Bridge to Renewables, Inc.
1 Thomas Circle NW, Suite 700
Washington, DC 20005

May 12, 2023

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Proposed eRIN Amendment's Compliance with the Clean Air Act

Dear Administrator Regan:

Bridge to Renewables, Inc. ("BTR") urges the U.S. Environmental Protection Agency ("EPA") to finalize its proposed amendments to the regulations governing the generation of RINs from electricity ("eRINs" and "eRIN Amendments") when it finalizes its proposed *Renewable Fuel Standard ("RFS") Program: Standards for 2023-2025 and Other Changes* rulemaking next month. In addition to the compelling policy justifications behind finalizing the eRIN rules, electricity derived from renewable biomass constitutes renewable fuel and EPA is thereby compelled to ensure that it is sold as transportation fuel in the United States at levels specified by the EPA and the Clean Air Act. Moreover, the eRIN Amendments comply with the Clean Air Act, and any objection to EPA's authority to allow for eRIN generation is long past the statutory deadline for such a challenge.

I. Electricity Derived from Biogas is a Renewable Fuel under the Clean Air Act

When Congress passed the Energy Independence and Security Act of 2007 ("EISA") it defined "renewable fuel" as "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."[1] Congress provided a broad definition of renewable biomass such that it is unquestionable that biogas is included within it.[2] Moreover, Congress defined "transportation fuel" as "fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels)"[3] and defined a "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway."[4] An electric vehicle is certainly a self-propelled vehicle designed for transporting persons on a highway. Consequently, fuel produced from biogas that powers an electric vehicle is unquestionably a renewable fuel.

EISA states that EPA shall "ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel" set each year by EPA in accordance with the RFS.[5] EPA is now

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[1] 42 U.S.C. § 7545(*o*)(1)(J).

[2] *Id.* § 7545(s)(4) (defining "renewable biomass" as "any organic matter that is available on a renewable or recurring basis . . . including dedicated energy crops and trees, agricultural food and feed crop residues, aquatic plants, animal wastes, wood and wood residues, paper and paper residues, and other vegetative waste materials").

[3] *Id.* § 7545(o)(1)(L).

[4] *Id.* § 7550(2).

[5] *Id.* § 7550(o)(2)(A)(i).

establishing the volumes of renewable fuel required to be sold as transportation fuel in 2023-2025, and as such, EPA is statutorily required to ensure that electricity is included within those volumes.

II. The eRIN Amendments Comply with the Clean Air Act and Any Challenge to EPA's Authority to Provide for eRIN Generation is Untimely

Some commenters to the eRIN Amendments assert that Section 211(o)(5) of the Clean Air Act only allows for RIN generation by those that refine, blend or import gasoline that contains renewable fuel at a level that is greater than the volumes mandated by RFS; and, as a result, EPA allowing parties that are not refiners, blenders or importers of gasoline to generate eRINs expressly violates the Clean Air Act.[6] Such a conclusion is in direct contravention to Section 206 of EISA that states EPA "shall conduct a study on the feasibility of issuing credits under the program established under section 211(o) of the Clean Air Act to electric vehicles powered by electricity produced from renewable energy sources." If Congress did not have any intent to include electricity under the legal structure it created, why would it have required EPA to study its "feasibility?" Clearly Congress contemplated that it had given EPA the statutory authority to promulgate such a program.

Additionally, the argument stating that only gasoline refiners, blenders and importers can generate RINs ignores the fact that EPA's regulations have never allowed for refiners, blenders or importers of gasoline to generate a RIN. Instead, since the inception of the RFS regulations implementing EISA in 2010, EPA's regulations have provided that producers of liquid renewable fuels generate RINs and producers, marketers or end users of gaseous and electric renewable fuels may generate RINs.

Specifically, in May 2009, EPA proposed the first rules for the RFS under EISA, which included a preamble discussing EPA's authority to promulgate rules allowing for the generation of eRINs by parties other than gasoline refiners, blenders and importers.[7] In July 2010, EPA finalized the RFS regulations under EISA with a significant number of regulations allowing for the generation of eRINs by producers, marketers and end-users of electricity.[8] In 2014, EPA subsequently promulgated rules that provided for a pathway to generate eRINs on electricity.[9] No companies, industry organizations or Congress objected either during the comment period or subsequently to EPA's authority to promulgate regulations allowing for the generation of eRINs, including the authority to allow parties other than refiners, blenders and importers of gasoline to generate eRINs.

Furthermore, in 2018, the Senate Appropriations Committee noted in the bill that accompanied the Senate Appropriations Bill, "the backlog of applications under the Renewable Fuels Pathway II rule finalized in 2014."[10] And since, "[n]o applications for the electric pathway—which could help support rural agricultural communities—[were] approved since the rule went into effect[,] [t]he Committee strongly encourages [EPA] to take action on the existing applications within 90 days of the enactment of this act."[11] Then in 2020, Congress appropriated $500,000 for "processing applications under the Renewable

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[6] *See id.* § 7545(*o*)(3)(B)(ii)(I).

[7] Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 24,910 (May 26, 2009).

[8] 40 C.F.R. §§ 80.1426(f)(10)-(11), 80.1429(b)(5), 80.1450-51, 80.1454 (2010).

[9] Regulation of Fuels and Fuel Additives: RFS Pathways II, and Technical Amendments to the RFS Standards and E15 Misfuelling Mitigation Requirements, 79 Fed. Reg. 42, 128 (July 18, 2014).

[10] S. REP. NO. 115-276, at 71 (2018).

[11] *Id.*

Fuels Pathway II rule for the electric pathway."[12] In doing so, Congress noted "the backlog of applications under the Renewable Fuels Pathway II rule finalized in 2014."[13] Again, Congress noted that "[n]o applications for the electric pathway, which could help support rural agricultural communities, have been approved since the rule went into effect," so it required EPA to take "action on the existing applications within 90 days of the enactment of this act."[14] In doing so, Congress did not express any concern that it had not delegated authority to EPA for the agency to authorize the generation of eRINs.

Now, almost 13 years after the finalization of the initial eRIN rules, some entities are asserting that EPA does not even have the statutory authority to allow for eRIN generation in the first place. Such objections are in direct contravention to the Clean Air Act's requirement that "any petition for review" must be filed within 60 days from the notice of EPA's promulgation, approval, or action that appears in the Federal Register.[15] While in certain cases, entities can challenge an issue despite not raising the issue during the initial notice for proposed rulemaking period if EPA explicitly or implicitly reconsiders the issue, EPA does not reopen its action, and thus does not restart the time for seeking review "merely by responding to an unsolicited comment by reaffirming its prior position."[16] Furthermore, the mere fact that "an agency invites debate on some aspects of a broad subject . . . does not automatically reopen all related aspects including those already decided."[17]

In 2019, EPA solicited comments on establishing new regulations related to the way that RINs are bought, sold, held and retired.[18] Certain parties used that comment solicitation to challenge EPA's authority to require RIN retirement on exports of renewable fuel, despite EPA not soliciting comment on that issue and EPA having decided the issue nine years prior when it established the RFS regulations under EISA. The D.C. Circuit concluded that the record did "not support the conclusion that EPA reopened its policy on exported renewable fuel" as "any aspect of this rulemaking" was a "generic statement alone [that] did not suggest that the agency was undertaking a reconsideration of the relevant matter—i.e., the RFS export policy."[19] Nevertheless, the Court did recognize that "EPA did solicit comments on certain alterations to the RIN system . . .[,] [b]ut the fact that EPA invited comment on possible reforms to the way RINs are traded and retired did not automatically reopen" all RIN trading and retirement rules.[20]

In the case of the eRIN Amendments, potential challengers would be unable to point to any provision within the proposed regulations where EPA is reconsidering its authority to allow for eRIN generation. Instead, EPA is proposing the eRIN Amendments to "provide clarity on how electricity would be incorporated into the RFS so that the existing RIN-generation pathway can be effectively utilized in a

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[12] H. COMM. ON APPROPRIATIONS, 116TH CONG., CONSOLIDATED BUDGET ACT, 2021, at 1391 (Comm. Print 2021) (the "2021 House Consolidated Budget Act Committee Print").

[13] S. REP. NO. 116-123, at 89 (2019).

[14] *Id.*

[15] 42 U.S.C. § 7607(b).

[16] *CTIA-The Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (cleaned up); see *also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (explaining that "regulations and interpretations that have not been reopened by agency action remain at repose and are not newly reviewable").

[17] *Nat'l Ass'n of Reservation Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 142 (D.C. Cir. 1998) (hereinafter "*NARPO*").

[18] *See* Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 10,584 (Mar. 21, 2019).

[19] *Growth Energy v. EPA*, 5 F.4th 1, 21-22 (D.C. Cir. 2021) (internal citations omitted).

[20] *Id.* at 22.

manner that ensures RINs are generated only for qualifying electricity."[21] While EPA did solicit comments on certain alterations to the eRIN system, such solicitation does not automatically reopen all related aspects of the eRIN rules, including the statutory authority of eRINs as contemplated under EISA.

III. EPA's Failure to Issue a Report Under Section 206 of EISA Does Not Preclude Finalization of the eRIN Amendments

Certain commentators mistakenly suggest that EPA's failure to submit to Congress "not later than 18 months after the date of" EISA's enactment a report describing the results of the feasibility of issuing credits to electric vehicles powered by electricity produced from renewable energy sources prohibits EPA from establishing eRINs.[22] EPA met EISA's eRIN report requirement in substance when it published its proposed 2009 RFS rulemaking within 18 months of EISA that included a discussion on the feasibility of generating eRINs. Congress did not state any required form for EPA's report on EIA feasibility and the proposed formal 2009 rulemaking would appear sufficient. Regardless, courts must "be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action."[23] When "there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended to lose its power to act."[24]

The above rule was applied in the D.C. Circuit in *Americans for Clean Energy v. EPA* when it reached the conclusion that EPA possessed authority to promulgate biomass-based diesel requirements despite the agency failing to do so "no later than 14 months before the first year" for which the volume requirement will apply."[25] The D.C. Circuit stated that "Congress authorized EPA to issue late renewable fuel volume requirements under" RFS because Congress "did not state" within the statutory text "what would happen if EPA failed to meet the statutory deadline for promulgating" renewable fuel regulations and less drastic remedies may be available to address EPA's delayed regulations.[26] Under the *Brock* principle articulated by the Supreme Court, the D.C. Circuit "concluded that it was 'highly unlikely' that Congress intended EPA's delay to prevent EPA from fulfilling its statutory mandate to 'promulgate regulations to ensure' that transportation fuel contains 'at least the amount applicable volume of . . . biomass-based diesel."[27] Ultimately, the D.C. Circuit supported its reasoning by acknowledging:

(1) Congress's failure to specify the consequences of EPA's failure to meet a statutory deadline;
(2) the principle that "where there are less drastic remedies available for an agency's failure to meet a statutory deadline, courts should not assume Congress intended for lose its power to act;"
(3) EPA's "statutory mandate" to ensure the annual volume requirements are met; and
(4) the notion that it would be "drastic" and "incongruous" to preclude EPA from fulfilling that statutory mandate" based on its delay.[28]

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[21] Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes, 87 Fed. Reg. 80,582, 80,585 (Dec. 30, 2022).

[22] *See* EISA § 206, Pub. L. 110-140, 121 Stat. 1530 (2007).

[23] *Brock v. Pierce Cnty.*, 476 U.S. 253, 260 (1986).

[24] *Id.*

[25] 864 F.3d 691, 720 (D.C. Cir. 2017); *see also* 42 U.S.C. § 7545(o)(2)(B)(ii).

[26] *Ams. for Clean Energy*, 864 F.3d at 720 (quoting *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 154 (D.C. Cir. 2010)).

[27] *Ams. for Clean Energy*, 864 F.3d at 720 (quoting 42 U.S.C. § 7545(*o*)(2)(A)(i)); *see Brock v. Pierce Cnty.*, 476 U.S. 253 (1986).

[28] *Ams. for Clean Energy*, 864 F.3d at 721.

Even if a court were to conclude that EPA did not issue the eRIN report despite its discussion in the proposed 2009 RFS rulemaking, any failure by EPA to submit to Congress does not preclude EPA from promulgating the eRIN Amendments. First, Congress *did not state* what would occur if EPA failed to deliver a report of the result of the study within the 18 months after the enactment of EISA. Second, reviewing courts are directed not to assume Congress intends for agencies to lose their authority to act when they fail to act within a statutorily mandated deadline, and the same principle applies here. Nothing within EISA contemplates EPA from losing its ability to promulgate regulations upon failure to submit its report. It would be incongruous to preclude the agency from developing policy outlined within EISA because it failed to provide Congress mere information about the program's practicality, even though the statute itself contemplates EPA's authority to promulgate eRIN regulations. Furthermore, the Supreme Court articulates that there is a "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents whose care they are confided."[29]

Additionally, some commenters confuse Section 206 of EISA's requirement to produce a report on the feasibility of eRIN generation with the additional requirement that EPA design "a pilot program to determine the feasibility of using renewable electricity to power electric vehicles as an adjunct to a renewable fuels mandate."[30] This pilot program was clearly intended to be in addition to eRIN generation.

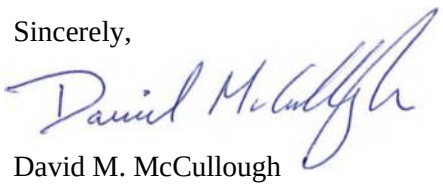
IV. Even if EPA does not Finalize the eRIN Amendments, the Original eRIN Rules will Remain Operative and EPA is Required to Act on Pending Registrations

In the event that EPA fails to finalize the proposed eRIN Amendments, the current and existing eRIN rules will remain effective. Various registrations for eRIN generation have been pending with EPA for over five years. EPA may not unreasonably delay in taking action on these registrations. If EPA does not finalize the eRIN Amendments, EPA will be required to take action on these registrations and allow for generation of eRINs by entities meeting EPA's existing eRIN regulations.

V. Conclusion

The eRIN Amendments comply with the Clean Air Act, EISA and the RFS. BTR urges EPA to include the eRIN Amendments in its rulemaking when it finalizes its rulemaking, *Renewable Fuel Standard ("RFS") Program: Standards for 2023-2025 and Other Changes*. Thank you for your consideration of these issues.

Sincerely,



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[29] *Brock*, 476 U.S. at 260 (quoting *United States v. Nashville, C. & St. L.R. Co.*, 118 U.S. 120, 125 (1886)).

[30] EISA § 206(c)(2)(A).

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