



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA-HQ-OAR-2019-0136; FRL-10001-36-OAR]

Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, and Response to the Remand of the 2016 Standards; Supplemental Notice of Proposed Rulemaking

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In a July 29, 2019 notice of proposed rulemaking, Environmental Protection Agency (EPA) proposed percentage standards for four categories of renewable fuel that would apply to obligated parties in 2020 under the Renewable Fuel Standard. This action takes into consideration certain comments received in response to the proposed rule. Based on these comments and additional information, EPA is issuing a supplemental proposal and requests comment on adjustments to the percentage standards for 2020 that result from the amended definitions of two of the terms used to calculate the percentage standards. We are proposing to project the volume of gasoline and diesel that will be exempt in 2020 due to small refinery exemptions based on a three-year average of the relief recommended by the Department of Energy (DOE). From 2016–2018 the relief recommended by the DOE would have resulted in a reduction to the renewable volume obligation of approximately 770 million RINs per year. The amended definitions proposed in this rule would effectively increase the percentage standards that apply to non-exempt obligated parties to offset future small refinery exemptions and help ensure that the required volumes are met.

DATES: *Comments:* Comments must be received on or before November 29, 2019.

Public Hearing: EPA will hold a public hearing will be held on October 30, 2019, at the location noted below under **ADDRESSES**. The hearing will begin at 9:00 a.m. and end when all parties present who wish to speak have had an opportunity to do so. Parties wishing to testify at the hearing should notify the contact person listed under **FOR FURTHER INFORMATION CONTACT** by October 24, 2019. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: You may send your comments, identified by Docket ID No. EPA–HQ–OAR–2019–0136, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov> (our preferred method) Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Office of Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery/Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking.

Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

Hearing: The hearing will be held at the following location: Ann Arbor Marriott Ypsilanti at Eagle Crest, 1275 S. Huron St., Ypsilanti, MI 48197 (telephone number (734) 487-2000). A complete set of documents related to the proposal will be available for public inspection through the Federal eRulemaking Portal: <http://www.regulations.gov>, Docket ID No. EPA-HQ-OAR-2019-0136. Documents can also be viewed at the EPA Docket Center, located at 1301 Constitution Avenue, NW, Room 3334, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4131; for questions regarding this proposed action, email address: *RFS-Rulemakings@epa.gov*; for information regarding the public hearing and to register for the public hearing, email address: *RFS-Hearing@epa.gov*.

SUPPLEMENTARY INFORMATION:

Entities potentially affected by the July 29, 2019, proposed rule,¹ should it become final, are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol, biodiesel, renewable diesel, and biogas. Potentially regulated categories include:

Category	NAICS ¹ Codes	SIC ² Codes	Examples of Potentially Regulated Entities
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¹84 FR 36762 (July 29, 2019).

Industry	324110	2911	Petroleum Refineries
Industry	325193	2869	Ethyl alcohol manufacturing
Industry	325199	2869	Other basic organic chemical manufacturing
Industry	424690	5169	Chemical and allied products merchant wholesalers
Industry	424710	5171	Petroleum bulk stations and terminals
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers
Industry	221210	4925	Manufactured gas production and distribution
Industry	454319	5989	Other fuel dealers

¹ North American Industry Classification System (NAICS).

² Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to engage in activities that may be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your entity would be affected by this action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Hearing: The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposal (which can be found at <https://www.epa.gov/renewable-fuel-standard-program/regulations-and-volume-standards-under-renewable-fuel-standard>). EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. Written comments must be received by the last day of the comment period, as specified in this notice.

Outline

I. Overview

- II. Consideration of Proposed Adjustments to the Percentage Standard Calculations for 2020
 - A. Proposed Changes to the Projected Volume of Gasoline and Diesel for Exempt Small Refineries
 - B. Projecting the Exempted Volume of Gasoline and Diesel in 2020
 - C. Example Calculation of Proposed Percentage Standards for 2020
- III. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
 - C. Paperwork Reduction Act (PRA)
 - D. Regulatory Flexibility Act (RFA)
 - E. Unfunded Mandates Reform Act (UMRA)
 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
 - I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - J. National Technology Transfer and Advancement Act (NTTAA)
 - K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- IV. Statutory Authority

I. Overview

On July 29, 2019, EPA proposed “Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes” (“the July 29 proposal”). We proposed reductions in the statutory volume targets for cellulosic biofuel, advanced biofuel, and total renewable fuel using the cellulosic waiver authority in Clean Air Act (CAA) section 211(o)(7)(D). We also proposed percentage standards that would apply to obligated parties in 2020 for each of the four categories of renewable fuel (cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel) based on the proposed volumes and a projection of the volume of gasoline and diesel used in the U.S. in 2020.²

² See 84 FR 36762 (July 29, 2019).

In response to the July 29 proposal, a number of stakeholders provided comments on the proposed percentage standards for 2020.³ Some of these parties requested that we change our interpretation of two terms used to calculate the percentage formula: the amount of gasoline projected to be produced by exempt small refineries and small refiners (collectively, “exempt small refineries”), and the amount of diesel projected to be produced by exempt small refineries. Rather than interpreting these terms to refer to the projected production of gasoline and diesel produced by refineries that have been exempted from their 2020 RFS obligations at the time the 2020 annual rule is finalized, many commenters stated that EPA should instead project the volumes of gasoline and diesel that will be exempted for the 2020 compliance year and use these projected volumes in calculating the percentage standards for 2020. In the July 29 proposal, we informed the public that these issues were beyond the scope of that proposal.⁴ On further consideration, we are issuing this supplemental proposal of a method to address these issues.

Since the July 29 proposal, EPA has granted small refinery exemptions (“SREs”) for 31 small refineries for the 2018 compliance year.⁵ We believe these comments and the 2018 SREs are germane to our approach for calculating the percentage standards for 2020. In light of this additional information, and in order to give all stakeholders an opportunity to consider potential changes to the calculation of the percentage standards, we are issuing this supplemental proposal. We are proposing to amend the definitions of “GE_i” and “DE_i” in the RFS percentage standard formula at 40 CFR 80.1405(c) to represent the projected volumes of exempt gasoline and diesel in the compliance year (in this case 2020), regardless of whether EPA has adjudicated exemption

³ See, e.g., comments from the Renewable Fuels Association (Docket Item No. EPA-HQ-OAR-2019-0136-0281).

⁴ See 84 FR 36797 and fn. 165 (July 29, 2019).

⁵ EPA also denied SRE requests from 6 small refineries. Petitions from 3 parties were declared ineligible or withdrawn, and 2 petitions were pending at the time EPA issued this supplemental proposal. More information about the number of SREs granted and the volume of RINs not required to be retired as a result of those exemptions can be found at <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

petitions by the time of the final rule establishing the percentage standards for that compliance year. These changes are intended to help ensure that the renewable fuel volumes established in the action that we take with regard to the July 29 proposal and this supplemental proposal (the “final rule”) are achieved. We request additional comment on this proposed change. This action does not solicit comment on any other aspect of the formula at 40 CFR 80.1405(c) or the July 29 proposal, nor are we soliciting comment on increasing the required volume of renewable fuel to account for the reductions in the required renewable fuel volumes that resulted from SRE decisions issued prior to the 2020 compliance year.

II. Consideration of Proposed Adjustments to the Percentage Standard Calculations for 2020

In the July 29 proposal, we proposed percentage standards for each of the four categories of renewable fuel based on the volumes that resulted from the exercise of the cellulosic waiver authority and projections of the volume of gasoline and diesel used in the U.S. in 2020.⁶ We received comments on that proposal suggesting that, in determining the percentage standards for 2020, we should project the volume of gasoline and diesel produced by small refineries that will be exempted from their renewable volume obligations in 2020.⁷ In light of these comments and the recent SREs, we are proposing new definitions for two of the terms used in calculating the percentage standards for 2020 to account for the projected volume of gasoline and diesel produced by small refineries that will be exempted from their renewable volume obligations in 2020.

⁶ See Section VIII of the July 29 proposal for more detail on the proposed percentage standard calculations.

⁷ See, e.g., comments from the Renewable Fuels Association (Docket Item No. EPA-HQ-OAR-2019-0136-0281).

A. *Proposed Changes to the Projected Volume of Gasoline and Diesel for Exempt Small Refineries*

The renewable fuel standards are expressed as volume percentages and those volume percentages are used by each obligated party to determine their Renewable Volume Obligations (RVOs). These percentage standards are calculated by EPA using the volumes of renewable fuel established in the annual rules following any reductions made using the cellulosic waiver authority and/or the general waiver authority. The formulas used to calculate the percentage standards applicable to producers and importers of gasoline and diesel are provided in 40 CFR 80.1405(c). The formulas rely on estimates of the volumes of gasoline and diesel fuel, for both highway and nonroad uses, which are projected to be used in the year in which the standards will apply. The formula for the percentage standard calculation for total renewable fuel, including the definitions of the terms, is shown below. The formulas for the other three percentage standards follow the same format, with the numerator of the fraction replaced with the annual volume of cellulosic biofuel, biomass-based diesel, and advanced biofuel, respectively.

$$Std_{RF,i} = 100 \times \frac{RFV_{RF,i}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

Where:

$Std_{RF,i}$ = The renewable fuel standard for year i, in percent.

$RFV_{RF,i}$ = Annual volume of renewable fuel required by 42 U.S.C. 7545(o)(2)(B) for year i, in gallons.

G_i = Amount of gasoline projected to be used in the 48 contiguous states and Hawaii, in year i, in gallons.

D_i = Amount of diesel projected to be used in the 48 contiguous states and Hawaii, in

year i , in gallons.

$RG_i =$ Amount of renewable fuel blended into gasoline that is projected to be consumed in the 48 contiguous states and Hawaii, in year i , in gallons.

$RD_i =$ Amount of renewable fuel blended into diesel that is projected to be consumed in the 48 contiguous states and Hawaii, in year i , in gallons.

$GS_i =$ Amount of gasoline projected to be used in Alaska or a U.S. territory, in year i , if the state or territory has opted-in or opts-in, in gallons.

$RGS_i =$ Amount of renewable fuel blended into gasoline that is projected to be consumed in Alaska or a U.S. territory, in year i , if the state or territory opts-in, in gallons.

$DS_i =$ Amount of diesel projected to be used in Alaska or a U.S. territory, in year i , if the state or territory has opted-in or opts-in, in gallons.

$RDS_i =$ Amount of renewable fuel blended into diesel that is projected to be consumed in Alaska or a U.S. territory, in year i , if the state or territory opts-in, in gallons.

$GE_i =$ The amount of gasoline projected to be produced by exempt small refineries and small refiners, in year i , in gallons in any year they are exempt per §§80.1441 and 80.1442.

$DE_i =$ The amount of diesel fuel projected to be produced by exempt small refineries and small refiners in year i , in gallons, in any year they are exempt per §§80.1441 and 80.1442.

Historically, EPA has interpreted the terms referring to the amount of gasoline and diesel projected to be produced by exempt small refineries (terms GE_i and DE_i in the equation above) to refer to the amount of gasoline and diesel projected to be produced by small refineries that

have already been granted exemptions from their obligations prior to issuing the final rule for the relevant compliance year.⁸ As a result of this interpretation, any SREs granted after we issue the annual rule containing the percentage standards for that year effectively reduces the required volume of renewable fuel for that year. For example, in August 2019 we granted 31 SREs for the 2018 compliance year after the percentage standards for 2018 had been established.⁹ These SREs reduced the obligated volume of gasoline and diesel for 2018 by 13.42 billion gallons, effectively reducing the required volume of total renewable fuel for 2018 by 1.43 billion RINs.

In comments on the July 29 proposal, many commenters requested that EPA adopt a different interpretation of the terms for the amount of gasoline and diesel projected to be produced by exempt small refineries in the existing percentage standard formula.¹⁰ Many commenters requested that these terms should refer to a projection of the exempted volume of gasoline and diesel produced by small refineries, regardless of whether EPA had already adjudicated such exemption petitions by the time of the final rule. These commenters argued that this interpretation of the regulations is reasonable and better implements the statutory requirement that EPA must “ensure” the renewable fuel volumes are met. Some commenters suggested that adjusting the percentage standards formula is more important now than in earlier years of the program as we have recently granted exemptions for more significant volumes of gasoline and diesel, resulting in applicable volumes that are not being met at the time of compliance.¹¹

The comments described above raise issues similar to those raised by a pending petition

⁸ See, e.g., 84 FR 36797 (July 29, 2019).

⁹ The percentage standards for 2018 were established in December 2017 (82 FR 58486, December 12, 2017).

¹⁰ See, e.g., comments from the Renewable Fuels Association (Docket Item No. EPA-HQ-OAR-2019-0136-0281).

¹¹ See, e.g., comments from Growth Energy (Docket Item No. EPA-HQ-OAR-2019-0136-0312).

for administrative reconsideration.¹² That petition, filed by parties who also commented on the July 29 proposal, also asked EPA to reconsider our approach to accounting for exempted volumes through the formula at 40 CFR 80.1405(c). In response to this petition, EPA is undertaking a process to reconsider this issue; however, we are doing so under our inherent authority to revise or amend a rulemaking.¹³

We are proposing to change the definitions of the two terms in the percentage standard formula at 40 CFR 80.1405(c), GE_i and DE_i , to represent a projection of the exempted volume of gasoline and diesel, regardless of whether we have adjudicated exemptions for that year by the time of the final rule establishing the percentage standards for the four renewable fuel types. We propose that the term “ GE_i ”, representing the volume of exempt gasoline, be defined as “the total amount of gasoline projected to be exempt in year i , in gallons, per §§80.1441 and 80.1442.” We similarly propose that the term “ DE_i ”, representing the volume of exempt diesel, be defined as “the total amount of diesel projected to be exempt in year i , in gallons, per §§80.1441 and 80.1442.”

While the statute does not specifically require EPA to redistribute exempted volumes in this manner, we believe that this is a reasonable interpretation of our authority pursuant to the

¹² “Petition for Reconsideration of 40 CFR 80.1405(c), EPA Docket No. EPA–HQ–OAR–2005–0161, promulgated in 75 FR 14670 (Mar. 26, 2010); Petition for Reconsideration of Periodic Reviews for the Renewable Fuel Standard Program, 82 FR 58364 (Dec. 12, 2017)” (June 4, 2018).

¹³ The petition asserted that reconsideration was required under CAA section 307(d)(7)(B). Consistent with caselaw and recent representations by the petitioners, we do not believe that the reconsideration criteria under CAA section 307(d)(7)(B) have been met; we instead are treating the petition as a petition to revise or amend a rulemaking. See EPA’s Sur-Reply in Opp. To Petr’s Mot. to Lift Stay of Proceedings, D.C. Cir. No. 18-1154, ECF No. 1807187, 3 (Sept. 19, 2019); Petr’s Reply in Further Support of Their Mot. to Lift Stay of Proceedings, D.C. Cir. No. 18-1154, ECF No. 1806347, 3 n.1 (Sept. 12, 2019); Pet. for Rev., D.C. Cir. No. 19-1201, ECF No. 1808877, 2 n.2 (Sept. 27, 2019). Regardless, we note that we are providing notice and a public hearing followed by a 30-day comment period, consistent with CAA section 307(d) procedures. We also take no position today on whether this administrative petition and the related judicial petitions meet the “grounds arising after” requirements, under CAA section 307(b)(1) and relevant caselaw, to challenge prior EPA rulemakings.

statute under *Chevron v. NRDC*,¹⁴ especially in light of our authority to “ensure” that the renewable fuel volumes are met.¹⁵ We also acknowledge that this supplemental proposal, if finalized, would reflect a change in policy direction as described in *FCC v. Fox*.¹⁶

We believe the newly proposed definitions are a reasonable measure to appropriately account for volumes that may become exempted after the promulgation of the final rule establishing the percentage standards and furthers Congressional intent to “ensure” the renewable fuel volumes are met. In other words, should we grant SREs without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program, potentially impacting the volume of renewable fuel used in the U.S. By contrast, were we to adopt this proposed change to the percentage standards for 2020, the percentage standard for each category of renewable fuel would increase (see Section II.C for example calculations). These higher percentage standards would have the effect of ensuring that the required volumes of renewable fuel are met when small refineries are granted exemptions from their 2020 obligations, provided EPA’s projection of the amount of gasoline and diesel produced by exempt small refineries in 2020 is accurate. We acknowledge the uncertainty in the projection, a topic we discuss further in the next section.

We also believe that accounting in the percentage formula for a projection of volumes that would be exempted after the final rule is particularly appropriate where those volume are projected to constitute a significant portion of the total volume of obligated fuel as established in the final rule. This has occurred in recent years but did not occur in the first years of the program when we first established the regulatory definitions and interpretations.

¹⁴ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

¹⁵ See CAA section 211(o)(2)(A)(i), (2)(A)(iii)(I), (3)(B)(i); see also CAA section 301(a).

¹⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

We solicit comment on other formulations of these definitions in order to accurately describe our intent that these terms represent a projection of the volume of gasoline and diesel produced by exempt small refineries, regardless of whether EPA had already adjudicated those exemptions by the time of the final rule.

B. Projecting the Exempted Volume of Gasoline and Diesel in 2020

Adoption of the proposed revised definitions of the terms referring to the amount of gasoline and diesel produced by exempt small refineries, as discussed in Section II.A, would require that we determine how to project the exempted volumes of these fuels in 2020. Although subject to uncertainty, this projection would affect the percentage standards and thus the actual volume of renewable fuel required to be used in 2020. If we over-project the volume of gasoline and diesel produced by exempt small refineries in 2020, the actual required volumes of renewable fuel will be higher than the volumes used in calculating the percentage standards. By contrast, if we under-project the volume of exempted gasoline and diesel, the actual required volumes of renewable fuel will be lower than the volumes used in calculating the percentage standards.

We acknowledge that there is uncertainty with projecting the exempted volume for 2020, as petitions for 2020 SREs have not yet been submitted to or evaluated by the Department of Energy (DOE) or EPA. EPA independently evaluates SRE petitions while taking DOE's recommendation into account and has discretion to provide relief that is different than the DOE recommendation. In 2020 we anticipate granting partial exemptions where such exemptions are appropriate. This is an approach we could have taken in response to recommendations from DOE in recent years, which included partial exemption recommendations on some applications. We therefore believe it is appropriate to consider the exempt volumes of gasoline and diesel in

previous years had EPA followed DOE's recommendations without deviation. We believe the approach described above is appropriate for two independent reasons.

First, in prior years, EPA has taken different approaches in evaluating petitions. For instance, in the EPA final action, the August 9, 2019, Memorandum Decision, we granted or denied 36 then-pending SRE petitions for the 2018 compliance year.¹⁷ We granted full exemptions to petitioners where DOE either recommended full or 50% relief. That is, in cases where DOE found a small refinery experienced either disproportionate impacts or viability impairment, EPA found the small refinery experienced disproportionate economic hardship and granted a full exemption. By contrast, in earlier years of the program, we denied petitions and provided no exemption in certain cases where DOE recommended a 50% exemption, finding that disproportionate economic hardship existed only where the small refinery experienced both disproportionate impacts and viability impairment.¹⁸ The proposed approach to projection, then, takes a middle ground between these prior approaches, and is a reasonable estimate of the aggregate expected exempted volume in 2020.

Second, this approach approximates our intended approach for adjudicating 2020 SRE petitions. The statute directs EPA to make an independent decision as to SRE petitions based on DOE's recommendation and other economic factors. While final decisions on 2020 SREs must await EPA's receipt and adjudication of those petitions, we generally have the statutory authority to issue a final decision consistent with DOE's recommendation following our own review and

¹⁷ "Decision on 2018 Small Refinery Exemption Petitions," Memorandum from Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation to Sarah Dunham, Director, Office of Transportation and Air Quality. August 9, 2019 ("August 9 Memorandum Decision").

¹⁸ See, e.g., *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

analysis.¹⁹ This reading of the statute is consistent with congressional guidance to DOE²⁰ and EPA.²¹ Consistent with that guidance and since 2014, DOE has also recommended 50% exemptions as it deemed appropriate.

We acknowledge that in the August 9 Memorandum Decision, we stated that the “best interpretation” of the statute was that EPA should either grant or deny petitions in full, and “not grant partial relief.” Specifically, we observed that the statute provided for exemptions as an “extension of the exemption under subparagraph (A)”, where subparagraph (A) stated that the RFS program requirements “shall not apply to small refineries under calendar year 2011.”²² We had implemented the statutory pre-2011 exemption as a full exemption for all qualifying small refineries. Thus, we concluded that, under this interpretation, “when Congress authorized the Administrator to provide an ‘extension’ of that exemption for the reason of [disproportionate economic hardship], Congress intended that extension to be a full, and not partial, exemption.”²³

We believe, however, that this is not the only reasonable way to adjudicate exemption petitions. Had Congress spoken directly to the issue of the amount of relief EPA could provide to

¹⁹ EPA retains the authority to deviate from DOE’s recommendation based upon “other economic factors,” refinery-specific information, and other persuasive evidence that EPA should reach a different outcome. See CAA section 211(o)(9)(B)(ii).

²⁰ See Consolidated Appropriations Act, 2016, Pub. L. 114-113 (2015), Explanatory Statement to Senate amendment to H.R. 2029 Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2016, Division D-Energy and Water Development and Related Agencies Appropriations Act, 2016, *available at* <https://docs.house.gov/meetings/RU/RU00/20151216/104298/HMTG-114-RU00-20151216-SD005.pdf>. Congress in this Statement directed DOE, under certain circumstances, “to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the [small refinery] petitioner.” *Id.* at 35.

²¹ S. Rep. 114-281. See also Consolidated Appropriations Act, 2019, Pub. L. 116-6 (2019), H. Rep. 116-9 at 741, continuing the directive contained in Senate Report 114-281. A recent Senate Report reiterated: “The [Environmental Protection] Agency is reminded that, regardless of the Department of Energy’s recommendation, additional relief may be granted if the Agency believes it is warranted.” Sen. Rep. 116-123, Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2020, Report Accompanying Sen. 2580, at 87-88 (Sept. 26, 2019) (again “continu[ing] the directive contained in Senate Report 114–281 related to small refinery relief”), *available at* <https://www.congress.gov/116/crpt/srpt123/CRPT-116srpt123.pdf>. This guidance, read together with that discussed in the previous footnote, supports the interpretation that DOE has authority to recommend partial exemptions for particular small refineries, and that EPA has discretion, to the extent supported by the record before it, either to accept that recommendation and grant a partial exemption, or to depart from that recommendation.

²² CAA section 211(o)(9)(B); CAA section 211(o)(9)(A).

²³ August 9 Memorandum Decision at 2.

small refineries, EPA would be bound by that directive. However, the statute is silent with respect to EPA's authority to issue partial exemptions. Nothing in the statute directly addresses this issue. No statutory language exists characterizing the scope of an exemption; there are no terms employed such as "partial" or "full."

We think there is another reasonable reading of this provision of the statute besides the one articulated in the August 9 Memorandum Decision. Again, there we stated that we could provide full relief to small refineries for which DOE recommends 50% relief.²⁴ At the same time, it is also reasonable to construe the statute to allow EPA to issue partial exemptions.²⁵

Notably, EPA may determine that only partial relief is warranted based on a particular small refinery's circumstances. In that case, it is reasonable for the level of relief that EPA grants to reflect that determination. Nowhere does Congress indicate that EPA must take an all-or-nothing approach. Specifically, nothing obligates EPA to provide full relief where we find that only partial relief is warranted.

For purposes of making the projection of the aggregate exempted volume of gasoline and diesel in 2020, we propose to adopt this interpretation of the statute, under which EPA has the authority to grant a partial exemption to a small refinery under appropriate circumstances.²⁶ Were we to finalize this approach, we would, in projecting the exempted volume, depart from the interpretation taken in the August 9 Memorandum Decision, under which EPA "shall either grant or deny petitions for small refinery hardship in full, and not grant partial relief."²⁷ We propose to adopt this new approach for several reasons. As already noted, this new policy would allow EPA

²⁴ It could also be appropriate for EPA to deny an exemption in some cases where DOE recommends 50% relief, as we did in earlier years of the program.

²⁵ EPA solicits comment on whether the interpretation set forth in the August 9 Memorandum Decision is indeed the "best" interpretation. EPA notes in this regard that the ultimate question is whether the statutory interpretation under which it operates is a reasonable one.

²⁶ See *Chevron*, 467 U.S. at 842-44.

²⁷ August 9 Memorandum Decision at 2. See *FCC*, 556 U.S. at 515.

to ensure that the level of relief that it grants reflect the determination it makes as to whether full or partial relief is appropriate based on a particular small refinery's disproportionate economic hardship. This allows EPA to more precisely calibrate its RFS policy, and to strike an appropriate balance between furthering the production and use of renewable fuels while granting relief to small refineries that meet the statutory criteria. This balance, moreover, is also appropriate in light of the above-cited recent Congressional direction.²⁸ Furthermore, we note again that even were EPA to deviate from this policy in adjudicating 2020 SRE petitions,²⁹ this approach to projection nonetheless provides a reasonable estimate of the aggregate exempted volume at this time. All projections are inherently uncertain, but this projection reflects a reasonable projection of the future.

Further, although we acknowledge the difficulty of making a precise projection,³⁰ this inherent uncertainty does not preclude us from taking the approach set forth in this supplemental proposal. To the extent our prior statements suggested we did not believe such a projection was appropriate, we propose to change course.³¹ The statute impliedly contemplates EPA's authority to make this projection, as it requires EPA to promulgate standards by November 30 of the prior year to "ensure[]" that the renewable fuel volumes are met,³² but authorizes small refineries to petition for an exemption based on disproportionate economic hardship "at any time."³³ This projection, moreover, is hardly unique in the RFS program as Congress required EPA to make

²⁸ See *supra* notes 20 and 21.

²⁹ For instance, EPA may deviate from DOE's recommendation where we find that other economic factors compel a different outcome than what DOE recommended. Other factors, such as judicial resolution of pending decisions or subsequent Congressional direction, could also potentially affect EPA's SRE policy going forward.

³⁰ See EPA's Br., Doc No. 1757157, D.C. Cir. No. 17-1258, *AFPM v. EPA* (Oct. 25, 2018).

³¹ See *FCC*, 556 U.S. at 515.

³² CAA section 211(o)(3)(B)(i).

³³ CAA section 211(o)(9)(B)(i).

numerous projections to implement the program.³⁴

Today's approach, moreover, avoids the problems we previously identified with projecting small refinery exemptions. Notably, we are projecting the *aggregate* exempted volume in 2020. We thus need not wrestle with the difficulties of predicting precisely which refineries will apply or the economic circumstances of specific refineries in 2020. We only need to estimate the total exempted volume. Moreover, we retain authority to adjust the standards as appropriate should our approach to 2020 small refinery exemptions significantly change from what we anticipate it will be as it is set forth here.³⁵ Finally, we have the benefit of additional experience administering the RFS program, knowledge of the relatively high levels of exempted volumes in prior years, and a proposed approach for how we intend to adjudicate 2020 small refinery exemption petitions that allows us to anticipate with a high degree of probability that there will be a non-zero aggregate exempted volume as a result of those petitions. Each of these developments independently support making a non-zero projection of the exempted volume in 2020.

To project the exempted volume under this methodology, it is instructive to look back at what the exempted volumes of gasoline and diesel in previous years would have been had EPA followed DOE's recommendations, including granting partial exemptions. These volumes, along with the Renewable Volume Obligation (RVO) that would have been exempted, are shown in Table II.B-1.

Table II.B-1
Estimated Exempted Volume of Gasoline and Diesel and Estimated RVO Exempted by
Compliance Year Following DOE's Recommendations

³⁴ See, e.g., CAA section 211(o)(7)(D) (projection of the volume of cellulosic biofuel production); (o)(3)(A) (projection of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel).

³⁵ See, e.g., *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 718 (D.C. Cir. 2017) (upholding EPA's authority to promulgate late renewable fuel requirements so long as EPA reasonably balances the burdens and benefits of its approach).

Compliance Year	Estimated Exempted Volume of Gasoline (million gallons)	Estimated Exempted Volume of Diesel (million gallons)	Estimated RVO Exempted (million RINs)
2015	1,590	1,450	290
2016	2,450	1,930	440
2017	5,650	3,870	1020
2018	4,620	3,270	840

As demonstrated in Table II.B-1, the volume of gasoline and diesel that would have been exempted if EPA had followed DOE's recommendations has varied significantly in previous years. This is because there are many factors that affect the number of SREs that are granted in a given year and those factors are inherently difficult to estimate with precision. We believe that it is appropriate to use an average volume of the gasoline and diesel that would have been exempted over a three-year period as our projection of gasoline and diesel that will be exempted in 2020, rather than the volume of gasoline and diesel that would have been exempted in any single year, as it helps to average out the effects of unique events or market circumstances that occurred in individual years in the past that may or may not occur in 2020.

We propose to project the volume of gasoline and diesel that will be exempted in 2020 per the proposed definitions described in Section II.A consistent with our current intention for evaluating the 2020 SRE petitions. While we cannot predict with certainty the approach that we will in fact take once we have received and reviewed petitions, at this time, we anticipate our evaluation will result in an exempted volume that is on the aggregate consistent with DOE's recommendations. The average volume of these fuels that would have been exempted in 2016–2018 if EPA had followed DOE's recommendations is 4,240 and 3,020 million gallons, for gasoline and diesel fuel, respectively. These exempted volumes would have resulted in an average reduction to the RVO of approximately 770 million RINs. This projection of exempted gasoline and diesel would effectively increase the percentage standards that apply to obligated

parties to offset future SREs and help ensure that the required volumes are met.

We also request comment on an alternative approach using the average volume of gasoline and diesel that would have been exempted from 2015–2017 (3,230 and 2,420 million gallons, respectively, resulting in an average reduction to the RVO of approximately 580 million RINs) as our projection for the exempted volumes of gasoline and diesel in 2020. We note that if for any reason we anticipate a different approach to evaluating SRE petitions by the time of the final rule, we may also consider adjusting our methodology for projecting the exempt volumes of gasoline and diesel accordingly.

C. Example Calculation of Proposed Percentage Standards for 2020

As described in Section II.A, the calculation of the applicable percentage standards would differ from that described in the July 29 proposal only in the definition and values of those terms representing projections of gasoline and diesel production by exempt small refineries. Rather than being assigned a value of zero as in the July 29 proposal, they would be assigned a value equal to our projection of the exempted volume of gasoline and diesel as discussed in Section II.B in accordance with our proposed definitions for GE_i and DE_i .

The values of all the variables used to calculate the applicable percentage standards are shown in Table II.C-1 for both the proposed approach to estimating 2020 SREs as well as the alternative on which we are seeking comment. All formulas for calculating the percentage standards are provided in 40 CFR 80.1405(c), subject to this action's proposed revision.

Table II.C-1

Example Values for Terms in Calculation of 2020 Standards³⁶ (billion gallons)

Term	Description	Proposed values based on average of 2016–2018 estimated exemptions	Alternative values based on average of 2015–2017 estimated exemptions
RFV _{CB}	Required volume of cellulosic biofuel	0.54	0.54
RFV _{BBD}	Required volume of biomass-based diesel	2.43	2.43
RFV _{AB}	Required volume of advanced biofuel	5.04	5.04
RFV _{RF}	Required volume of renewable fuel	20.04	20.04
G	Projected volume of gasoline	142.49	142.49
D	Projected volume of diesel	56.77	56.77
RG	Projected volume of renewables in gasoline	14.58	14.58
RD	Projected volume of renewables in diesel	2.48	2.48
GS	Projected volume of gasoline for opt-in areas	0	0
RGS	Projected volume of renewables in gasoline for opt-in areas	0	0
DS	Projected volume of diesel for opt-in areas	0	0
RDS	Projected volume of renewables in diesel for opt-in areas	0	0
GE	Projected volume of exempt gasoline	4.24	3.23
DE	Projected volume of exempt diesel	3.02	2.42

³⁶ See “Calculation of supplemental proposed % standards for 2020” in docket EPA-HQ-OAR-2019-0136.

As described in Section II.B, the values for GE and DE in Table II.C-1 do not represent the SREs actually granted in the years cited, but rather the SREs that would have been granted had EPA followed, without deviation, the recommendations received from DOE following their independent assessment of the information provided by each small refinery. We updated the projected volumes of total gasoline and diesel, and the renewable fuels contained within them, since the July 29 proposal to use volumes derived from values in the September 2019 version of EIA’s Short-Term Energy Outlook. An estimate of fuel consumed in Alaska, derived from the June 28, 2019, release of EIA’s State Energy Data System and based on the 2017 volumes contained therein, was subtracted from the nationwide volumes. The required volumes of renewable fuel used in Table II.C-1 are based on the July 29 proposal. These volumes have not been updated to reflect data available since the July 29 proposal; however, we intend to adjust these volumes to account for more recent information in the final rule.

Using the volumes shown in Table II.C-1, we have calculated two versions of revised proposed applicable percentage standards for 2020 as shown in Table II.C-2. We have also included the percentage standards from the July 29 proposal.

Table II.C-2

Example Percentage Standards for 2020

	Proposed values in the July 29 proposal	Proposed values based on average of 2016–2018 estimated exemptions	Alternative values based on average of 2015–2017 estimated exemptions
Cellulosic biofuel	0.29%	0.31%	0.31%
Biomass-based diesel	1.99%	2.08%	2.06%
Advanced biofuel	2.75%	2.88%	2.85%
Renewable fuel	10.92%	11.46%	11.35%

The percentage standards in the final rule will depend upon not only the value of

projected volume of exempt gasoline and diesel, which could differ from those used above, but also the projected volumes of gasoline and diesel produced by all refineries as well as the volume requirements for renewable fuel. Our determination of all of these values will be informed by the comments we received on the July 29 proposal and this supplemental proposal, as well as other information that may become available.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is expected to be an Executive Order 13771 regulatory action. There are no quantified cost estimates for this supplemental proposed rule because it does not change the applicable volumes proposed in the July 29 proposal.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0637 and 2060–0640. The proposed revisions will not impose new or different reporting requirements on regulated parties than already exist for the RFS program.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule.

The small entities directly regulated by the RFS program are small refiners, which are defined at 13 CFR 121.201. This supplemental proposed rule does not change the applicable volumes proposed in the July 29 proposal. Nor does it change the compliance flexibilities currently offered to small entities under the RFS program (including the SRE provisions we continue to implement). We have therefore concluded that this action will have no net regulatory burden for directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action will be implemented at the Federal level and affects transportation fuel refiners, blenders,

marketers, distributors, importers, exporters, and renewable fuel producers and importers. Tribal governments will be affected only to the extent they produce, purchase, or use regulated fuels.

Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it implements specific standards established by Congress in statutes (CAA section 211(o)) and does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The RFS program and this rule are designed to achieve positive effects on the nation’s transportation fuel supply, by increasing energy independence and security and lowering lifecycle GHG emissions of transportation fuel.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse human

health or environmental effects on minority populations, low income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

This regulatory action does not affect the level of protection provided to human health or the environment by applicable air quality standards. This action does not relax the control measures on sources regulated by the RFS regulations.

IV. Statutory Authority

Statutory authority for this action comes from sections 114, 203-05, 208, 211, and 301 of the Clean Air Act, 42 U.S.C. sections 7414, 7522-24, 7542, 7545, and 7601.

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Air pollution control, Diesel fuel, Fuel additives, Gasoline, Imports, Oil imports, Petroleum, Renewable fuel.

Dated: October 15, 2019.

Andrew R. Wheeler,
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 80 as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7521, 7542, 7545, and 7601(a).

Subpart M—Renewable Fuel Standard

2. Amend § 80.1405 by revising the equation in paragraph (c) definitions of GE_i and DE_i to read as follows:

§80.1405 What are the Renewable Fuel Standards?

* * * * *

(c) * * *

GE_i = The total amount of gasoline projected to be exempt in year i, in gallons, per §§80.1441 and 80.1442.

DE_i = The total amount of diesel fuel projected to be exempt in year i, in gallons, per §§80.1441 and 80.1442.

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