

July 31, 2024

VIA CERTIFIED MAIL

Hon. Michael Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Mail Code 1101A
Washington, DC 20460

Re: *Notice of Intent to Sue for Failure to Issue Volume Requirements Under Renewable Fuel Standard Program*

Dear Administrator Regan:

Growth Energy hereby provides notice of its intent to sue the Environmental Protection Agency ("EPA") under section 304(a)(2) of the Clean Air Act to enforce EPA's mandatory, non-discretionary duties under section 211(o) of the Act to issue renewable fuel volume requirements for 2026 under the Renewable Fuel Standard program ("RFS").

Growth Energy is the country's leading association of ethanol producers. With its members, Growth Energy works to bring consumers better choices at the fuel pump, grow America's economy, and improve the environment. Growth Energy's members' operations depend directly on the annual RFS obligations issued by EPA.

The Clean Air Act states that, when determining "the applicable volumes of each [category of renewable] fuel ... for calendar years after" 2022 (or after 2012 for biomass-based diesel), EPA "shall promulgate rules establishing the applicable volumes ... no later than 14 months before the first year for which such applicable volume will apply."¹ Accordingly, EPA is required to issue the applicable volumes for 2026 by November 1, 2024. Yet, the Unified Regulatory Agenda maintained by the Office of Management and Budget states that EPA has decided to issue its notice of proposed rulemaking regarding the 2026 volume requirements in March 2025 and to promulgate the final 2026 volume requirements in December 2025—more than one full year after the statutory deadline for setting the 2026 volumes.²

¹ 42 U.S.C. §7545(o)(2)(B)(ii); see *Wynnewood Refining Co., LLC v. EPA*, 77 F.4th 767, 773 (D.C. Cir. 2023).

² <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=2060-AW23>.

EPA's decision not to timely perform its mandatory, non-discretionary duty to issue the 2026 volume requirements violates the Clean Air Act. It also undermines Congress's directive that the RFS program "force the market to create ways to produce and use greater and greater volumes of renewable fuel each year"³ and deprives market participants of the "market certainty" that is "so critical to the long term success of the Renewable Fuel Program."⁴

Therefore, Growth Energy requests that EPA commit to promulgating the final volume requirements by the statutory deadline. Correspondingly, Growth Energy urges EPA to issue a notice of proposed rulemaking for the 2026 RFS no later than September 2, 2024. That would allow the bare minimum amount of 30 days for public comment and the bare minimum amount of 30 days for agency review before issuing the final rule.⁵ Should EPA fail to do so, Growth Energy reserves its right to sue for relief beginning 60 days from today,⁶ including seeking an order compelling EPA to perform its mandatory, non-discretionary duty promptly.⁷

If you have any questions concerning this notice, please contact me at 202-545-4025.

Respectfully submitted,



Joseph Kakesh
General Counsel
Growth Energy

³ *Americans for Clean Energy v. EPA*, 864 F.3d 691, 710 (D.C. Cir. 2017); accord *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 568 (D.C. Cir. 2019).

⁴ *Americans for Clean Energy*, 864 F.3d at 715 (quotation marks omitted).

⁵ "Administrative agencies usually provide a comment period of thirty days or more." *Hollingsworth v. Perry*, 558 U.S. 183, 192 (2010) (quotation marks omitted). Historically, EPA has provided more than 40 days to comment on proposed RFS volume requirements. It provided 71 days to comment on the proposed requirements for 2023-2025 (from December 1, 2022, to February 10, 2023). See 88 Fed. Reg. 44,468 44,479:1 (July 12, 2023). Additionally, EPA may not issue the final regulation until at least 30 days after the closure of the comment period. 42 U.S.C. §7607(d)(5) (EPA "shall keep the record of such proceeding open for thirty days after completion of the proceeding").

⁶ See 42 U.S.C. §7604(b)(2) ("No action may be commenced ... under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator").

⁷ See 42 U.S.C. §7604(a)(2) ("any person may commence a civil action ... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator"); 5 U.S.C. §706(1) ("The reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed").

cc: Jeffrey Prieto
Joseph Goffman