July 11, 2016

Administrator Gina McCarthy
Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Submitted via regulations.gov

Re: Docket ID No. EPA–HQ–OAR–2016–0004; Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018

Dear Administrator McCarthy:

On behalf of DuPont, I am pleased to offer the following comments on EPA's Proposed Rule on the Renewable Fuels Standards Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018 (May 31, 2016) (hereinafter referred to as the Proposed Rule). Consistent with last year's proposed and final rulemaking for the 2014 to 2016 RVOs and our comments to the agency, DuPont has concerns with EPA's interpretation of the general waiver provision. Annual renewable fuel volumes should be based on the quantity of fuel produced and not dependent on the amount of biofuels that the oil industry is willing to bring to the marketplace. Investments in new technologies and additional cellulosic ethanol capacity are directly dependent on EPA fulfilling its obligations to administering the law. With this proposal, EPA is undermining Total Renewable Fuel Volumes that specifically affects domestic corn ethanol volumes. The domestic corn ethanol industry has the capacity to supply 15 billion gallons of fuel in 2017 and EPA should be setting the RVO accordingly. In addition, corn ethanol plant owners and operators of existing biofuels capacity are among the potential investors for advanced biofuels. Limiting growth for corn ethanol means limited growth for advanced biofuels.

As Congress recognized in 2005 and again in 2007 when it passed the RFS, the program is a unique pathway for reducing the carbon footprint of the transportation sector. Recently, world leaders from the U.S. and more than 170 other countries met at the United Nations to sign an historic accord demanding urgent action to combat climate change. The landmark agreement marks a major milestone in international efforts to decarbonize the world's energy supplies to prevent a disastrous increase in global temperatures. Yet, the U.S. commitment to reducing greenhouse gas emissions does not account for the emission reductions associated with biofuel use because of the RFS. Given that EIA characterizes transportation as the largest contributor of greenhouse gas emissions by end-use sector[1], it is perplexing and a major oversight that biofuels would be excluded from the methodology for calculating the U.S. actions committed to reduce greenhouse gas emissions. DuPont's view is that the U.S. strategy to combat climate change must include all available options including biofuels.

[1] U.S. Energy Information Administration, October 2015 Monthly Energy Review. Table 12.2-12.5. http://www.eia.gov/environment/emissions/carbon/

Already, current U.S. blends of 10 percent ethanol allow American drivers to avoid over 40 million tons of CO_2 emissions. Blends beyond 10 percent ethanol will increase these benefits. New technologies are allowing every gallon of biofuel to achieve higher carbon savings. These technologies are the direct result of investments by companies like DuPont that are working to produce clean-burning alternatives from resources such as agricultural residues and other cellulosic biomass.

Today's corn-based ethanol already produces fewer greenhouse gas emissions over its full life cycle than regular gasoline, reducing emissions by 34 percent. Second-generation cellulosic ethanol is substantially more efficient and getting better every day. In fact, DuPont's new plant in Iowa will produce fuel with at least 90 percent lower carbon emissions than conventional gasoline. Accelerating this progress requires a commitment by policymakers to drive to specific goals and to implement them across large markets. Biofuels policy provides the stability and economic driver needed to decarbonize our fuel supplies. That is why entrenched interests have worked aggressively to undermine the RFS and preserve the status quo. However, relying exclusively on oil as our only source of transportation fuel will never help us reduce human-made greenhouse-gas emissions or reduce pollution.

The U.S. must support all forms of low carbon transportation. Allowing those efforts to be diverted or divided will only guarantee that America misses its last, best chance to revolutionize the entire energy sector and meet the aggressive climate goals that world leaders now recognize as vital to success in the fight against climate change. With the RFS, America has shown that it is possible to embrace alternative energy supplies without harming consumers. Science holds the answers. Biofuels are a part of the solution now, and they belong at the center of any serious plan to protect our planet for future generations.

In addition to providing data and analysis on biofuels and greenhouse gas emissions in Section VI, DuPont's comments will expand upon the following key points:

I. EPA has incorrectly interpreted its statutory authority to issue a general waiver due to inadequate distribution capacity.

II. The proposed 2017 volumes for Total Renewable Fuel fails to account for increased demand for gasoline, E15 and E85 capacity and a 2015 RVO Error Correction

III. The proposed 2017 Total Renewable Fuel volume will continue to prevent growth and investments in new technologies.

IV. Projecting and setting CE volumes should take a facility-by-facility approach

V. Modifications to the Cellulosic Waiver Credit Program are needed to encourage investment in cellulosic ethanol capacity.

VI. If Adopted in a Final Rule, EPA's Proposal Will Continue to Increase U.S. Greenhouse Gas Emissions

Introduction

DuPont's interests in biofuels are diverse and include:

- Pioneer corn seed
- Enzymes supplied to 1st generation corn ethanol and 2nd generation cellulosic ethanol plants
- A 30 million gallon cellulosic ethanol plant in Nevada, IA
- The DuPont/BP joint venture, Butamax

DuPont is an industry leader in providing products for agricultural energy crops, feedstock processing, animal nutrition, and biofuels. Our three-part approach to biofuels includes: (1) improving existing ethanol production through differentiated agriculture seed products, crop protection chemicals, as well as enzymes and other processing aids; (2) developing and supplying new technologies to allow conversion of cellulose to ethanol; and (3) developing and supplying next generation biofuels.

We bring the perspective of a company deeply involved in the agricultural and biofuels industries. Our seed business DuPont Pioneer sells corn seed to farmers growing for a variety of end-use markets, including grain ethanol production. Our intimate relationship with our farmer customers and our extensive research provides us significant insight into the agronomics of the harvest and management of corn stover as a cellulosic feedstock. We provide a variety of products for the grain ethanol business including saccharification enzymes and fermentation processing aids, and have an intimate knowledge of the operation of these relevant sugar fermentation operations.

I. EPA has incorrectly interpreted its statutory authority to issue a general waiver due to inadequate distribution capacity

As with the 2014 to 2016 Renewable Volume Obligation proposed and final rule, EPA has invoked the general waiver authority to reduce Total Renewable Fuel Volumes.

> "…we are also proposing to further reduce total renewable fuel volumes for 2017 using the general waiver authority.
>
> EPA interpreted and applied this waiver provision in the 2014–2016 final rule, and concluded that it was appropriate to use this authority in combination with the cellulosic waiver authority to reduce total renewable volumes for those years. EPA, in consultation with DOE and USDA, continues to find that the circumstances justifying the use of the general waiver authority exist and support a finding of inadequate domestic supply. As discussed in the 2014–2016 final rule, we find that this undefined provision is reasonably and best interpreted to
> encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers, including fuel production, infrastructure and other constraints. This includes, for example, factors affecting the ability to produce or import biofuels as well as factors affecting the ability to distribute, blend, dispense, and consume those renewable fuels as transportation fuel, jet fuel or heating oil."

Given EPA's citation to the 2014 to 2016 Renewable Volume Obligation final rule and the fact that public notice and comment do not follow a final regulation, we are providing a full legal analysis of the RFS general waiver authority as we did in comments to the agency for the proposed 2014 to 2016 Renewable Volume Obligation rule. The analysis is provided in Attachment A to these comments.[2]

Consistent with our comments to the agency on the proposed 2014 to 2016 Renewable Volume Obligation rule, we believe EPA lacks statutory authority to grant the waiver it has proposed under Section 211(o)(7)(A)(ii) of the Clean Air Act. That provision permits EPA to waive renewable fuel requirements in whole or in part if the Administrator determines "that there is an inadequate domestic supply." EPA has proposed an interpretation of this provision that would allow the Agency to consider not just the quantity of renewable fuel the United States can produce but also distribution and use by the ultimate consumer. As explained in Attachment A, this is an interpretation the statute simply cannot bear.

II. The proposed 2017 Total Renewable Fuel Volume fails to account for increased demand for gasoline, E15 and E85 capacity, a 2015 RVO error correction and carryover RINs.

In setting the final 2017 RVOs, there are a number of sources of data that EPA should consider. As described below, utilizing some fairly simple mathematical corrections to reflect new or updated data, we believe that EPA does not need to invoke the general waiver authority to lower the Total Renewable Fuel Volumes as in the proposed rule. EPA can rely solely on its cellulosic waiver authority to alleviate any inadequacy of supply in both advanced and total renewable fuel volumes.

A. EIA projects increased gasoline demand and E85 consumption

EPA derives its estimated ethanol volume of 14.4 billion gallons from a previous Energy Information Administration projection[3], combined with internal estimates of use of E15, E85 and E0, which are variously detailed in memos submitted to the docket for this rulemaking. In more recent projections for 2017, including the June Short Term Energy Outlook and the 2016 Annual Energy Outlook (Early Release)[4], EIA has increased its projected gasoline use for 2017 by nearly 1 billion gallons, from 142 to 143 billion gallons. EIA also projects 735 million gallons of E85 fuel in 2017. This projection for E85 is considerably higher than EPA's internal projections of 200 to 400 million gallons, but not outside the possible range that EPA has recognized in its scenarios. The higher volume of E85 use is also justified by the corresponding increase in projected fuel use. Simple corrections to EPA's calculations based on these updated EIA projections would increase EPA's projection of ethanol use from 14.4 billion gallons to nearly 14.8 billion gallons.

B. E15 and E85 capacity

Today, more than 3,400 stations sell E85 and approximately 210 sell E15. As a result of USDA's BIP program and other initiatives, nearly 2,200 additional stations are in the process of installing equipment to dispense both E85 and E15. The Renewable Fuels Association and Growth Energy

[2] The legal analysis in Attachment A is identical to the analysis submitted on the 2014 to 2016 proposed RVO rule with updated citations to the 2014 to 2016 RVO final rule.
[3] Supporting document to the docket, EPA-HQ-OAR-2016-0004-0017
[4] *See* http://www.eia.gov/forecasts/steo/.

comments to this rulemaking will include a detailed discussion of the fuel use data from these stations and we support EPA's careful consideration of this analysis for purposes of revising the projected E15 and E85 consumption levels for 2017.

C. 2015 RVO error correction

Because the 2014 to 2016 final RVOs were released before data was available on full-year 2015 RIN generation, EPA had to project the net available supply of 2015 RINs available for compliance. EPA clearly states that it intended to take seasonal increases in RIN generation into account when making the projection, but then failed to do so. This led to the 2015 RVO being 90 million gallons lower than it should have been. This uncounted volume should be counted as supply available to meet the 2017 RVO.

D. EPA should include carryover RINs in its consideration of the supply of fuels that could satisfy 2017 RVO requirements

EPA should not exclude carryover RINs from its consideration of the supply of fuels that are available to satisfy 2017 RVO requirements. Doing so would be in direct conflict with the goals of the RFS program, and would be arbitrary and capricious. EPA has no authority to attempt to build a bank of carryover RINs, regardless of whether it might be thought that doing so is important or helpful. The notion of an ongoing bank of carryover RINs is inconsistent with the text and purpose of the relevant statutory provision. Moreover, building and preserving a RIN bank as a justification for waiving statutory volume requirements is particularly perverse and unlawful. EPA's arbitrary and unlawful decision to build a bank of carryover RINs directly harms biofuel producers and obligated parties who have invested in biofuel production and distribution capacity. By cheapening the value and utility of RINs, EPA's bank-building actions severely harm some parties, even while the agency is demonstrably unable to guarantee a benefit to others.

In the 2010 RFS Implementing Rule, EPA demonstrated the regulatory flexibility it has in accommodating carryover deficits and carryover RINs. In that case, EPA was required to transition from the RFS1 program to the RFS2 program. In doing so, EPA permitted obligated parties to carryover RINs generated from the RFS1 program and use them for their RFS2 obligations. In the 2010 rule EPA states: "…since RINs generated in January through June of 2010 will be generated under RFS1 regulations, we must provide a means for them to be used to meet the annual 2010 RFS2 standards." 75 Fed. Reg. 14,723. The RFS2 standards required more of obligated parties than under the RFS1 program and is analogous to the present circumstance where the RFS statute requires EPA to establish biofuel blending beyond 10%. Given EPA's history of adapting the regulations to meet the given challenge, including carrying over deficits and RINs, the agency has the requisite authority to do so for the present rulemaking.

In the current proposed rule, EPA recognizes this flexibility. "While we acknowledge the uncertainty that the market has experienced due to the delay, our proposal to determine the applicable requirements to account for past production for both 2014 and 2015 means that there will be an adequate quantity of RINs available to satisfy those portions of the proposed requirements. In addition, there are a number of program flexibilities that will facilitate compliance. There is a considerable bank of carryover RINs that can be used to comply with up to 20% of the 2014 RVOs, and to the extent it is not used, that bank of carryover RINs can be rolled forward to assist in compliance with 2015 and 2016 requirements." 80 Fed. Reg. 33,108. Even recognizing the flexibility, EPA has decided to give the oil industry a free pass to bank the RINs. An increase in the number of banked RINs will keep RIN prices low.

The agency goes on to say, "To set the volume requirements at a higher level would require either noncompliance, which EPA deems an unreasonable approach, or the drawdown of the bank of carryover RINs. Although the availability of carryover RINs is a relevant consideration in determining the extent to which a waiver is justified, see *Monroe* 750 F.3d at 917*,* we believe that carryover RINs serve an important function under the program, including providing a means of compliance when natural disasters cause unexpected supply limitations, and that in the current circumstances EPA should not set the annual standards for 2014-2016 at levels that would clearly necessitate a reduction in the current bank of carryover RINs." 80 Fed. Reg. 33,114. This analysis is in direct conflict with the regulatory flexibilities that the RFS provides. First, setting the volumes at a higher level would not result in noncompliance. Obligated parties threaten noncompliance but there are a number of readily available market based options to facilitate meeting their obligations. Second, if a natural disaster were to cause supply limitations either for biofuels suppliers or gasoline suppliers or refiners, EPA has existing waiver authority for economic hardship or biofuels supply shortages. Therefore, the explanation that EPA gives for refusing to account for carryover RINs in setting biofuels volumes in 2014, 2015 and 2016 isn't based in reality and serves to let the oil industry escape from blending addition biofuels.

Recently, EPA published new annual data on RIN transactions for 2010 to 2014.[5] This new data supports DuPont's suggestion that there are sufficiently large carryover stocks of RINs available to assist obligated parties in meeting their RVOs—thereby contradicting EPA's illogical dismissal of carryover RINs in the determination of "available supply" in the 2017 RVO proposal.

In addition to carryover RINs, the 2014 and 2015 volumes should account for some portion of exports that would have been blended in the U.S. fuel supply if EPA had set the RVO's as the statute requires. According to the Energy Information Administration (EIA) monthly supply data through December 2014, U.S. exports of fuel ethanol in 2014 reached their second-highest level at a total of 826 million gallons. This level was second only to the 1.2 billion gallons exported during 2011 and 33% more than exports of fuel ethanol in 2013. Given this data, the U.S. exported approximately 205 million gallons of ethanol in 2014 that should be accounted for in the RVO. A similar projection for 2015 exports should be accounted for in the 2015 RVO.

Given the quantity of carryover RINs and the volume of exports for 2014 and 2015, DuPont recommends that EPA set the 2014 Total Renewable Fuel Volume at 16.433 billion gallons and the 2015 Total Renewable Fuel Volume at a value higher than 17.606 billion gallons depending on the cellulosic ethanol RVO.

Finally, the RFS program itself contains a number of inherent flexibilities that can be used to mitigate or reduce burdens on obligated parties, such as the use of carryover RINs and the option to carry compliance deficits forward. In addition, EPA may consider extending relevant compliance deadlines (as it has done in the past), as a preferable alternative to the more extreme and improper course of unnecessarily reducing volumes below statutory requirements. In a specific factual context, the D.C. Circuit upheld EPA's extension of a compliance deadline as a "way to balance obligated parties' interest in regulatory certainty with EPA's statutory obligation to ensure the renewable fuel volumes are annually met."[6] At the same time, EPA must avoid unnecessarily extending compliance deadlines, which can further destabilize the program, and which could in some circumstances exceed EPA's legal authority. EPA must also take care to avoid approving

[5] http://epa.gov/otaq/fuels/rfsdata/rin-sales-summary.htm?cm_mid=4806793&cm_crmid=19529e77-9437-df11-bf30-001e0b613b64&cm_medium=email

[6] 750 F.3d at 920.

compliance deadline extensions that adversely affect the value of RINs, undermining the incentives that are essential to the success of the program as Congress designed it.

III. The proposed 2017 Total Renewable Fuel Volume will prevent growth and investments in new technologies

In the Proposed Rule, EPA states that "the total volume of ethanol that could reasonably be consumed is a function of three factors: (1) the overall demand for gasoline; (2) the consumption of ethanol as E10, E15 and E85; and (3) the presence of non-oxygenated gasoline (E0)." Given the foregoing analysis, DuPont believes that EPA's proposed method of determining the volume of ethanol that can be consumed is based on a mistaken belief that the E10 blendwall is a controlling factor in setting the renewable fuel volumes. DuPont strongly objects to this approach. At the time Congress passed the RFS2 and when EPA finalized the 2010 implementing rule, it was well known that renewable fuel would eventually need to be blended above ten percent in order to meet the increasing statutory volumes. DuPont recommends that EPA abandon the proposed methodology for setting the renewable fuel volumes and instead rely on the statutory volumes incorporated in the 2010 implementing rule unless EPA has indication that all biofuels plants combined cannot produce these volumes. Using this approach, DuPont recommends that EPA set the 2017 Total Renewable Fuel Volume at a value higher than 19.5 billion gallons depending on the cellulosic ethanol RVO.

EPA's reliance on the E10 blendwall sets a precedent that is inconsistent with long term growth. Even if the statute were to give EPA the authority suggested by the proposed rule, DuPont believes that market conditions would not warrant reducing the total ethanol RVO below the level established in the 2010 RFS implementing rule.[7] EPA asserts in the proposed rule that it has the discretion "to consider the full range of constraints, including legal, fuel infrastructure and other constraints that could result in an inadequate supply of renewable fuel to consumers."[8] DuPont believes that the perceived constraints on delivering renewable fuel to consumers are nothing more than oil industry created obstacles to competition. The so-called E10 blendwall is not an actual physical barrier to increased biofuels consumption. Options exist today for additional biofuels consumption, provided the fuel marketing and distribution system allows for appropriate access and pricing mechanisms.

EPA can correct course in the 2017 rule by reversing its use of the general waiver authority to reduce fuel volumes, raising advanced biofuel volumes sufficiently to obviate competition among biofuel developers, and carrying out its statutory responsibility to ensure that U.S. transportation fuel market is open to every gallon of renewable fuel that can be produced, up to the statutorily set volumes.

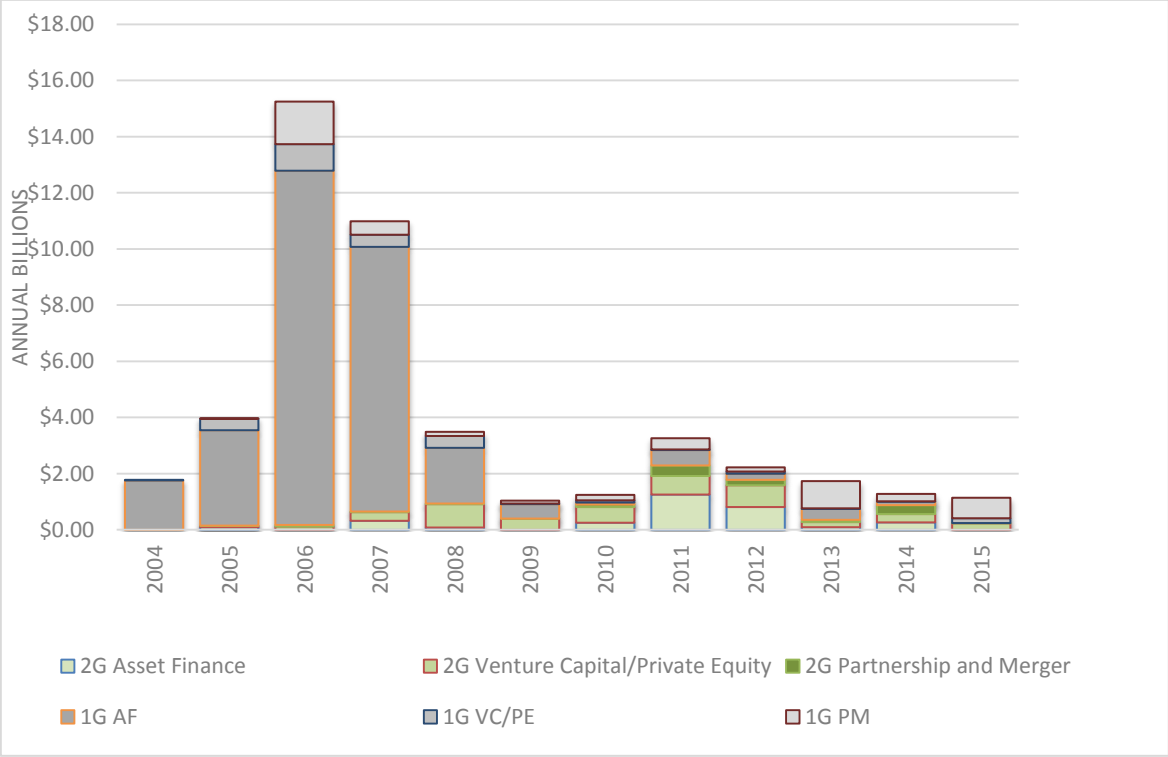
As the data in Figure 2 below demonstrate, investors reacted almost immediately and very strongly to EPA's delays and changes to its interpretation of and approach to the RFS statute and program since 2013. Investment in second-generation biofuel (commercial production as well as piloting and demonstration of advanced biofuel, excluding soy biodiesel) had been increasing over time from the establishment of the RFS2 in 2007 through 2012. The type of investment in second-generation technologies was also beginning to shift from venture capital and private equity, which is characteristic of early stage technologies, to partnerships, mergers and asset financing (or debt equity), which is more characteristic of a maturing industry. New commercial-scale cellulosic and advanced biofuel biorefineries began to start up operations in 2013 and prove production

[7] 75 Fed. Reg. 14,670 (Mar. 26, 2010).
[8] 80 Fed. Reg. 33,113.

technologies and processes. Yet, no new commercial-scale production facilities have broken ground in their wake.

Instead, in 2013 there was a sharp drop in investment in advanced biofuel production and an increase in first-generation partnerships and mergers. While there was some renewed activity in 2014, there were no asset financing deals reported during 2015.

Figure 2: Annual Investment in First- and Second-Generation Biofuels by Type[9]



Both EPA's delays in RFS rulemakings and EPA's methodology and approach to the statutory program have undercut the high-value asset finance or partnering investments necessary to continue progress in building large-scale production facilities. In fact, the methodology has had a demonstrably larger impact. The number of deal announcements in 2014 was similar to the number in 2011, even though the overall value of the deals was cut in half, while EPA delayed finalizing a rulemaking it had proposed in 2013. But the number of deals shrank considerably in 2015 as EPA first issued a proposal and then finalized a rule setting in stone a damaging methodology.

IV. Analyzing, projecting and setting cellulosic ethanol volumes

A. EPA should take a facility by facility approach

Section 7545(o)(7)(D)(i) of the Clean Air Act provides that EPA's annual "projected volume of cellulosic biofuel production" should be "based on" EIA's estimates of future production volumes. 42 U.S.C. §§ 7545(o)(3)(B), 7545(o)(7)(D)(i). In *API v. EPA*, however, the D.C. Circuit recognized

[9] Data from Bloomberg New Energy Finance; Ocean Park Advisors; United Nations Environment Programme.

that “[p]lainly Congress didn’t contemplate slavish adherence by EPA to the EIA estimate; had it so intended, it could have skipped the EPA ‘determination’ altogether.” 706 F.3d at 478. Nevertheless, the D.C. Circuit held that EPA’s methodology for determining the “projected volume of cellulosic ethanol” must yield “a prediction of what will *actually* happen” as opposed to one that systematically overstates or understates future production. *Id*. at 479. Since EPA has not adopted EIA’s estimates for cellulosic ethanol production, EPA must adopt a methodology for determining projected volumes of cellulosic ethanol production that does not systematically overstate or understate those volumes.

DuPont believes that there are a number of different approaches that EPA could have used to project cellulosic volumes that would result in estimates consistent with the D.C. Circuit’s instructions. While DuPont is generally supportive of the methodology that EPA chose for the proposed and final 2016 volumes and the proposed 2017 volumes, we believe that EPA could improve on the approach. Specifically, EPA’s approach separates facilities into two major categories: (1) those facilities without consistent commercial scale production; and (2) facilities with consistent commercial scale production. EPA then applies a discount, 75% for the first category and 50% for the second category. By applying an across-the-board, one-size-fits-all discount to each facility, this approach does not take a facility-by-facility approach for projecting what each individual plant will produce. We believe that a summation of projections from each facility would yield a more accurate projection of fuel volumes.

DuPont recommends that in projecting future cellulosic ethanol volumes that EPA defer to the technical expertise of: (1) the cellulosic ethanol manufacturers including plant operators and engineers in their respective volume projections; and (2) EPA staff expertise and judgment. While predicting the future is difficult, this approach will result in the closest projection of what will actually happen for 2017 and future years for new and existing facilities coming on-line.

DuPont believes that the best path to set accurate volumes for cellulosic ethanol approach involves the interview process that EPA has used in the past but with the addition of directed questions aimed at the three major areas of risk for any new project. The first risk is committed funding and progress toward project completion. This will likely mean steel in the ground for any production facility as well as receipt of all permits. The second risk is committed supplies of feedstock and biocatalysts such as enzymes and a fully implemented process for disposal of co-products. The third risk area is process reliability which could be evaluated based on the size of and the project sponsor’s experience with pilot facilities. A more detailed interview should be developed, and we believe that this process would reduce any unrealistic optimism that project sponsors might communicate. EPA could then form its own conclusion based on the results of each interview.

For facilities that EPA classifies as having “consistent commercial scale production,” any uncertainty associated with the high end of the projected range for each of these facilities should be evaluated on an individual basis. Like with DuPont’s recommendation for new facilities, EPA should defer to the technical expertise of: (1) the cellulosic ethanol manufacturers in their respective volume projections; and (2) EPA staff expertise and judgment. EPA should develop a more detailed interview process that would reduce any unrealistic optimism that project sponsors might communicate. EPA could then form its own conclusion based on the results of each interview. Volumes from each likely supplier should be added to reach a total projection for available cellulosic ethanol supply for a calendar year.

B. Based on data provided in the proposed rule and projected growth for the biogas industry, the proposed cellulosic ethanol volume for 2017 is too low.

As a result of our suggestion for EPA to develop a more detailed interview process for evaluating each cellulosic ethanol facility's production, DuPont requests that EPA reopen the docket and collect the necessary data for 2017. Given this, it is not possible for DuPont to make a specific recommendation on the cellulosic volume for calendar year 2017. However, given that EPA may not be persuaded that additional data collection is warranted, DuPont recognizes the need to supply EPA with feedback on the proposed cellulosic ethanol volume for 2017.
DuPont is concerned that EPA has underestimated the production volume for biogas for 2017. Given the nature of the CNG/LNG industry, we recognize that the amount of biogas that will be dedicated to the transportation sector is not easy to predict. However, the Coalition for Renewable Natural Gas conducted this analysis and provided it to EPA in a March 2016 letter.[10] The Renewable Natural Gas Coalition's fuel projection for biogas for 2017 is approximately 376 million gallons. While DuPont is unable to provide feedback on whether 376 million gallons of biogas is a reasonable projection, we believe this should be the starting point for setting the 2017 cellulosic ethanol volumes with a particular focus on facilities that have already generated RINs. For those locations that have already generated RINs and have a production history, a 75% reduction in their individual production level may not be warranted. We offer this approach because biogas will comprise the overwhelming majority of the total cellulosic ethanol volumes and the projection from the Coalition for Renewable Natural Gas significantly exceeds the 284 million gallons that EPA proposed for 2017.

Accurately projecting biogas volumes combined with cellulosic ethanol imports and an EPA effort to develop a more detailed interview process for producers will improve the accuracy for projecting cellulosic ethanol volumes and support the conclusion that EPA has underestimated the value for 2017.

V. Cellulosic Waiver Credit program

EPA's administration of the cellulosic waiver credit program and flexibility to make changes to it is critical to creating the right incentives for obligated parties to buy D3 gallons as opposed to defaulting to the waiver credit. Administering it in a way that requires obligated parties to buy D3 gallons is fundamental to the success of new cellulosic ethanol capacity and technologies and to attracting additional investment. While we realize that EPA did request comment on the Cellulosic Waiver Credit Program, we view its administration as fundamental to the overall RFS program.

A. EPA's authority to make adjustments to the CWC program and the need for adjustments

As communicated in a memo to EPA on January 7, 2015 from the Advanced Ethanol Council and the Renewable Fuels Association, the following sets forth EPA's authority to make adjustments to the cellulosic waiver credit program.

Cellulosic biofuel producers recently expressed their concerns to EPA about the transparency and liquidity of the D3 RIN marketplace. Some cellulosic biofuel producers are reporting that obligated

[10] Memo from the Renewable Natural Gas Coalition, RNG Coalition 2017 Cellulosic Biofuel Projected Volume, provided to D. Burkholder at EPA on March 23, 2016.

parties are not engaging in offtake for liquid gallons of cellulosic biofuel because of the availability of Cellulosic Biofuel Waiver Credits (CWCs) and past decisions by EPA to refund obligated parties for purchases of CWCs. Concerned parties in the cellulosic biofuel sector believe that EPA could remedy the problem by making adjustments to its current approach to administering CWCs. This section explores the legal question of how much flexibility EPA has under the statute to modify how it administers CWCs as part of its broader authorities under the RFS.

i. The Cellulosic Waiver Credit provision in the 2007 Energy Bill

Generally speaking, there is broad agreement that EPA is required by Clean Air Act section 211(o)(7)(D)(ii) to issue CWCs whenever it acts to waive any part of the cellulosic biofuel volumetric standard pursuant to its authorities and obligations under section 211(o)(7)(D)(i). Congress required EPA to promulgate regulations to govern the issuance of CWCs, based on the pricing formula established by section 211(o)(7)(D)(ii) and to address certain policy objectives set forth in section 211(o)(7)(D)(iii), which reads in its entirety:

> (iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

One of the key questions under consideration is how much authority EPA has to control the number of CWCs issued in any given year. While section 211(o)(7)(D)(iii) clearly specifies that the number of CWCs made available may not exceed the applicable volume of cellulosic biofuel (i.e., the cellulosic biofuel RVO for that calendar year), it clearly *does not* establish a minimum number of CWCs that must be made available by EPA.

According to 211(o)(7)(D)(iii), "[t]he regulations shall **limit** the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year." When used as a verb, as in statutory text above, the term "limit" means to "to restrict the bounds or limits of" or "to assign certain limits to." The noun "limit" included in the definition for the verb "limit" means "[a]n amount or number that is the *highest allowed*," "[t]he *utmost extent*," or "[a] prescribed *maximum* amount, quantity, or number." Thus, use of the term "limit" in 211(o)(7)(D)(iii) means EPA may not issue more CWCs than the "highest allowed" or "maximum" amount, which is defined as being equal to the finalized cellulosic biofuel RVO. As such, the statute establishes that waiver credits made available for sale may not *exceed* the cellulosic biofuel RVO (as reduced under 211(o)(7)(D)(i)), but does not prohibit EPA from making available an amount of waiver credits that is *less than* the cellulosic biofuel RVO.

This reading of the term "limit" is further supported by the surrounding text, which instructs EPA to:

…include such provisions, including *limiting the credits' uses* and useful life, as the Administrator deems appropriate to *assist market liquidity* and transparency, to *provide appropriate certainty for regulated entities and renewable fuel producers*, and to ***limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels***, and for such other purposes as the Administrator determines will help achieve the goals of this subsection.

ii. EPA's interpretation of Section 211(o)(7)(D)(iii)

The final rule establishing the RFS (published March 26, 2010) includes the rules governing the issuance of CWCs required by section 211(o)(7)(D)(iii). As part of this process, EPA recognized that: (1) "Congress afforded the Agency *considerable flexibility* in implementing the system of cellulosic biofuel credits;" (2) the waiver credit system should facilitate the broader aims of the RFS to promote advanced biofuels; (3) the availability of waiver credits could have "unintended consequences," and, (4) restrictions on the use of waiver credits are being enforced by EPA at least in part to "ensure that waiver credits are not overutilized at the expense of actual renewable volume."[11] As such, there appears to be agreement amongst affected parties and EPA that the Agency has considerable latitude to administer the CWC program in such a way as to facilitate rather than undercut the broader goals of the RFS program.

With regard to the legal constraints around the specific number of CWCs issued by EPA in any given year, the Agency appears to agree that Congress's use of the term "limit" establishes an upper bound for the quantity of CWCs issued rather than a requirement to align the quantity of waiver credits issued with the cellulosic biofuel RVO for the respective year. In summarizing its authority to issue waiver credits as part of the final rule, EPA states that "[w]henever EPA sets the cellulosic biofuel standard at a level lower than that required in EISA, but greater than zero, EPA is required to provide a number of cellulosic credits for sale that is ***no more than*** the volume used to set the standard."[12] As such, there should be agreement among the parties that Congress capped the number of CWCs that can be issued by EPA in any cellulosic biofuel "waiver year" to the total cellulosic biofuel RVO for that year without prescribing that these quantities must match.

The issue with regard to the quantity of CWCs made available by EPA seems to stem from EPA's apparent decision to nonetheless declare that the quantity of waiver credits issued in a cellulosic biofuel "waiver year" would be "equal to" the cellulosic biofuel RVO for that year.[13] However, the purpose of this section is to delineate what EPA *has the authority to do* within the directive set forth by Congress to establish a CWC system, as opposed to what the Agency *decided to do* during the rulemaking within those constraints. The Agency does not assert in the final rule that its decision to align the number of CWCs issued with the cellulosic biofuel RVO is required by law. And there does not appear to be a rationale provided by EPA in the final rule for its decision to match the number of CWCs issued to the RVO. As discussed, the Agency's own statements in the final rule evidence the opposite conclusion: that EPA is not required to align these numbers. As such, we believe that the Agency has the authority to make available a quantity of CWCs that is less than the final cellulosic biofuel RVO, and any decision to do so would be consistent with the Agency's own interpretation of its legal authorities under the statute even while it is a different position than the one set forth by EPA in the final rule.

[11] See 75 FR 14,727.

[12] See 75 FR 14,726. Emphasis added.

[13] See CFR §80.1456, accessed at 75 FR 14892. U.S. EPA states that "[t]he total cellulosic biofuel waiver credits available will be equal to the reduced cellulosic biofuel volume established by EPA for the compliance year."

B. Recommendations to the Cellulosic Waiver Credit program to incent purchases of D3 gallons

EPA should address the unintended consequence that an abundance of cellulosic waiver credits has had on the cellulosic biofuel market. With the way EPA currently administers the CWC program, there is no certainty that available production of cellulosic biofuel with D3 RINs attached will be purchased or used by obligated parties and thus investment in cellulosic biofuels is not appropriately incentivized. The problem of CWCs being purchased in lieu of cellulosic biofuels with D3 RINS is apparent. The magnitude of the problem will increase as cellulosic biofuel production increases during 2015. The consequence of available cellulosic volumes with D3 RINs attached not being purchased clearly falls within the category of unintended consequences that EPA has acknowledged could occur. EPA should promptly modify the rules which allow obligated parties to purchase CWCs in lieu of making good faith efforts to purchase cellulosic biofuel gallons in order to align the CWC program with Congressional intent.

VI. If adopted in a final rule, EPA's proposed biofuel volumes will continue to increase U.S. greenhouse gas emissions

EPA recognizes the global importance of "limiting GHGs from major emitting sectors, such as electricity production and transportation."[14] Yet EPA's new substantive approach to the RFS, combined with its failure to establish RFS volumes in a timely manner for 2014 and 2015 – which EPA acknowledges negatively affected how it set volumes for 2016[15] – resulted in a measurable increase in greenhouse gas emissions. According to the Energy Information Administration, emissions from the transportation sector in 2015 surpassed those of the electricity production sector.[16]

EPA's failure to set RFS volumes that guarantee an increasing displacement, over time, of fossil fuels is a failure that subverts the intent of Congress and the design of the program. Because EPA is adopting the same methodology for setting the 2017 volumes, if the volumes EPA proposes for 2017 are finalized, the United States will continue to forego attainable reductions in greenhouse gas emissions from the transportation sector.

A. Reductions in greenhouse gas emissions will not be achieved unless biofuels displace fossil fuels

The RFS was designed to reduce U.S. greenhouse gas emissions by displacing fossil fuels with less carbon intensive biofuels in transportation. Prior to the proposed rule for 2017, EPA recognized that achieving this goal of the RFS depended on ensuring "that biofuels replace fossil fuels used in transportation fuel in the United States."[17] With the proposed 2017 rule, however, EPA now seems to suggest that it is sufficient merely "[t]o increase the use of renewable fuels in the U.S. transportation system every year in order to reduce greenhouse gases," regardless of

[14] EPA, Office of Atmospheric Programs, "Climate Change in the United States: Benefits of Global Action," EPA 430-R-15-001, *available at* http://www2.epa.gov/sites/production/files/2015-06/documents/cirareport.pdf.
[15] 80 Fed. Reg. 34,798.
[16] "May 2016: Monthly Energy Review." Energy Information Administration, May 25, 2016. http://www.eia.gov/mer.
[17] EPA OTAQ, "Renewable Fuel Standards for 2014, 2015 and 2016, and the Biomass-Based Diesel Volume for 2017: Response to Comments." EPA-420-R-15-024, November 2015, 2.3.1, p.86 et seq. *See also* 2014-2016 RFS Proposal at 33121 ("The purpose of the RFS program is to ensure that renewable fuels are increasingly used to replace or reduce the use of fossil-fuel based transportation fuel."); 2014-2016 RFS Rule at 77421 (Increased use of renewable fuels means less use of fossil fuels, which generally results in lower GHG emissions over time.").

whether fossil fuels are displaced.[18] To the extent that such language represents a change in emphasis or approach on the part of EPA, such a change is mistaken and is inconsistent with the purposes of the governing statute.

Greenhouse gas reduction is dependent on measurable fossil fuel use reduction because the greenhouse gas intensity of petroleum fuels has grown worse since 2007.[19] At the same time, the greenhouse gas intensity of biofuels has improved, as production has become more efficient.[20] EPA's proposal for 2017 cuts short the effectiveness of the RFS program for emission reduction by limiting market space for renewable fuels and guaranteeing more market space for petroleum fuels.

Despite EPA's prior concern that there was "less growth in gasoline use than was expected when Congress enacted these [RFS] provisions in 2007",[21] the Energy Information Administration currently projects gasoline and diesel fuel use to increase through 2017.[22] The increased use of transportation fuel in 2014 and 2015 led to increases in greenhouse gas emissions from the U.S. transportation sector year to year. In 2016, ongoing increases in transportation fuel use continue to increase greenhouse gas emissions. The projected increased use of transportation fuel in 2017 will also increase greenhouse gas emissions during the year. EPA could, however, substantially mitigate this anticipated increase by setting higher volumes for conventional and advanced biofuels for 2017.

According to EIA, U.S. transportation fuel use increased from 180 billion gallons in 2014 to 182 billion gallons in 2015. EIA projects that this number will increase further in 2016 and reach 183.2 billion gallons in 2017. EPA's failure to establish annual RFS volumes during 2014 and 2015 allowed obligated parties to meet increased transportation fuel demand with increased use of petroleum fuels, rather than renewable fuels, increasing greenhouse gas emissions beyond achievable levels. The Biotechnology Innovation Organization (BIO) estimates that transportation-related greenhouse gas emissions increased by 72 million metric tons in 2014 and again by 22.9 million metric tons in 2015. BIO also estimates greenhouse gas emissions will increase in 2016 by an additional 6.9 million metric tons and in 2017 by 16.8 million metric tons if EPA finalizes the biofuel volumes it proposed.

If EPA had maintained the successful approach to the RFS that EPA used in 2013, EPA could have considerably limited greenhouse gas emissions from the increase in transportation fuel use. EPA suggests that the greenhouse gas emissions reductions were not achievable because the statutory "volumes were not supportable."[23] The proposed rule avoids analyzing the GHG impacts

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[18] Proposed Rule at 34779; *but cf. id.* at 34803 ("When the RFS program is fully phased in, the program will result in considerable volumes of renewable fuels that will reduce GHG emissions in comparison to the fossil fuels which they replace. . . . Through the RFS program, EPA is creating a sustained market signal to incentivize low greenhouse gas renewable fuels, especially for advanced biofuels. This should provide a way to reduce GHG emissions in future years as the market for renewable fuels develops further.").

[19] Wang, M., J. Han, J. Dunn, H. Cai, and A. Elgowainy, 2012, "Well-to-Wheels Energy Use and Greenhouse Gas Emissions of Ethanol from Corn, Sugarcane and Cellulosic Biomass for US Use," Environmental Research Letter, 7 (2012) 045905 (13pp).

[20] Energy Information Administration, Corn ethanol yields continue to improve, Today in Energy (May 13, 2015), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=21212.

[21] 80 Fed. Reg. 33,101.

[22] Energy Information Administration, Annual Energy Outlook 2016 Early Release, Report No. DOE/EIA-0383ER(2016), May 17, 2016, *available at* http://www.eia.gov/forecasts/aeo/er/index.cfm.

[23] Response to Comments, 8.1, pp.757-58.

for 2017.[24] And yet, EPA analyzes other costs of the 2017 rule such as the compliance costs of obligated parties, using 2016 as the baseline.[25] By foregoing use of the general waiver to reduce overall volumes and limiting use of the cellulosic waiver to reduce advanced and overall volumes, EPA could in fact minimize growth in greenhouse gas emissions for 2017.

VII. Recommendations and Conclusion

In summary, DuPont submits that EPA has incorrectly interpreted the general waiver provision. The goal for every annual RVO rulemaking should be to make renewable fuels more widely available and economically competitive. EPA's interpretation and use of the general waiver authority sets a precedent for the RFS rulemaking process that makes it impossible to predict with any certainty what biofuels volumes will be for a particular year. This approach undermines the long term certainty that is needed in order to make investments in new technologies and capacity attractive.

It is also difficult to understand why the aggressive U.S. commitment to global cooperation to reducing greenhouse gas emissions at COP21 does not include biofuels. There are limited opportunities to make significant shifts in how we supply energy to major economic sectors. For the transport sector and the electric power grid, the U.S. should be utilizing an all-of-the above strategy for reducing emissions and biofuels should be part of the equation.

Thank you for the opportunity to comment on EPA's 2017 Proposed RVO Rule. Please contact me at Jan.Koninckx@dupont.com if you have any questions about the comments provided.

Sincerely,

Jan Koninckx, Global Business Director, Advanced Biofuels
DuPont, Industrial Biosciences

[24] See ''Illustrative Costs Impact of the Proposed Annual RFS2 Standards, 2017'', Memorandum from Aaron Sobel and Michael Shelby to EPA Docket EPA–HQ–OAR–2016–0004.
[25] 80 Fed. Reg. 34,801.

Attachment A: DuPont's legal analysis of the RFS General Waiver provision and EPA's reliance on it for setting the annual RVOs

We believe EPA lacks statutory authority to grant the waiver, as the agency has interpreted, under Section 211(o)(7)(A)(ii) of the Clean Air Act. That provision permits EPA to waive renewable fuel requirements in whole or in part if the Administrator determines "that there is an inadequate domestic supply." EPA is relying on an interpretation of this provision that would allow the Agency to consider not just the quantity of renewable fuel the United States can produce but also "…to consider supply in terms of distribution and use by the ultimate consumer, and that the term ''inadequate supply'' of a fuel need not be read as referring to just the capacity to produce renewable fuel or the capacity to supply it to obligated parties and blenders." Renewable Fuel Standard Program: Standards for 2014, 2015 and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,437 (December 14, 2015). This is an interpretation the statute cannot bear.

Under the *Chevron* framework, the first question in evaluating an agency's construction of a statute it administers is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If employing the "traditional tools of statutory construction" yields a clear answer, "that is the end of the matter" and the agency "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43 & n.9. If, however, the statute remains "silent or ambiguous with respect to the specific issue," courts will defer to an agency's "permissible construction of the statute," *id*. at 843—that is, a construction that "go[es] no further than the ambiguity will fairly allow," *City of Arlington v. FEC*, 133 S. Ct. 1863, 1874 (2013).

A. EPA's Interpretation of the General Waiver Authority Fails Chevron Step One

EPA's proposed interpretation of its waiver authority under Section 211(o)(7)(A)(ii) fails at step one of the *Chevron* analysis. The traditional tools of statutory construction, which include evaluating the statute's "text, legislative history, structure, and purpose," *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000), yield a clear answer to the question at issue: EPA may issue a waiver under Section 211(o)(7)(A)(ii) only where producers in the United States are unable to produce a sufficient quantity of renewable fuel, such as ethanol, to meet the statutory requirements. For this reason, DuPont recommends in our introductory summary that there should be no reduction in Total Renewable Fuel Volumes for 2017 unless EPA has data that all biofuel plants combined cannot produce the RFS statutory volume. Limitations in the capacity to distribute blended renewable fuel to the ultimate consumers are not sufficient grounds for a waiver.

1. The Statutory Text and Structure Does Not Support EPA's Interpretation

The clearest indicator of congressional intent is the statutory text. Section 211(o)(7)(A)(ii) permits EPA to "reduc[e] the national quantity of renewable fuel required under paragraph (2) . . . based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply." The plain meaning of this provision is that the Administrator may only grant a waiver if there is an inadequate domestic supply of *neat renewable fuel* available to *obligated parties*.

The phrase "inadequate domestic supply" in Section 211(o)(7)(A)(ii) unambiguously refers back to "renewable fuel required under paragraph (2)." And the phrase "renewable fuel required under paragraph (2)," it is clear, describes pure (or "neat") renewable fuel, not blended fuel. The statute defines "renewable fuel" to mean "fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel." CAA Section

211(o)(1)(J). Because it is used to "reduce the quantity of fossil fuel" in "a transportation fuel," "renewable fuel" unambiguously refers only to neat renewable fuel made exclusively from renewable biomass, not blended fuel comprising a mix of fuel made from renewable biomass and fossil fuel, such as petroleum.

Further, paragraph (2) of Section 211(o) specifies the "applicable volume of renewable fuel" that must be "contain[ed]" within "transportation fuel." CAA Section 211(o)(2)(A)(i). The volumes listed in paragraph (2)—18.15 billion gallons of renewable fuel for 2014, for example—are volumes of neat renewable fuel, not blended fuel. Thus, an "inadequate domestic supply" of "renewable fuel required under paragraph (2)" means an insufficient supply of neat renewable fuel, not blended fuel. And because neat renewable fuel is supplied directly to obligated parties, not ultimate consumers, only when the supply of neat renewable fuel available to obligated parties for blending into transportation fuel is inadequate may the Administrator grant a general waiver under Section 211(o)(7)(A)(ii).

EPA nevertheless asserts the statute is ambiguous on these points because it "does not specify what product is at issue (for example, neat renewable fuel or renewable fuel that is blended with transportation fuel) or the person or place at issue (for example, obligated party, blender or ultimate consumer)." 80 Fed. Reg. 77,435. EPA did not, however, think the provision ambiguous when it stated in the 2010 final rule implementing the RFS2 program "that it is ultimately the availability of qualifying renewable fuel, as determined in part by the number of [Renewable Identification Numbers ("RINs")] in the marketplace, that will determine the extent to which EPA should issue a waiver of RFS requirements on the basis of inadequate domestic supply." Regulation of Fuels and Fuel Additives: Changes to the Renewable Fuel Standard Program, 75 Fed. Reg. 14,698, (Mar. 26, 2010). RINs are "generated by renewable fuel producers and importers" and then transferred to the "party that blends renewable fuel with gasoline or diesel." *Id*. at 14,725-726. EPA thus correctly recognized in its 2010 final rule that it was up to "renewable fuel producers"—those who make neat renewable fuel—*not* blenders or distributors, "to avoid a situation where a waiver" based on inadequate domestic supply "appears necessary." *Id*. at 14,698.

Moreover, EPA's present assertion of statutory ambiguity rests on an overly narrow focus on the phrase "inadequate domestic supply" standing alone. When evaluating statutory ambiguity, EPA and courts "are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole v. Steelworkers of America*, 494 U.S. 26, 35 (1990). And viewing the waiver provision in the broader statutory context serves only to confirm the natural reading of the general waiver provision.

Comparing Section 211(o)(7)(A)(ii) to other waiver provisions in Section 211 of the Clean Air Act demonstrates that distribution capacity is not a valid justification for invoking the general waiver provision. For example, Section 211(m)(3)(C)(i) authorizes EPA to waive statutory requirements for oxygenated gasoline if the Administrator finds there is "an inadequate domestic supply of, *or distribution capacity for*, oxygenated gasoline." (Emphasis added.) That section of the Statute further directs "the Administrator [to] consider distribution capacity separately from the adequacy of domestic supply" when granting such waivers. Section 211(m)(3)(C)(iii). This provision is especially relevant because it employs the exact phrase at issue in Section 211(o)(7)(A)(ii) ("inadequate domestic supply"), separately lists "distribution capacity" as a distinct factor immediately after it, and then instructs EPA to consider the two separately from each other. Given the wording of Section 211(m)(3)(C)(i), it is implausible that Congress intended "distribution capacity" in the general waiver provision of Section 211(o)(7)(A)(ii) to be subsumed within the term "domestic supply."

Other waiver provisions within the Clean Air Act are to the same effect. Section 211(c)(4)(C)(ii) allows EPA to temporarily waive certain controls relating to fuels and fuel additives where "extreme and unusual supply circumstances exist in a State or region of the Nation *which prevent the distribution of an adequate supply* of the fuel or fuel additive to consumers." (Emphasis added.) Sections 211(k)(6)(A)(ii) and (B)(i) allow EPA to waive requirements for the use of reformulated gasoline in States that opt-in to the regulatory regime where "there is insufficient domestic capacity to produce [reformulated gasoline]" or "there is insufficient *capacity to supply* reformulated gasoline." (Emphasis added.) And Section 211(o)(8)(B) directs the Secretary of Energy to conduct a study evaluating "renewable fuel supplies and prices, blend stock supplies, and supply *and distribution system capabilities*" as part of helping EPA determine whether to waive RFS requirements for the year 2006. (Emphasis added.) Each of these provisions further demonstrates that Congress did not understand the term "supply" to encompass distribution capacity. When Congress intended for EPA to consider distribution capacity, it explicitly instructed EPA to do so by employing specific words in addition to "supply," such as "*distribution of* an adequate supply," "*capacity to* supply," and "supply *and distribution system* capabilities."

Beyond the various waiver provisions, Congress also specifically directed EPA to consider distribution capacity in other contexts. In Section 211(o)(2)(B)(ii), for example, Congress instructed the Administrator to set renewable fuel requirements for calendar years after 2022—the last year for which the statute prescribes volumes—by analyzing, among other things, "the expected annual rate of future commercial production of renewable fuels" and "the sufficiency of infrastructure to deliver and use renewable fuel." This provision further demonstrates that, when Congress wanted EPA to consider distribution capacity, it did not mince words and plainly said so.

EPA asserts that other parts of the statute, including the waiver provisions, "highlight both the ambiguity of the RFS general waiver provision and the reasonableness of applying it broadly to include adequacy of supply to the ultimate consumer" because they demonstrate that adequacy of supply can sometimes be "judged in terms of the availability of the fuel . . . to the ultimate consumer." 80 Fed. Reg. 77,437. In fact, as set forth above, they prove just the opposite. The other provisions make clear that Congress explicitly listed distribution capacity when Congress intended for EPA to consider it. The inescapable corollary of that proposition is that Congress did not intend EPA to consider distribution capacity in the general waiver provision of Section 211(o)(7)(A)(ii), which does not specifically enumerate distribution capacity as a factor. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013).

The Supreme Court applied exactly this kind of statutory analysis in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), a case involving EPA's interpretation of a different provision of the Clean Air Act. The question in that case was whether Section 109(b)(1), which directs EPA to set primary air quality standards at a level "'requisite to protect the public health' with 'an adequate margin of safety,'" authorizes EPA to consider the costs of compliance when setting the standards. *Id*. at 464 (quoting 42 U.S.C. § 7409(b)(1)). The Court held that the statute did not allow EPA to consider compliance costs, principally because "[o]ther provisions" in the statute "explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." *Id*. at 467. The Court "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id*.

American Trucking makes two things perfectly clear: EPA may consider neither distribution capacity nor costs of compliance in deciding whether to grant a general waiver because of

inadequate domestic supply. As set forth in detail above, Congress expressly granted EPA the authority to consider distribution capacity in other provisions within Section 211. EPA should not infer it has the same authority in provisions like Section 211(o)(7)(A)(ii) that do not expressly enumerate distribution capacity as a factor, but nevertheless specifically enumerate other considerations. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (holding that CAA section 211(f)(4) does not permit Administrator to consider fuel additive's effects on public health as part of approval process where nearby provision, section 211(c)(1), explicitly instructs Administrator to consider public health effects).

The same is true with respect to costs of compliance. Like the section of the Clean Air Act at issue in *American Trucking*, Section 211 of the Act, at issue here, "elsewhere, and so often, . . . expressly grant[s]" EPA authority to consider costs of compliance. 531 U.S. at 467; *see, e.g.*, CAA Section 211(k)(1)(A) (directing EPA to issue regulations concerning reformulated gasoline that require the greatest reduction in harmful emissions achievable "taking into consideration the cost of achieving such emission reductions"); CAA Section 211(o)(4)9C) (directing EPA, when lowering the required reduction in greenhouse gas emissions for fuels to qualify as renewable, advanced, or cellulosic, to make the smallest possible reduction "taking cost into consideration"). EPA may not consider costs of compliance in deciding whether to invoke the general waiver provision, which does not expressly enumerate costs of compliance as a relevant factor.

2. The Legislative Drafting History Does Not Support EPA's Interpretation

The statute's drafting history confirms that EPA may not consider distribution capacity in determining whether to grant a general waiver. Section 211(o)(7)(A)(ii) was added to the Clean Air Act by the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594. The version of the bill that passed the House of Representatives would have authorized EPA to grant a waiver if the Administrator found "that there is an inadequate domestic supply *or distribution capacity to meet the requirement*." Energy Policy Act of 2005, H.R. 6, 109th Cong. § 1501(a)(2) (emphasis added). The Senate excised the italicized language, the Conference Committee adopted the Senate's Amendment, H.R. Rep. No. 109-90, at 486 (2005), and the language remained out of the final statute, Pub. L. 109-58, 119 Stat. 594, § 1501(a)(2).

Although there is no express explanation in the legislative history of why Congress deleted the language, the deletion nevertheless "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). As the Supreme Court has recognized, the deletion during a bill's progression through Congress of the very language that would have authorized a questioned practice "is fairly seen . . . as a deliberate elimination of any possibility" that Congress intended the practice to be permitted under the statute. *Doe v. Chao*, 540 U.S. 614, 622-23 (2004) (holding that the Privacy Act does not authorize awarding presumed damages because "Congress cut out the very language in the bill that would have authorized any presumed damages"). This is especially true where, as here, Congress left the precise relevant language in other parts of the statute.

3. The Legislative Purpose Does Not Support EPA's Interpretation

The purposes of the Clean Air Act and the Renewable Fuel Standard program reinforce the above interpretation of Section 211(o)(7)(A)(ii). By enacting the renewable fuel standards, Congress sought "[t]o move the United States towards greater energy independence and security [and] to increase the production of clean renewable fuels." Energy Independence and Security Act of 2007 ("EISA"), Pub. L. 110-140, 121 Stat. 1492. Congress pursued this goal by mandating that specified volumes of renewable fuels be incorporated into the U.S. fuel supply each year. And at the time

they adopted the relevant provisions, legislators were well aware of the infrastructure challenges that stood in the way of widely distributing renewable fuels to consumers. *See* H.R. Rep. No. 110-306, pt. 1, at 2 (2007) (recognizing the "disparity" between production of renewable fuels and "their compatibility with the current motor fuel infrastructure"); *id*. (reporting that, "of the approximately 170,000 retail outlets that sell motor fuel, . . . only 1,133 sell E85"); *see also Alternative Fuels: Current Status, Proposals for New Standards, and Related Infrastructure Issues: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (statement of Alexander A. Karsner, Asst. Sec'y, Energy Efficiency and Renewable Energy, U.S. Dep't of Energy) (encouraging Congress to "examine what forces will enable either voluntary uptake of E85 distribution predominantly amongst the majors that have been thus far recalcitrant to bring it on board" because "if E85 is to be a primary pathway, we will need a substantially larger growth rate than current mechanisms provide"); *see also id.* (statement of Rep. John Barrow) (discussing the need to "incentivize the players to invest in" infrastructure necessary to distribute E85).

Congress therefore adopted an accelerating schedule in which the prescribed quantity of renewable fuel to be blended into the transportation fuel supply increased gradually each year, from 4.0 billion gallons in 2006 to 36.0 billion gallons in 2022. One of the purposes of adopting this incremental schedule was to give the U.S. fuel industry both the incentive and the opportunity to ramp up its capability to produce, blend and distribute renewable fuel. *See* S. Rep. No. 109-74, at 6-7 (2005) ("This phase-in schedule is essential to the success of the program. The renewable fuels industry must be given an opportunity to ramp up production capacity and the petroleum industry must be given an opportunity to make adjustments to the refining, supply and distribution system necessary to successfully implement the program."); *see also* 153 Cong. Rec. H715 (daily ed. Jan. 18, 2007) (statement of Rep. Etheridge) (explaining that the "legislation before us today will begin" to provide "the leadership to develop the infrastructure needed to facilitate the use of [renewable] fuels").

To aid in this process, Congress provided a measure of flexibility as the fuel industry worked to meet the increasing requirements. Section 211(o)(5) of the Clean Air Act directs EPA to promulgate regulations allowing surplus renewable fuel credits to be traded and permitting obligated parties who are unable to meet their renewable fuel requirement in a given year to carry a deficit forward into the following year. Congress also dedicated an entire subtitle of EISA to encouraging the development of renewable fuel infrastructure. Title II, Subtitle C of EISA, entitled "Biofuels Infrastructure," prohibits gas station franchise agreements from restricting franchisees' ability to install renewable fuel pumps or sell and market renewable fuel (Section 241); directs the Secretary of Energy to conduct feasibility studies regarding installation of E85 fuel pumps, tanks, and pipelines (Sections 242 and 243); and establishes a grant program to assist retail and wholesale fuel dealers with the installation of renewable fuel infrastructure (Section 244). The inclusion of these provisions is consistent with Congress's decision to remove "inadequate . . . distribution capacity" from the final version of the general waiver provision.

But Congress also clearly intended for the renewable fuel mandates to carry real bite. If, despite the flexibility and incentives built into the statutory and regulatory regimes, obligated parties fail to meet the renewable fuel requirements, Congress prescribed a civil penalty of up to "$25,000 for every day of such violation and the amount of economic benefit or savings resulting from the violation." CAA Section 211(d)(1). Congress also gave EPA authority to enforce these penalties through either a civil action or administrative assessment. CAA Section 205(b) and (c). Congress thus adopted a classic carrot-and-stick approach to accomplish its goal of steadily increasing the country's use of renewable fuels over time, providing both flexibility and incentives but backing everything up with real legal consequences.

It is implausible that Congress intended in Section 211(o)(7)(A)(ii) to grant EPA the authority to undo this finely-calibrated statutory scheme. Granting a waiver based on limitations in distribution capacity would reward heel-dragging by obligated parties and fundamentally undermine the statute's clear purpose of providing a "jump-start to get [renewable fuels] to the market more quickly." S. Rep. No. 109-78, at 10 (2005). As EPA recognized just over a year ago when it rejected a similar waiver request submitted by Texas and other states, "[s]takeholders in the refining sector have been aware of the E10 blendwall since passage of EISA in December of 2007." Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,773 (Nov. 27, 2012).

Obligated parties have had more than eight years to work with gas stations and other partners to develop the infrastructure necessary to deliver fuels with higher ethanol contents, such as E85, to the sizable and rapidly growing fleet of flex-fuel vehicles. If EPA grants a waiver in 2017 as it did in 2014, 2015 and 2016 because obligated parties have failed to take the necessary steps to meet their statutory obligations, it is hard to see how the United States will ever get back on the mandated path towards greater use of renewable fuels. Permitting EPA to grant a waiver based on inadequate distribution infrastructure would remove altogether the incentives on obligated parties to develop the distribution infrastructure necessary to meet future renewable fuel targets, fatally undermining the key goals of the statutory scheme. *See* Shannon S. Broome & Paul E. Esformes, *Food v. Fuel: Are Legal Attacks on the Renewable Fuel Standard Just a Bunch of Empty Calories?*, 28 Nat. Resources & Envt. 33 (2013) (recognizing that the waiver provisions impose "strict criteria" because "[i]f uncertainty as to the required volumes exists, investors might be reluctant to take the plunge, potentially undermining program goals"). Congress did not intentionally plant this poison pill in Section 211(o)(7)(A)(ii). Congress does not, after all, "alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

B. EPA's Construction of the Statute is not Permissible Under Chevron Step Two

The fact that EPA's proposed interpretation of the waiver provision is manifestly at odds with the evident purpose of the statute also dooms EPA's interpretation at *Chevron* step two. Even if the text, structure, and legislative history of the statute left any ambiguity as to the meaning of "inadequate domestic supply"—for the reasons above, they do not—courts will only defer to an agency's construction at step two if the construction is "permissible." *Chevron*, 467 U.S. at 843. A permissible construction is one that is "compatibl[e] . . . with the policy goals . . . or objectives of Congress." *Continental Air Lines, Inc. v. Dept. of Transp.*, 843 F.2d 1444, 1452-53 (D.C. Cir. 1988). Courts "must reject" at *Chevron* step two "administrative constructions of a statute that frustrate the policy that Congress sought to implement." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citation and alterations omitted). For the reasons explained above, interpreting Section 211(o)(7)(A)(ii) to permit EPA to issue a waiver based on obligated parties' failure to make the investments necessary to improve the nation's distribution capacity for renewable fuels would condone the very behavior Congress sought to change in the statute, fundamentally undermining the statutory purpose. Therefore, even if EPA's proposed interpretation could make it to *Chevron* step two, it would fail there because the interpretation is "manifestly contrary to the statute." *Chevron*, 467 U.S. at 843.[26]

[26] Granting a general waiver based on inadequate distribution capacity would not only negatively impact first generation ethanol prices, but also would have a significant negative impact on the price of advanced biofuels and hence would dampen investment in development of cellulosic ethanol and other advanced biofuel production

In summary, the foregoing legal analysis leads to the conclusion that EPA's interpretation of the authority to invoke the general waiver provision is contrary to the legislative text and structure, drafting history, purpose, policy goals and objectives.

C. Other Clean Air Act Provisions that EPA Cites as Instructive Do Not Support EPA's Interpretation

In the final RVO rule for 2014, 2015 and 2016,[27] EPA cites four other sections of the Clean Air Act as instructive for interpreting the phrase "inadequate domestic supply" in Section 211(o)(7)(A)(ii) of the Clean Air Act. EPA undertakes this analysis to attempt to provide additional support to the agency's conclusion that infrastructure constraints are a permissible consideration for reducing total renewable fuel volumes under the RFS general waiver authority. DuPont disagrees with EPA's analysis and conclusion that these Clean Air Act sections "highlight both the ambiguity of the RFS general waiver provision and the reasonableness of applying it broadly to include adequacy of supply to the ultimate consumer of the transportation fuel." 80 Fed. Reg. 77,436.

i. Clean Air Action Section 211(k)(6)

The scope of Clean Air Act Section 211(k)(6) covers ozone as an air pollutant, classified ozone areas and ozone transport regions. Section 211(k)(6) gives the Administrator the authority to delay bringing reformulated gasoline to market: (1) for a specific classified ozone area when there is an insufficient domestic capacity; and (2) for an ozone transport region when there is an insufficient domestic supply. These delays are an absolute release from the obligation for reformulated gasoline.

Section 211(k)(6) in relevant part states:

> ***(6) Opt-in areas***
>
> ***(A) Classified areas***
>
> ***(ii)*** *Effect of insufficient domestic capacity to produce reformulated gasoline. If the Administrator determines, on the Administrator's own motion or on petition of any person, after consultation with the Secretary of Energy, that there is* ***insufficient domestic capacity to produce gasoline certified under this subsection****, the Administrator shall, by rule, extend the effective date of such prohibition in Marginal, Moderate, Serious, or Severe Areas referred to in clause (i) for one additional year, and may, by rule, renew such extension for 2 additional one-year periods…*[28]
>
> ***(B) Ozone transport region***
>
> ***(iii)*** *Extension of commencement date based on insufficient capacity.*
>
> ***(I)*** *In general If, after receipt of an application from a Governor of a State under clause (i), the Administrator determines, on the Administrator's own motion or on petition of any person, after consultation with the Secretary of Energy, that there is*

capacity. An interpretation of the statute that would undermine investment in advanced biofuel production technologies would be unreasonable and hence fail at *Chevron* Step 2.

[27] 80 Fed. Reg. 77,420 (December 14, 2015).

[28] Emphasis added.

> ***insufficient capacity to supply reformulated gasoline****, the Administrator, by regulation—*
> ***(aa)*** *shall extend the commencement date with respect to the State under clause (ii)(I) for not more than 1 year; and…*[29]

In the final RVO rule for 2014, 2015 and 2016,[30] EPA highlights that the use of the two terms "capacity to produce" and "capacity to supply" indicates the term "capacity to supply" is broader in scope and "does not occur in isolation but in reference to the person intending to make use of the product. 80 Fed. Reg. 77,449. DuPont agrees with EPA's comparative analysis of the two terms in the context of Section 211(k)(6). However, EPA goes on to conclude that "capacity to supply would therefore be expected to include consideration of the infrastructure needed to deliver reformulated gasoline to vehicles in the state…" 80 Fed. Reg. 77,436. DuPont disagrees with this conclusion. While it is a reasonable interpretation that EPA would consider a larger subset of factors for determining the supply of reformulated gasoline to the end consumer, the statute does not supply the factors to consider. Therefore, the question as to whether infrastructure constraints could be a consideration in this context is not apparent and instructive for interpreting the general waiver provision in the RFS.

In addition, the scope and application of Section 211(k)(6) is fundamentally different from the RFS as follows:

- Section 211(k)(6) requires a two-part approach so that Classified Areas are a priority if the volume of reformulated gasoline becomes constrained. This is very different from the RFS which takes a national approach and does not subdivide regions of the country requiring a hierarchy for distributing fuel.
- Section 211(k)(6) is an absolute release from bringing reformulated gasoline to market whereas the quantity of renewable fuel that EPA is proposing to waive under the RFS is a partial waiver.
- Reformulated gasoline can be manufactured with a number of different oxygenates and additives providing regulated parties with tremendous flexibility. Therefore, there are no infrastructure constraints for reformulated gasoline similar to those cited by EPA for renewable fuel.

Based on the foregoing analysis, DuPont does not agree with EPA that Section 211(k)(6) is instructive for interpreting the phrase "inadequate domestic supply" in Section 211(o)(7)(A)(ii) of the Clean Air Act.

ii. Clean Air Action Section 211(c)(4)(C)(ii)

The scope of Clean Air Act Section 211(c)(4)(C)(ii) covers the circumstances under which the EPA Administrator may temporarily waive fuel or fuel additive requirements pursuant to specified subsections within Section 211 and defines extreme or unusual supply circumstances.

Section 211(c)(4)(C)(ii) in relevant part states:

> ***(ii)*** *The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this*

[29] Emphasis added.
[30] 80 Fed. Reg. 77,420 (December 14, 2015).

> *section or prescribed in an applicable implementation plan under section 7410 of this title approved by the Administrator under clause (i) of this subparagraph if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that—*
> ***(I)** extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;*
> ***(II)** such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented **and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive** to such State or region; and*
> ***(III)** it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).*[31]

In the final RVO rule for 2014, 2015 and 2016,[32] EPA's analysis is that "Congress clearly specified that the adequacy of the supply is judged in terms of the availability of the fuel or fuel additive to the ultimate consumer, and includes consideration of the ability to distribute the required fuel or fuel additive to the ultimate consumer." 80 Fed. Reg. 77,436. DuPont's judgment is that EPA's analysis is wholly inconsistent with the plain meaning of the text. A regulated party's failure to invest in and adopt new fueling infrastructure when existing laws and regulatory programs are in place that require such action is a prime example of a lack of prudent planning. It is inconceivable that failing to install infrastructure could be argued to be "a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented." 80 Fed. Reg. 77,437.

Based on the foregoing analysis, DuPont does not agree with EPA that Section 211(c)(4)(C)(ii) is instructive for interpreting the phrase "inadequate domestic supply" in Section 211(o)(7)(A)(ii) of the Clean Air Act.

iii. Clean Air Action Section 211(m)(3)(C)

The scope of Clean Air Act Section 211(m)(3)(C) covers the circumstances under which the EPA Administrator may temporarily waive requirements for oxygenated gasoline. Section 211(m)(3)(C) gives the Administrator the authority to temporarily delay or waive bringing oxygenated gasoline to market when there is either an inadequate domestic supply or distribution capacity. These delays are an absolute release from the obligation for oxygenated gasoline.

Section 211(m)(3)(C) in relevant part states:

> ***(m) Oxygenated fuels***
> ***(3) Waivers***
> ***(C)***

[31] Emphasis added.
[32] 80 Fed. Reg. 77,420 (December 14, 2015).

> ***(i)*** *Any person may petition the Administrator to make a finding that there is, or is likely to be, for any area,* ***an inadequate domestic supply of, or distribution capacity for****, oxygenated gasoline meeting the requirements of paragraph (2) or fuel additives (oxygenates) necessary to meet such requirements. The Administrator shall act on such petition within 6 months after receipt of the petition.*
> ***(ii)*** *If the Administrator determines, in response to a petition under clause (i), that there is an* ***inadequate supply or capacity*** *described in clause (i), the Administrator shall delay the effective date of paragraph (2) for 1 year. Upon petition, the Administrator may extend such effective date for one additional year. No partial delay or lesser waiver may be granted under this clause.*
> ***(iii)*** *In granting waivers under this subparagraph the Administrator* ***shall consider distribution capacity separately from the adequacy of domestic supply*** *and shall grant such waivers in such manner as will assure that, if supplies of oxygenated gasoline are limited, areas having the highest design value for carbon monoxide will have a priority in obtaining oxygenated gasoline which meets the requirements of paragraph (2).*
> ***(iv)*** *As used in this subparagraph,* ***the term distribution capacity includes capacity for transportation, storage, and blending.***[33]

In the final RVO rule for 2014, 2015 and 2016,[34] EPA's analysis is that "Congress chose to expressly differentiate between domestic supply and distribution capacity indicating that each of these elements was to be considered separately. This would indicate that the term inadequate supply, although ambiguous for the reasons discussed above, could in appropriate circumstances be read as more limited in scope." 80 Fed. Reg. 77,437. DuPont absolutely agrees.[35] Applying this interpretation to the general waiver provision in Section 211(o)(7)(A)(ii) leads to the conclusion that if Congress intended for distribution capacity to be a consideration, they would have specifically included the term in the text of the law.

[33] Emphasis added.

[34] 80 Fed. Reg. 77,420 (December 14, 2015).

[35] EPA's analysis includes a discussion that "inadequate supply of" is applicable to either fuel or oxygenates and the same is true for "distribution capacity". EPA concludes that this underscores the ambiguity in these terms and therefore the agency has the discretion to interpret the application of these terms. DuPont does not agree with this portion of EPA's analysis.