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U.S. Environmental Protection Agency 1200 Pennsylvania Ave., NW Washington, DC 20460

ATTN: Docket ID No. EPA-HQ-OAR-2024-0411

Re: Comments on EPA Proposed Rule – Renewable Fuel Standard Program: Partial Waiver of 2024 Cellulosic Biofuel Volume Requirements and Extension of 2024 Compliance Deadline

OPAL Fuels ("OPAL"), a leader in the renewable energy sector, appreciates the opportunity to comment on the U.S. Environmental Protection Agency ("EPA") Renewable Fuel Standard ("RFS") program's proposed rule to partially waive the 2024 Cellulosic Biofuel Volume Requirements and Extension of 2024 Compliance Deadline (Docket ID No. EPA-HQ-OAR-2024-0411) (the "Proposed Rule"). OPAL submits these written comments in addition to verbal testimony presented at the Public Hearing on December 13, 2024. As discussed below, OPAL respectfully requests that EPA take immediate action and formally withdraw the proposed partial waiver of 2024 D3 volumes. Significant damage has already occurred as a result of the mere publication of the Proposed Rule and the longer it remains unresolved, the more protracted the recovery will be from the loss of investor confidence and higher risk premiums required to invest capital in new cellulosic transportation fuel production.

If EPA were to adopt the Proposed Rule as introduced and retroactively reduce D3 volumes, the destabilizing effects on trading liquidity and the price of D3 Renewable Identification Numbers ("RINs") could halt all new investment in production supply, encourage RNG producers to seek other offtake markets, and remove the most cost-effective and best low carbon alternative that is working today for heavy duty trucking versus diesel.

As a premier producer and distributor of renewable natural gas ("RNG"), OPAL captures harmful "waste in place" biogenic methane emissions from decaying organic waste and converts them into productive, low-carbon-intensity energy products – such as RNG and renewable electricity. Using these renewable energy products, OPAL replaces fossil fuels in hard-to-decarbonize industrial sectors, most notably heavy-duty trucking with our produced RNG. The company's renewable electricity projects not only lower the carbon intensity of the electricity grid, but they also enhance grid stability by providing stable baseload power. OPAL's vertical waste-to-energy model combines upstream production of RNG through methane abatement with downstream marketing and distribution of renewable transportation fuels, delivering a proven, scalable, low-cost, safe and reliable solution that fights climate change and supports energy security. Additionally, OPAL provides local air quality and economic benefits to municipalities and rural agriculture



communities, through biogenic methane emissions abatement and creating economic value for those communities.

Today, OPAL is at scale with 11.4 million MMBTU of renewable natural gas design capacity in operation and construction across 17 facilities and 108 MW of renewable power nameplate capacity. The company has built over 350 fueling stations nationwide, supplying over 8,000 Class 8 trucks and dispensing approximately 12% of all RNG transportation fuel delivered in the United States, equating to 100 million gallons annually. OPAL is also one of the country's largest builders of fueling stations, constructing approximately 35% of all new stations nationwide each year. OPAL manages all phases of RNG and fuel station project development – from plant and station design and engineering to construction, operations and optimization. Furthermore, OPAL operates 16 landfill gas-to electricity projects, providing renewable electricity that replaces fossil fuel-based generation with 24/7/365 baseload power, offering a stable alternative to intermittent renewable sources such as wind and solar. OPAL has been investing between \$200 to \$250 million annually in new biogas capture and conversion plants and associated fueling infrastructure and maintains an active backlog of projects that would support an additional \$1 billion of future investment over the next several years.

OPAL's leadership in RNG production and its visibility and contributions to its use as a transportation fuel uniquely position the company to offer valuable insights on the importance of maintaining a stable and predictable RFS program from various stakeholder perspectives. OPAL recognizes the challenges associated with achieving statutory targets for cellulosic biofuel production, and nonetheless, OPAL respectfully requests that EPA expeditiously withdraw the proposed partial waiver of 2024 D3 volumes for the following reasons, as described more fully herein:

- The Proposed Rule undermines market stability and the statutory intent of the RFS Program and reiterated in the 2023-2025 Renewal Fuels Standards Rule (the "Set Rule")¹;
- If promulgated, the Proposed Rule will halt critical investment in the infrastructure, new project developments, long term contracts and partnerships, and work force development that support renewable fuels generation; and
- The Proposed Rule conflicts with the Clean Air Act ("CAA") in that it attempts to make retroactive market adjustments without adequate factual or legal basis.

As explained more fully below, EPA should never retroactively apply market balancing mechanisms. There are existing mechanisms in place, namely the deficit carryforward, which could also be modified in a proposed rule to allow for more compliance flexibility, to address potential volume shortfalls and any action taken regarding future market imbalances should be addressed in the coming Set Rule. We look forward to discussing those options with the EPA, consistent with statutory deadlines and the overarching goals of the RFS program. Importantly,

¹ 88 Fed. Reg. 44,468 (July 12, 2023).



given 2025 will be the third year of the previous Set Rule, any 2025 D3 RIN shortfalls within the 20% deficit carry forward limit can be addressed in the new Set Rule volumes for 2026.²

POLICY CONCERNS WITH THE GENERAL WAVIER AUTHORITY

The EPA has issued a Proposed Rule under the RFS program, seeking to partially waive the 2024 cellulosic biofuel volume requirement and extend the compliance deadline for the same year. The proposal reflects EPA's authority under the CAA to evaluate renewal fuel volume targets based on market conditions and supply constraints. Proposed Rule § II. B. Specifically, EPA cites expected shortfalls in the production of cellulosic biofuels, which are advanced biofuels derived from renewable feedstocks, as the basis for this proposed partial waiver. *Id.* § III. Additionally, the Proposed Rule aims to address anticipated compliance burdens by adjusting deadlines for obligated parties. *Id.* § VIII. While EPA's goals include ensuring the program's feasibility and fostering renewable fuel market stability, the Proposed Rule raises significant concerns.

Background on the General Waiver Authority

The RFS program's general waiver authority was established to provide the EPA with flexibility in administering renewable volume obligations ("RVOs"). RVOs are annual renewable fuel blending requirements assigned to refiners, importers and other obligated parties. To meet these obligations, parties must either physically blend renewable fuels into their transportation fuels or obtain RINs, which serve as tradable compliance credits representing the production or import of a gallon of renewable fuel. The general waiver authority allows the EPA to waive total or partial RVOs for a given year if it determines that there is "inadequate domestic supply" of renewable fuels or that compliance with RVOs would "severely harm the economy or environment." 42 U.S.C. § 7545(o)(7)(A). It appears that the EPA is conflating the supply of cellulosic biofuels with what it may be seeking to address – namely, a perceived shortfall in the supply of D3 RINs.

Historically, the EPA has used the general waiver authority sparingly to avoid undermining the program's overarching objectives. Waivers are typically granted only in situations where clear and substantial evidence demonstrates that the statutory criteria—either inadequate supply of biofuels or severe harm—are met. 42 U.S.C. § 7545(0)(7)(A).³ For instance, in past rules, the EPA has

 $^{^2}$ It is also within EPA's authority to propose a rule to adjust the current carry-forward limitation in 40 C.F.R. § 80.1427 from 20% to 25%.

³ EPA's use of a general waiver is only permissible where there clear and substantial evidence demonstrates that the statutory criteria—either inadequate supply or severe harm—are met. 42 U.S.C. § 7545(o)(7)(A).

According to an August 3, 2020 CRS report, the EPA has frequently used its cellulosic biofuel waiver authority since 2010 to address production shortfalls by reducing cellulosic biofuel volume. U.S. Congressional Research Service, Renewable Fuel Standard (RFS): Waiver Authority and Modifications of Volumes. CRS Report R44045, 6, updated Aug. 3. 2020. Available at https://sgp.fas.org/crs/misc/R44045.pdf. For contrast, the report also provides that as of the date of the report, "EPA has only exercised the general waiver authority once to reduce the total renewable fuel volumes for 2014, 2015, and 2016, which the U.S. Court of Appeals for the D.C. Circuit subsequently vacated after concluding that EPA's interpretation of 'inadequate domestic supply' was not a permissible



underscored the importance of preserving market stability and incentivizing long-term investment in renewable energy infrastructure when considering whether to exercise this authority. *See* Set Rule at 44,474 ("As EPA has stated in previous actions, we generally do not think it is appropriate to reconsider and revise previously finalized RFS standards. Revising standards has the potential to decrease market certainty and create unnecessary market disruption . . .").

Background on the Cellulosic Waiver Credit Mechanism

The Cellulosic Waiver Credit (CWC) mechanism provides a compliance pathway for obligated parties when cellulosic biofuel production falls short of the RVO established under the RFS program. 40 C.F.R. § 80.1456. Unlike the general waiver authority, which reduces overall volume obligations, the CWC mechanism allows obligated parties to purchase compliance credits as an alternative to blending cellulosic biofuels, ensuring compliance while mitigating the impact of production shortfalls.

The EPA must determine the availability of cellulosic biofuels and finalize the applicable CWC price by November 30^{th} of the preceding year, ensuring that the mechanism is forward-looking and provides clarity to obligated parties. 42 U.S.C. § 7545(o)(7)(D)(i). This approach contrasts with the general waiver authority, which is broader in scope, but may only be invoked in cases of severe economic or environmental harm or inadequate domestic supply of biofuels across all renewable fuel categories. The statute specifies that the price of CWCs is calculated as the greater of \$0.25 per gallon or \$3.00 minus the wholesale price of gasoline, adjusted annually for inflation. 42 U.S.C. § 7545 (o)(7)(D)(ii). By linking the credit price to the wholesale gasoline price, the mechanism accounts for market conditions and helps support the stability of the credit market.

Historically, the CWC mechanism has been instrumental in addressing anticipated production shortfalls without disrupting the integrity of the RFS program. Unlike general waivers, CWCs have the ability to preserve the incentives necessary to drive innovation and expansion in the renewable fuels sector, aligning with statutory goals to grow the cellulosic biofuel category.

While the CWC mechanism has benefits to various RFS stakeholders in terms of ensuring compliance and price caps for obligated parties and providing a supportive structural trading environment for D3 RIN liquidity and potentially less volatile pricing, it is not a perfect tool to support the RFS Program and its intent to grow cellulosic biofuels. The CWC pricing mechanism is not strong enough to encourage new investment in cellulosic production and also requires supportive D5 RIN pricing to support the goals of increasing investment and supply of cellulosic biofuels.⁴

one." *Id.* (citing *American for Clean Energy v. EPA*, 864 F.3d 691, 710-13 (D.C. Cir. 2017)). Additionally, in 2008, Texas Governor Rick Perry requested a 50% waiver of the RFS mandate, citing severe economic harm due to rising corn prices. The EPA denied the request, concluding that the evidence did not demonstrate that the RFS was causing severe economic harm. U.S. Congressional Research Service, *Waiver Authority Under the Renewable Fuel Standard (RFS)*, CRS Report RS22870, 1, updated April 7, 2014. Available at <u>https://crsreports.congress.gov/product/pdf/RS/RS22870</u>.

⁴ We look forward to discussing with EPA how these various tools can work together to advance the agency's policy goals.



Disruption of Market Stability

The Proposed Rule's retrospective application of the general waiver raises significant concerns about market disruptions and regulatory uncertainty. While the waiver authority is a necessary tool for addressing legitimate biofuel supply or economic crises, its use must be carefully calibrated to avoid destabilizing the renewable fuels market or discouraging investment in the advanced biofuel sector. The Proposed Rule's reliance on this authority in a retroactive context deviates from its intended forward-looking function and risks undermining the confidence of market participants who rely on predictable regulatory frameworks.

The general waiver authority set forth in 42 U.S.C. § 7545(o)(7)(A) permits the EPA to adjust total RVOs in cases of inadequate domestic supply or severe economic harm. However, the current market does not meet these conditions. To evaluate whether a waiver is justified, it is essential to consider the distinct contributions of different renewable fuel categories to meeting RVO – such as RNGs and other D3 biofuels. RNGs are a form of cellulosic biofuel derived from biogas produced by landfills, livestock waste, wastewater treatment plants, food waste and other organic waste facilities. Other D3 biofuels, such as cellulosic ethanol produced from agricultural residues, provide an additional avenue to meet RVOs. Together, these sources currently available in the market, along with the allowable 20% carryover of unused RINs from the prior compliance year,⁵ provide a framework for compliance.

Available data indicates that we are within deficit carry forward volumes through 2023 and 2024 and EPA appears to be considering potential 2025 D3 RIN generation shortfalls. However, as mentioned previously, EPA's general waiver authority is meant to address extreme biofuel <u>supply</u> shortfalls, <u>not</u> credit shortfalls. While we agree that there are D3 RIN generation constraints and those constraints could continue in 2025, it is important to note that the EPA itself has been one of the key reasons D3 RIN generation has been constrained – both in its failure to approve new pathways, such as renewable electricity from cellulosic sources, and the new Phase III truck regulations that discourage the use of RNG as a transportation fuel for heavy duty trucking. Any cumulative shortfalls are not a biofuel supply issue, but rather a RIN generation issue that we look forward to working with EPA to address.

Despite potentially conflating the purpose of the general waiver authority, OPAL's evaluation of D3 RIN credit generation in 2025 indicates that the 20% carryover is adequate to address cumulative RIN generation shortfalls. It is important to note that the supply of RNG biofuel likely exceeds the actual credit generation below and that D3 RIN generation for 2025 is estimated:

	2023	2024	2025
Supply	775	1,021	1,267
RVO	838	1,090	1,376
Cumulative Surplus	(63)	(132)	(241)
Shortfall %	-8%	-12%	-18%

⁵ 40 C.F.R. § 80.1427(b).



The EPA has not provided evidence of any biofuel supply shortages that would justify invoking the general waiver authority under these circumstances.

Additionally, there is no substantial evidence of severe economic harm caused by RFS compliance in 2024. The RIN market has demonstrated resilience and existing mechanisms, such as the CWC mechanism and the 20% carryover, offer obligated parties alternative compliance options without disrupting the market.

Market dynamics and pricing trends do not support the assertion that RFS compliance creates an economic emergency, further rendering the general waiver authority unnecessary in this instance. The Proposed Rule's retroactive waiver would disrupt market stability by incentivizing obligated parties to delay purchasing RINs and destabilize price signals. In fact, this reduced D3 RIN trading by 25-30% since the Proposed Rule was published.

Retroactive volume reductions penalize obligated parties that proactively purchased RINs and encourages "gaming" of the system. This means that obligated parties who planned ahead and purchased RINs to meet their compliance obligations may find themselves at a disadvantage compared to those who delayed purchasing. The current market conditions suggest that using the general waiver authority in this manner sets a troubling precedent. If adopted, obligated parties will likely delay purchasing RINs, unsure of what their obligation will be retroactively.

Additionally, when obligated parties hesitate to purchase RINs, it disrupts the normal trading flow of the market. Producers, who rely on steady RIN sales to fund their operations, are left with reduced purchasing liquidity, which leads to lower prices and a negative feedback loop. Ultimately, RNG producers may lose confidence in the RFS market and sell their RNG in other offtake markets, leading to lower RIN generation, the need for general waivers, and other regulatory relief.

Ineffectiveness of the General Waiver

The general waiver creates uncertainty about the future RIN market and fails to provide a clear price signal for investors. In prior denials of partial waiver requests, EPA has appropriately considered the impact the waiver can have on the RFS Program. *See* 59 Fed. Reg. 20,961, 20,962 (Mar. 26, 2024) (denying a partial waiver of the 2023 cellulosic biofuel standard because it "would be injurious to the RFS program because it would be disruptive to program participants and could result in reduced future demand for cellulosic biofuel production.). By contrast, the CWC mechanism offers a forward-looking compliance tool that aligns with the statutory intent to grow the cellulosic biofuel category. The CWC mechanism ensures:

- Market stability through predictable pricing signals; and
- Compliance flexibility for obligated parties without penalizing market participants who act in good faith.

LEGAL CONCERNS WITH RETROACTIVE ADJUSTMENTS

The RFS program is a statutory framework established under the CAA to promote the use of renewable fuels. Any rulemaking under the RFS must align with the implementing statute (the



CAA) and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. These laws require that RFS regulations may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The statutory framework of the RFS program is forward-looking, with no provision authorizing retroactive adjustments to RVOs, and for good reason. The program was designed to provide clarity and predictability for market participants; any retroactive adjustments undermine this framework. Consistent with these goals, the EPA is required to finalize adjustments to the applicable cellulosic biofuel volumes no later than November 30 of the preceding year. 42 U.S.C. 7545(o)(7)(D)(i). The statute explicitly states:

For any calendar year for which the projected volume of the cellulosic biofuel production is less than the minimum applicable volume...not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume.

Id. As such, the proposed retroactive reduction of the 2024 cellulosic biofuel requirement in 2025 would exceed EPA's statutory authority.⁶ Furthermore, the general waiver authority does not permit the retroactive adjustment of finalized RVOs in this case. As explained above, the EPA may only invoke the general waiver in cases of inadequate domestic supply or severe harm, neither of which are satisfied here.⁷

CONCLUSION

The EPA has sufficient tools within its existing authority to address near term compliance shortfalls without resorting to retroactive waivers, such as the deficit carry-forward provision under 40 C.F.R. § 80.1427(b) for 2024 or potentially a prospective CWC in conjunction with establishing volumes in the next Set Rule to alleviate market imbalances from the previous Set Rule. These tools ensure market stability, incentivize investment and maintain the integrity of the RFS program. When applied effectively, these tools support the clear intent of the statute, provide sufficient

⁶ Courts have addressed former attempts by the EPA to change deadlines. In *Clean Wisconsin v. Envtl. Prot. Agency*, 964 F3d 1145 (D.C. Cir. 2020), Clean Wisconsin challenged the EPA's delay in acting on state implementation plans under the CAA. The CAA required the EPA to review these state plans within specific statutory deadlines. The court held that the EPA's delay violated the CAA's explicit statutory deadlines and emphasized that statutory deadlines are critical for maintaining regulatory predictability and accountability. Similarly, in *S. Coast Air Quality Mgmt. Dist. v. Envtl. Prot. Agency*, 882 F3d 1138 (D.C. Cir. 2018), South Coast Air Quality Management challenged the EPA's decision to extend compliance deadlines (without explicit congressional authorization) for certain areas that failed to meet the National Ambient Air Quality Standards under the CAA. The court held that the EPA exceeded its authority, vacating the relevant portions of the EPA's rule, and affirmed that the agency must adhere to statutory timelines unless explicitly authorized to do otherwise.

⁷ In promulgating a rule pursuant to its authority under the CAA, EPA must provide a statement of basis and purpose that includes a summary of "the factual data on which the proposed rule is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3).



options for stakeholders to remain complaint while preserving market stability, and ultimately encouraging long-term growth and investment in renewable fuels. By leveraging these tools, the EPA can address shortfalls without disrupting the RFS program. As such, we respectfully request that EPA immediately withdraw the proposed partial waiver of 2024 D3 volumes.

We look forward to continued engagement with the EPA on this important issue and utilizing the tools with the RFS Program to unleash new investment in the capture of biogenic methane for its productive use as either renewable natural gas or renewable electricity.

Sincerely,

Adam Comora

Adam Comora Co-Chief Executive Officer