the domestic supply of transportation fuel.**

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<sup>14</sup> EPA, *Renewable Fuel Standards for 2014, 2015 and 2016, and the Biomass-Based Volume for 2017: Response to Comments*, at 116 (Nov. 2015) (EPA-420-R-15-024).

<sup>15</sup> CAA section 211(o)(7)(A) allows EPA to waive the “requirements of paragraph (2) “in whole or in part.” EPA has interpreted this authority to allow EPA to waive any or all of the four applicable volume requirements. In addition, however, CAA section 211(o)(7)(A) allows EPA to reduce the “national quantity of renewable fuel required under paragraph (2).” This “national quantity” is composed of four separate categories of renewable fuel specified in CAA section 211(o)(2). Thus, this element of EPA’s CAA 211(o)(7)(A) waiver authority further affirms EPA’s ability to waive applicable requirements for all four categories of renewable fuel, i.e., total renewable fuel, advanced biofuel, biomass-based diesel and cellulosic biofuel.

As noted previously, statutory provisions must be read with regard to their statutory context. Where context lends a term such a plain meaning, that meaning must govern, as the duty of agencies and the courts is “to construe statutes, not isolated provisions.”<sup>16</sup>

The EISA has multiple purposes, as its language demonstrates. *One* of those purposes – but by no means the only one – is to promote the consumption of renewable fuels in the United States. Another key purpose, however, which is embodied in the general waiver provision, is to ensure that the promotion of renewable fuels does not result in severe economic harm to any part of the Nation. Yet another is to ensure that promotion of renewable fuels does not result in an “inadequate domestic supply” of transportation fuel containing renewable fuel. Since the purpose of the EISA is to promote the consumption of renewable fuel, and since the consumption of such renewable fuel is necessarily limited by the amount of transportation fuel into which the renewable fuel is blended, a plain reading of the statute requires EPA to consider this external constraint on the *use* of renewable fuel when determining whether there is an “inadequate domestic supply.” Stated another way, compliance with the EISA is achieved through blending renewable fuel into the domestic transportation fuel supply, not merely producing it.

Read in their proper statutory context, then, the waiver provisions of section 211(o)(7) – particularly the language authorizing EPA to grant a waiver where there is “an inadequate domestic supply” – *plainly* give EPA authority to adjust the volumetric requirements in a broad array of circumstances. Given the statute’s express reference to basing the annual volumetric requirements on, among other things, the “volumes of transportation fuel...projected to be sold or introduced into commerce in the United States,” the statute plainly gives EPA authority to adjust the volumetric obligations to account for reductions in, or declines in the expected growth of, those volumes. This authority is reflected in EPA’s authority to grant waivers of the statutory renewable fuel volumes where failing to do so would cause severe economic harm to any portion of the Nation or lead to transportation fuel supply issues. Given that the E10 blendwall discussed in depth in these comments and long acknowledged by EPA will, left unaddressed, cause just such severe economic harm and transportation fuel supply issues, EPA has clear authority to waive the otherwise-applicable volumetric requirements to avoid such harms.

- 2. Even were the statutory term “inadequate domestic supply” ambiguous, EPA reasonably interprets it to refer to the renewable fuels blended and actually consumed within the domestic supply of transportation fuel.**

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<sup>16</sup> *Burwell*, 135 S. Ct. at 2489 (internal quotations omitted).

Even ignoring the statutory context that gives the term “inadequate domestic supply” plain meaning, an interpretation of that term allowing grant of a waiver in the present circumstances would be reasonable and entitled to deference under Step Two of the *Chevron* analysis.

In the final rule for 2014-2016, EPA explained that the supply of renewable fuel is “best understood in terms of the person or place using the product.”<sup>17</sup> EPA correctly points out that the vast majority of renewable fuels are not consumed as neat fuel, but instead, are blended downstream of production and “in almost all cases are supplied to the consumer as a blend with conventional fuel (ethanol blended in gasoline or biodiesel blended in diesel).”<sup>18</sup> Thus, the reference to “inadequate domestic supply” in the general waiver provision must be read in the context of the overall supply of transportation fuel to the consumer.

Indeed, the RFS program is explicitly based on projections of the volumes of transportation fuel to be sold or introduced in domestic commerce, *not* on the production of renewable fuel or the production capacity of renewable fuel producers. This statutory and programmatic structure is manifest in the congressional directive that EPA ensure that “*transportation fuel sold or introduced into commerce in the United States . . . on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel and biomass-based diesel . . .*”<sup>19</sup> This statutory focus has been consistent since the enactment of EPAct and the RFS1 program in 2005, which also required that EPA “ensure that *gasoline sold or introduced into commerce in the United States . . . on an average annual basis, contains the applicable volume of renewable fuel . . .*”<sup>20</sup>

Within the RFS2 program, the statutory focus on renewable fuel as contained in transportation fuel is further evidenced by the definition of “transportation fuel.” Pursuant to CAA section 211(o)(1)(L), “the term ‘transportation fuel’ means fuel for *use* in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).” (Emphasis added.) The definition of “renewable fuel” in CAA section 211(o)(1)(J), which also references “fuel . . . *used* to replace or reduce the quantity of fossil fuel present in transportation fuel,” reinforces this interpretation.<sup>21</sup> Thus, the RFS provides that applicable requirements apply with respect to transportation fuel that is used in transportation activities and in other engines and equipment actually utilized by consumers. The RFS waiver provisions must therefore be read in light of this statutory context. Within that context, the term “domestic supply” is best understood with reference to the statutory requirement that transportation fuel *sold or introduced into commerce* contain qualified renewable fuel.

Indeed, the level of the domestic supply of renewable fuel in transportation fuel sold to the consumer is an express assumption underlying EPA’s regulations implementing the RFS program. Specifically, EPA designed the RIN system to ensure that renewable fuel would be consumed in the United States:

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<sup>17</sup> 80 Federal Register at 77435.

<sup>18</sup> *Id.*

<sup>19</sup> CAA section 211(o)(2)(A)(i) (emphasis added).

<sup>20</sup> EPAct 2005 at sec. 1501 (emphasis added).

<sup>21</sup> 42 U.S.C. § 7545(o)(1)(J) (emphasis added).

RINs represent proof of production which is then taken as proof of consumption as well, since all but a trivial quantity of renewable fuel produced or imported will be consumed as fuel or exported . . . An obligated party demonstrates compliance with the renewable fuel standard by accumulating sufficient RINs to cover their individual renewable fuel obligation. It will not matter whether the obligated party used the renewable fuel themselves. An obligated party's obligation will be to ensure that a certain amount of renewable fuel was used, either by themselves or someone else, and the RIN is evidence that this occurred for a certain volume of renewable fuel . . . *RINs claimed for compliance purposes by obligated parties will thus represent renewable fuel actually consumed as motor fuel in the U.S.*<sup>22</sup>

It is thus entirely consistent with the statutory structure of the RFS and EPA's long-standing regulations implementing the program that EPA waiver authority in CAA section 211(o)(7)(A) is available with respect to the supply *to the consumer* of transportation fuel containing renewable fuel. Indeed, interpreting "inadequate domestic supply" to refer to anything other than the supply of renewable fuel to the consumer (as both evidenced by RINs and limited by the amount of RINs) would create a disconnect between a waiver of RFS applicable requirements and the intended relief, making the intended relief ineffective, uneconomic, or both. The waiver term "inadequate domestic supply" must be read in the context of the RFS mandate it is waiving, *i.e.*, the requirement that finished transportation fuels *contain* some volume of renewable fuels.

**3. As a result of the E10 blendwall, the domestic supply of transportation fuel is inadequate in volume to be blended with the statutory volumes of renewable fuels.**

EPA properly concludes that it is not possible to deliver transportation fuel containing renewable fuel to consumers at the volumes provided for in CAA section 211(o)(2)(B)(i). This is because of the E10 blendwall and limitations regarding advanced biofuels and cellulosic biofuel. Simply stated, the annual increases in the statutory volumes of renewable fuel required to be produced or used have far outpaced the ability of the total supply of domestic transportation fuel to absorb those volumes. Put in terms of the statute, there is an "inadequate domestic supply" of transportation blended with renewable fuel compared with the statutory volumes of renewable fuels.

There are a number of technological and economic reasons for this. Briefly, the domestic fuel market lacks the physical infrastructure, sufficient numbers of renewable fuel-compatible vehicles, and sufficient consumer demand necessary to support enough sales volumes of ethanol-blended fuels other than E10 to meet the growing mandate. While it is legally permissible for obligated parties to blend ethanol in gasoline to produce E85 or E15 blends, simply because EPA has removed one legal impediment to the production of these blends through a CAA section 211(f)(4) waiver does not mean that local regulations allow the use of these fuels, or that the

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<sup>22</sup> 72 *Federal Register* at 23909 (emphasis added).

market, the vehicles on the road, or the consumers can or will accommodate the use of such fuels. The limitations regarding utilization of E85 and E15 are discussed more fully in Sections II.A of API's main comments.

**4. EPA cannot interpret “inadequate domestic supply” to refer only to the capacity to produce renewable fuels.**

API agrees with EPA's interpretation that the term “supply” in section 211's general waiver provision cannot be read to refer solely to the “capacity to produce” renewable fuels.<sup>23</sup> Indeed, equating “domestic supply,” as that term is used in the general waiver provision, with the “capacity to produce renewable fuel” would produce absurd results. To the extent that *capacity* to produce outstrips *actual* production, as it did in 2014,<sup>24</sup> EPA's general waiver authority would be either precluded or limited in scope even if there were an actual shortage of current year RINs and an inadequate “RIN bank.” As in the case of 2014, this would not result in *any* additional renewable fuels being blended into transportation fuel and used by consumers. The only result would be a gross imbalance between those parties holding RINs for sale and those needing to buy RINs; individual obligated parties could have difficulty or be prevented from obtaining sufficient RINs to demonstrate compliance. This result – obligated parties finding themselves in violation of their RFS obligations without any means of remedying those violations other than curtailing their fuel production or sales – would be divorced from any reasonable policy objectives for renewable fuel use in pursuit of greater economic and energy security.

**5. That Congress referred to “inadequate domestic supply” in section 211(m)(3)(C) does not suggest congressional intent to bar EPA from considering inadequate domestic supply in the separately-enacted section 211(o)(7)(A) general waiver provision.**

In connection with its 2014-2016 RFS rule, EPA responded to comments proffering an interpretation of EPA's general waiver authority under section 211(o)(7)(A) based on the existence of other, “non-RFS” waiver authority found in CAA section 211(m)(3)(C)(i). In essence, commenters argued that the existence of a waiver authority for oxygenated fuel requirements – which specifically referenced the “distribution capacity” for oxygenated fuel in part of its waiver criteria – meant that EPA could not consider concerns about distribution capacity when granting a general waiver under the RFS program based on “inadequate domestic supply.”

EPA found this argument unpersuasive when *all* of EPA's various waiver authorities for conventional, reformulated, and renewable fuels were taken into account.<sup>25</sup> For example, EPA

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<sup>23</sup> *Id.* at 77436-37.

<sup>24</sup> Nameplate capacity for United States fuel ethanol plants was 14.986 billion gallons as of Jan 1, 2016. *See* <http://www.eia.gov/petroleum/ethanolcapacity/>. As of January, 2016, annual biodiesel production capacity was 2.087 billion gallons, or 3.13 billion RINs. *See* <http://www.eia.gov/biofuels/biodiesel/production/table1.pdf>. Thus, total RINs based on production capacity for these two renewable fuels would total 18.116 billion RINs, or about 684 million RINs above EPA's proposal of 18.8 billion proposal for total RINs in 2016

<sup>25</sup> 80 Fed. Reg. at 77,438.

reasoned that since other CAA section 211 waiver authorities in the reformulated gasoline program distinguish between the “capacity to supply” and “capacity to produce,” the use of the term “inadequate domestic supply” in CAA section 211(o)(7)(A) cannot be considered to be the same thing as an inadequate capacity to produce renewable fuel.

API agrees with EPA that section 211(m)(3)(C) poses no impediment to EPA’s consideration of the adequacy of distribution capacity in determining whether a waiver should be granted under EPA’s general waiver authority in section 211(o)(7)(A). Section 211(m)(3)(C) and the general waiver provision are separate statutory provisions, separately enacted by different Congresses, and each deals with a unique set of circumstances. No congressional intent regarding the general waiver provision can be drawn from Congress’ reference in section 211(m)(3)(C) to “inadequate distribution capacity,” and EPA reasonably interprets section 211(o)(7)(A) to allow similar consideration.

#### **6. EPA’s proposed interpretation does not improperly focus on demand for renewable fuel.**

Some stakeholders have argued that “consideration of all constraints on the use of ethanol by the ultimate consumer would amount to focusing on ‘demand’ rather than ‘supply’ and would, therefore, be impermissible under the Act.”<sup>26</sup> The focus of the RFS, however, as noted previously, is not on the *supply* of renewable fuels (*i.e.*, the raw capacity to produce it) but on *use* of those renewable fuels when blended into the Nation’s supply of transportation fuel. Thus, consideration of the constraints on the use of ethanol does not constitute an impermissible focus on “demand,” but rather a permissible focus on use. Thus, EPA provides a sufficient rebuttal to the stakeholders’ assertion about demand based on the limited number of fueling stations selling ethanol blends above E10 and the limited number of FFVs in existence and with access to E85.

Even putting that aside, the general waiver provision clearly focuses on the “adequacy” of supply. Such a standard inherently requires the exercise of the Administrator’s judgment as to whether the overall supply of transportation fuel containing renewable fuels is constrained based on real world conditions. A range of possible effects flows from an “adequate” versus an “inadequate” supply of transportation fuel, including effects on price, availability, and the ability of the supply of transportation fuel to absorb the specified volumes of renewable fuels. The “adequacy” of the supply of transportation fuel must involve an element of conservatism: if EPA misses the mark by setting the waiver level *too low*, adverse effects in the fuels market may result, including rising fuel and commodity prices for consumers; if EPA sets the level of a waiver *too high*, adverse effects could be felt by certain renewable fuel producers, who may export excess product. The supply of transportation fuel *to the consumer* will not be constrained, however, and consumer fuel prices will remain steady notwithstanding the effects on the renewable fuel producer. The fact that the possible consequences of setting the waiver level too low are more severe and more widespread than the possible consequences of setting the waiver level too high suggests that, where confronted with a choice between the two, EPA should lean

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<sup>26</sup> *Id.* at 33114.

in favor of setting the waiver level on the high end. This provides more protection to the fuel supply and to the consumer of the fuel, the focus of the RFS program.

Simply, Congress evinced no intent in enacting the RFS to limit consumer access to transportation fuel or to effect a rise in fuel and commodity prices solely to benefit renewable fuel producers. Indeed, had consumption of petroleum-based gasoline continued to increase and drop-in advanced biofuels been brought to market as Congress was led to believe would occur, the E10 blendwall likely would not have been the constraining factor it is today. Moreover, while an annual increase in statutory volumes was included within CAA 211(o), the existence of waiver authorities within this section, and a separate provision requiring EPA to “reset” the statutory schedule if waivers of over 20% for two years or over 50% for one year are required, demonstrate that Congress intended to avoid such adverse impacts.

**7. EPA has authority to adjust renewable fuel volumetric requirements through the general waiver provision to avoid limiting supplies of gasoline and diesel fuel in the United States.**

In RFS1 and RFS2, Congress provided EPA with multiple waiver authorities to make adjustments to renewable fuel volumetric requirements to avoid the potential negative consequences of implementing a statutory volume mandate over a multiyear period. In this regard, it is significant that EPA’s general waiver authority is essentially unlimited as to the volumes that may be waived. The provision allows EPA to reduce applicable volumes in each year that an applicable standard applies; it allows for repeated and renewed waivers; and it imposes no limit on the “size” of the necessary waiver or the number of waivers that can be granted over the lifetime of the program.

Thus, the waiver authorities at issue in this rulemaking are specifically designed to allow EPA to address, thoroughly and completely, a number of different situations that could have negative consequences for the Nation’s energy security or severely undermine public support for renewable fuels generally. Congress could not have intended to grant EPA authority to issue waivers only where there is an inability to produce or import renewable fuels, as that would run directly counter to the structure of the law, which is based on the *consumption* of transportation fuel.

**D. The Legislative History of EPA’s General Waiver Authority Supports Broad Availability of Waivers to Address the Adequacy of the Overall Supply of Transportation Fuels**

**1. EPAct granted EPA broad waiver authority that was maintained in EISA.**

As EPA has noted, in EISA Congress specified increasing annual volume requirements for total renewable fuel, advanced biofuel, and cellulosic biofuel through 2022, but also expressly recognized that circumstances might arise justifying reductions, “as evidenced by the waiver provisions in CAA 211(o)(7).”<sup>27</sup> While this observation is true as a general matter, EPA fails to note throughout its discussion of its general waiver authority that this authority did not *originate* in the expanded RFS program enacted by EISA in 2007. Instead, the general waiver authority EPA is proposing to exercise originated in the earlier EPAct, and Congress conspicuously chose not to change its operative provisions in EISA.<sup>28</sup>

As evidenced by the text below, EPA’s ability to waive renewable fuel volumes based on an “inadequate domestic supply” has remained constant since 2005, when the RFS was originally enacted. The only change that Congress made to the waiver provisions when it enacted EISA was to expand the number of parties that were eligible to petition EPA for relief under the general waiver provision. Congress did not alter the substantive criteria for granting a waiver request or otherwise amend or limit EPA’s authority to grant a general waiver based on “inadequate domestic supply.” Thus, there is no basis for any contention that Congress considered but rejected including “distribution capacity” as part of its consideration of the waiver provisions in EISA.

This is apparent from a comparison of the statutory language that existed in EPAct, with the statutory language as amended by EISA:

EPAct 2005 (Section 1501) (CAA section 211(o)(7))<sup>29</sup>

(7) Waivers.—

(A) IN GENERAL.—The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on the petition by one or more States by reducing the national quantity of renewable fuel required under paragraph (2) –

- (i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or
- (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

EISA 2007 (Title II, Sections 201-210) (CAA section 211(o)(7))

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<sup>27</sup> 80 *Federal Register* at 77433.

<sup>28</sup> Compare CAA section 211(o)(7)(A) in EPAct with same provision in EISA.

<sup>29</sup> Section 1501 of EPAct amended section 211 of the Clean Air Act by redesignating subsection (o) as subsection (r) and inserting a new subsection (o) containing the Renewable Fuel Standard program.

(7) Waivers.—

- (A) IN GENERAL.—The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on the petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2) –
- (i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or
  - (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

As can readily be seen, the only language in the general waiver provision that Congress altered during its consideration of EISA involved who can file a petition to waive RFS standards under CAA section 211(o)(7)(A).

With regard to contemporaneous expressions of legislative intent regarding the general waiver provisions, the conference report for EPAct indicates that the House and the Senate agreement was intended to “ensure jobs for our future with secure, affordable, and reliable energy.”<sup>30</sup> There is only a limited Joint Explanatory Statement of the Committee of Conference for EPAct, but this does not directly address the general waiver provision.

The Senate committee report regarding the waiver criteria, however, indicates that the general waiver criteria are based on “opportunities for a State or States to waive the program requirements . . .”<sup>31</sup> Thus, there is nothing in the legislative history to suggest that Congress intended to restrict the use of the general waiver authority as it respects distribution capacity.

It is further instructive to review legislative language that Congress had under consideration during the proceedings leading to passage of EPAct. As evident from the comparison below, the House legislation, H.R. 6, included reference to “distribution capacity to meet the requirement.” The Senate amendment to H.R. 6<sup>32</sup> included language that there “is an inadequate domestic supply to meet the requirement.” The “requirement” referenced in both bills is the “national quantity of renewable fuel required under paragraph (2).”

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<sup>30</sup> H. Rept. 109-90 at 1. The Senate committee report for this legislation, indicates that the purpose of the legislation was to “provide a comprehensive national energy policy that balances domestic energy production with conservation and efficiency efforts to enhance the security of the United States and decrease dependence on foreign sources of oil.” Section-by-Section Analysis, Section 204, Renewable content of motor vehicle fuel, S. Rpt. 109-78, June 9, 2005.

<sup>31</sup> *Id.* at 18-19.

<sup>32</sup> S. 10 was offered as an amendment to H.R. 6 on June 14, 2005. *Congressional Record* at S6496 (June 14, 2005).

As shown below, the conference committee resolved differences between the two versions by deciding to *strike both the House and Senate versions* and, instead, adopt the broader term “inadequate domestic supply” as the waiver criteria. Thus, if any legislative intent can be inferred from this action, it is the intent to adopt *broader* waiver authority, not a narrower mechanism that might impede EPA’s consideration of the supply of transportation fuel to the consumer. Stated another way, Congress deleted language linking the waivers to the national quantity of renewable fuel, instead granting authority to base waivers on the basis of “inadequate domestic supply” a term inherently broader than the term “national quantity of renewable fuel” found in CAA section 211(o)(2).

H.R. 6 (as adopted by the House of Representatives)

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply ~~or distribution capacity to meet the requirement.~~<sup>33</sup>

S. 10 (as adopted by the Senate as amendment to H.R. 6)

(B) based on a determination by the Secretary, after public notice and opportunity for comment, that there is an inadequate domestic supply ~~to meet the requirement.~~<sup>34</sup>

House/Senate Conference Report (adopted by House and Senate)

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

At bottom, it is clear that congressional consideration of the House and Senate versions of the general waiver provision in EPAct resulted in enactment of *broad* waiver authority. Moreover, it should be noted that EPA’s exercise of its waiver authority in the context of this rulemaking is not based on “distribution capacity” but instead is based on a range of considerations that prevent the use of additional renewable fuel in the domestic supply of transportation fuel.

**2. EPA made several errors in its review of the legislative history of the general waiver provision.**

In the preamble to the 2014-2016 Final Rule, EPA states that prior to the adoption of EISA, Congress considered other iterations of possible waiver authority, specifically to allow for a waiver based on “inadequate domestic supply or distribution capacity to meet the requirement.”<sup>35</sup> As outlined above, however, EPA failed to recognize that the referenced language was *not*

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<sup>33</sup> Strikeout language deleted in conference.

<sup>34</sup> Strikeout language deleted in conference.

<sup>35</sup> EPA references H.R. 6 and S. 606 as reported by the Senate Environment and Public Works Committee in Senate Report 109-74..

considered with respect to the adoption of EISA in 2007, but rather with respect to EPCA in 2005. Thus, EPA mistakenly asserts that EISA language on general waiver authority was enacted “in lieu of this alternative formulation.”<sup>36</sup> In fact, this language was *not* contained in legislation that formed the basis of EISA’s amendments to the CAA section 211(o) RFS provisions. Thus, it was not adopted “in lieu of” other waiver language regarding distribution capacity.

Moreover, if it is constructive to look at legislative language that *was not adopted* by Congress in determining the legislative intent of language that *was adopted*, then EPA should also consider that Congress did not adopt other possible amendments to the general RFS waiver authority during its consideration of EISA in 2007.<sup>37</sup> Specifically, on June 21, 2007, the Senate adopted an amendment to H.R. 6, which formed much of the basis of the EISA amendments to the RFS program.<sup>38</sup> Title I of this amendment contained “Subtitle A—Renewable Fuels Standard.” This subtitle included language that was ultimately *not adopted* by the House and the Senate during the conference committee to consider EISA. Specifically, with reference to the general waiver authority, the subtitle approved by the Senate specified the following general waiver authority for renewable fuel standards:

(1) IN GENERAL.—The President, in consultation with the Secretary of Energy, the Secretary of Agriculture, and the Administrator of the Environmental Protection Agency, may waive the requirements of subsection (a) in whole or in part on petition by one or more States by reducing the national quantity of renewable fuel required under subsection (a), based on a determination by the President (after public notice and opportunity for comment), that—

(A) implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(B) extreme and unusual circumstances exist that prevent distribution of an adequate supply of domestically-produced renewable fuel to consumers in the United States.<sup>39</sup>

Thus, in mid-2007 the Senate approved a general waiver provision for renewable fuels that attempted to both restrict the availability of such waivers (*i.e.*, by requiring “extreme and

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<sup>36</sup> 80 *Federal Register* at 77437.

<sup>37</sup> In going to conference on the legislation that would ultimately be enacted as EISA, the Senate first considered H.R. 6, the CLEAN Energy Act of 2007, as approved by the House of Representatives. H.R. 6, as passed by the House, did not contain language amending the RFS, instead the bill consisted of three titles, one respecting the denial of oil and gas tax benefits, measures addressing royalties under offshore oil and gas leases and legislation to create a separate federal account to offset the cost of using renewable and alternative fuels and energy-efficient products. H.R. 6, as approved by the House did not amend the RFS program, but was confereed with Senate legislation containing numerous energy provisions, including provisions affecting renewable fuels.

<sup>38</sup> The Senate amendment, the Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007, was based on legislation reported by the Senate Energy and Natural Resources Committee.

<sup>39</sup> Public Print, June 25, 2007, at 22 (accessed at: <http://www.gpo.gov/fdsys/pkg/BILLS-110hr6pp/pdf/BILLS-110hr6pp.pdf>). Language regarding the criteria for a general waiver that was not adopted as part of the EISA amendments to CAA section 211(o) is highlighted in red.

unusual circumstances” as a precondition to the determination) and to indicate that “supply” specifically meant a supply of “domestically-produced renewable fuel.” Yet a few months later in EISA, Congress did not adopt these changes to the pre-existing EAct waiver criteria of “inadequate domestic supply,” leaving the original EAct language intact. If legislative intent can be derived from this inaction, it would indicate that even though in EISA Congress expanded and extended statutory RFS volume goals to 2022, Congress chose not to impose more stringent waiver language that linked “supply” directly to “renewable fuel.” Again, Congress left intact the broad waiver criteria enacted in EAct.<sup>40</sup>

### **3. Congress did not indicate that EPA’s general waiver authority was only to be “supplemental” to its cellulosic biofuel waiver authority.**

EPA has proposed to exercise both its cellulosic biofuel waiver authority<sup>41</sup> and its general waiver authority to lower proposed volume requirements and corresponding percentage standards for 2017. EPA, in its 2014-2016 proposed rule, indicated that it is using its general waiver authority in “a supplemental fashion” to its cellulosic biofuel waiver authority. EPA also stated that it is exercising its general waiver authority to waive the volume of total renewable fuel and advanced biofuel in excess of the amount allowable under its cellulosic waiver authority.<sup>42</sup>

While API agrees with EPA’s exercise of *both* waiver authorities in these circumstances, we note that EPA is not limited by statute to using its general waiver authority in a “supplemental fashion.” Instead, the E10 blendwall fully justifies the exercise of EPA’s general waiver authority to a degree equal to and beyond that proposed by EPA. EPA appears to recognize this, as its 2014-2016 Final Rule no longer uses the “supplemental fashion” language. Based on an assessment of projected fuel supply, market demand for E0, limited uptake of E85 and E15, and other constraints, EPA should waive applicable volumes for total renewable fuel and advanced biofuel in excess of volumes proposed for 2017.

The general waiver authority exists in the context of other waiver authority contained in the RFS that EPA has not proposed to use in this Proposed Rule.<sup>43</sup> Congress, therefore, considered that

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<sup>40</sup> Amendments to the RFS waiver authority made by EISA respecting who may petition for a waiver originated in the House amendment to the Senate’s approved H.R. 6. On December 6, 2007, the House of Representatives voted to agree to the Senate amendments to H.R. 6 with various amendments to the Senate amendments.

<http://www.gpo.gov/fdsys/pkg/BILLS-110hr6eah/pdf/BILLS-110hr6eah.pdf>. The House approved legislation incorporated only the additional language to expand those permitted to petition EPA for a waiver of RFS requirements. *Id.* at 85. The House adopted waiver language was then approved by the Senate on December 13, 2007 and incorporated into EISA and CAA section 211(o).

<sup>41</sup> EPA actually describes two separate waiver authorities within CAA section 211(o)(7)(D)(i), the first allowing EPA to waive the volume of cellulosic biofuel required, and the second allowing it to waive the total renewable fuel volume and the advanced biofuel volume after applying the first waiver. EPA describes these two separate authorities in the singular as EPA’s “cellulosic waiver authority.” For purposes of these comments, we also adopt this description.

<sup>42</sup> 80 Fed. Reg. 33111

<sup>43</sup> See CAA section 211(o)(7)(E) regarding waiver of biomass-based diesel volumes; CAA section 211(o)(7)(F) regarding waiver of the statutory schedule upon waiver of the RFS volume requirement by 50% in one year or 20%

the applicable volumes of renewable fuel contained in CAA section 211(o)(2)(B) were not immutable requirements to be imposed regardless of the consequences or harm caused. The multiple waiver provisions contained in section 211(o) confirm that Congress sought to balance the specification of applicable volumes of renewable fuels for multiple future years with the authority to waive or change those volumetric requirements through a regulatory process resulting in potentially widespread, multiyear alteration of the statutory applicable volumes. The waiver provisions are therefore best understood as vital protections against the law of unintended consequences.

### **III. Conclusion**

Section 211(o) gives EPA broad authority to grant waivers of the otherwise-applicable annual volumetric requirements specified in the statute when implementation of a specific year's volumetric requirement "would severely harm the economy or environment of a State, a region, or the United States" or when there is "an inadequate domestic supply," and additional authority to waive cellulosic biofuel volumetric obligations when production of cellulosic biofuels is expected to fall short of statutory volumes. Read in context, these provisions plainly give EPA authority to grant a waiver when, as in the year covered by the Proposed Rule, there is not only a massive shortfall in cellulosic biofuel production but also a supply of domestic transportation fuel that is grossly inadequate to accept for blending the volumes of renewable fuels otherwise required by the statute.

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in two consecutive years; CAA section 211(o)(8) regarding study and waiver of the RFS for the initial year of the program.