An examination of documents related to the White House Office of Management and Budget’s (OMB) inter-agency review of the 2019 RVO Proposed Rule shows that EPA was planning to reallocate expected 2019 small refiner exemption volumes to ensure achievement of statutory RFS requirements. However, just four days before the proposal was publicly released, the reallocation measures were stricken from the proposal. Following is a timeline of events based on inter-agency review documents.

May 9: EPA submits its first draft of the 2019 RVO proposal to the White House for inter-agency review. The draft includes a 10.88% RVO for total renewable fuels and does not attempt to adjust the RVO to account for expected small refinery exemptions.

In the initial draft, EPA writes, “…at this time, no exemptions have been approved for 2019, and therefore we have calculated the percentage standards for 2019 without any adjustment for exempted volumes.” In other words, any exemptions that would be issued after the rule is finalized would result in an effective reduction of required volumes, as was the case in 2016 and 2017.

May 25: The first round of comments from reviewers at other agencies is circulated. One reviewer writes, “…we suggest that EPA include an ‘expected’ amount of [small refiner] waivers for the 2019 standards…In that way, the expected waivers will provide certainty to the industry with respect to their standards, but also will more closely meet the amount of renewable fuel stated as the objective of the rulemaking.”

Another reviewer asks a series of questions related to small refiner exemptions, including “In what ways can EPA provide more transparency regarding the number and volume of small refiner exemptions granted for the volume years covered by this proposed rule?”

Yet another review comment states, “EPA is required by [a D.C. Circuit Court of Appeals] ruling to account for the 2016 incorrect waiver of 500 million gallons…” and thus recommends that the “volume allowance for conventional biofuel” be increased to “15.5 billion gallons.”

June 3: EPA replies to inter-agency reviewers that it “…is not addressing the issue raised by the commenter regarding the re-allocation of RINs exempted through the small refinery hardship petition process in this rule. Similarly, EPA is considering how to respond to the U.S. Court of Appeals decision on ACE in a separate proceeding that is independent from the 2019 RVO rulemaking process.”

June 4: In the second round of comments, agency reviewers again recommend that EPA “…include the 500 mg of conventional biofuels waived under the general waiver authority for 2016 as determined by the court” and “include an estimate for 2019 small refinery waivers based on the waivers granted over the past two years. Current procedures ensure the RVO isn’t met.”

Another reviewer states, “…it is wholly consistent with efforts to come close to the promulgated volumes that you estimate small refinery waivers instead of using a zero.”

Regarding the small refiner exemptions, another comment suggests that “…it would be appropriate to provide information on numbers of operations and total volumes waived, the status of 2018
waivers at the time of the release and a discussion about the use of small refinery waiver estimates for gasoline and diesel."

A few days later, another reviewer implores EPA to “Estimate small refinery waivers in calculating the percent standard.”

Despite these recommendations from inter-agency reviewers, EPA drafts of the proposal in early June still do not account for small refiner exemptions or attempt to adjust the RVO to account for waived volumes.

**June 12:** Administrator Pruitt begins a three-day trip to the Midwest with a visit to East Kansas Agri-Energy, an ethanol plant near Garnett, Kansas. During a heated discussion with farmers and ethanol producers, **Pruitt admits that EPA could reapportion the renewable fuel volume lost to small refiner waivers.**¹

**June 13:** Just a day later in South Dakota, Pruitt tells a group of farmers that EPA lacks the authority to retroactively reallocate renewable fuel volumes lost as a consequence of small refiner waivers.²

Back in D.C., EPA is circulating a revised draft of the proposal, but it maintains the same approach of failing to adjust the RVO to account for small refiner waivers. EPA keeps the language stating, “...at this time no exemptions have been approved for 2019, and therefore we have calculated the percentage standards for 2019 without any adjustment for exempted volumes. EPA is maintaining its approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2019.” EPA’s draft adds that the Agency “…is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas.”

**June 14:** Pruitt meets with farmers in Nebraska, who express concern about the corn and ethanol demand destruction resulting from the recent wave of small refiner exemptions.

**June 19:** Days after Pruitt returns to D.C. from the Midwest, EPA circulates a new draft of the 2019 RVO proposal that **includes significant changes regarding the approach to small refiner exemptions.** In this draft, EPA says it “…is taking a different approach in this proposed rule. Our proposed approach for 2019 is consistent with CAA section 211(o)(3)(B)(i), which states that EPA ‘shall determine and publish…the renewable fuel obligation that ensures that the requirements of the RFS program are met.’

The draft continues, “For 2019, we have calculated the percentage standards adjusting for estimated exempted volumes, using the exempted volume for 2017. EPA finds that this number is appropriate because it represents the most recent year for which EPA has granted small refinery exemptions.”

Finally, EPA writes that in a separate action, it “…intends to propose changes to our regulations that would allow EPA to precisely account for any small refinery exemptions in establishing the percentage standards for future years.”

In calculating the RVO percentages, **EPA projects that 8.18 billion gallons of gasoline and 5.44 billion gallons of diesel produced by small refiners will be exempt from renewable fuel**

¹ [http://ethanolproducer.com/articles/15384/east-kansas-agri-energy-hosts-pruitt-for-roundtable](http://ethanolproducer.com/articles/15384/east-kansas-agri-energy-hosts-pruitt-for-roundtable) (“Pruitt did commit to the audience at East Kansas Agri-Energy that EPA could reallocate RINs from merchant refiners operations receiving an economic hardship waiver.”)

² [https://twitter.com/cornfarmerkeith/status/1007005146751164418](https://twitter.com/cornfarmerkeith/status/1007005146751164418)
blending requirements in 2019. Adding these exemptions into the RVO formula raises the applicable renewable fuel blending percentage for remaining obligated parties, **effectively reallocating the volume lost via small refiner waivers.** In this draft, the total RVO for renewable fuel **increases to 11.76% from the 10.88%** in previous drafts, as remaining obligated parties are required to blend more biofuel to make up for exempted volumes from small refiners.

*This new approach to the RVOs essentially follows the earlier recommendations of the inter-agency reviewers.*

**June 20:** A slightly revised draft adds legal heft to the proposal’s new approach to accounting for small refiner exemptions. The tweaked draft states, “EPA’s proposed approach implements CAA section 211(o)(3)(B)(i), which states that EPA ‘shall determine and publish...the renewable fuel obligation that ensures that the requirements of [the RFS program in CAA section 211(o)(2)] are met.’ *Projecting the total exempted volume based on the most recent exemption data is an appropriate way to address this effect and facilitate the satisfaction of the RFS program requirements in CAA section 211(o)(2).*” EPA adds that “…this approach is **consistent with the text of our regulations**, which accounts for the ‘amount of gasoline’ and ‘amount of diesel projected to be produced by exempt small refineries’ in 2019.”

Finally, EPA writes that it “…solicits comment on this new interpretation of our regulations...In addition, in a separate, future action, EPA intends to propose changes to our regulations that would allow EPA to more precisely account for exempted small refinery volumes in establishing the percentage standards."

**June 21:** Refiners apparently catch wind of the change in direction at EPA and **mount an aggressive last-minute campaign to dissuade Pruitt from releasing a proposal that includes reallocation of small refiner exemptions.** According to the *Washington Examiner*, “Sources close to the lobbying push say the eleventh-hour push to get Pruitt to back off from reallocating ethanol gallons to refiners worked” and the proposal would be released “…without the reallocation measure attached.”

Pruitt’s calendar shows he had calls with “RFS stakeholders” in the evening, following calls with small refiner champions Sens. Ted Cruz (R-TX) and Pat Toomey (R-PA) on June 20. 4

*Reuters* reports that Pruitt is cancelling an appearance with Agriculture Secretary Sonny Perdue scheduled for June 22 at a farm near Kansas City, where it was expected the 2019 RVO proposal would be announced. 5 The cancellation adds to suspicions that Big Oil has persuaded Pruitt to abandon attempts to reallocate lost volumes.

**June 22:** A new draft of the proposal is sent from EPA to the White House, **showing that the refiners were successful in ensuring the reallocation measures were removed from the proposal.** In this draft, the total RVO percentage is **reduced back to 10.88% from 11.76%** and all of the language regarding adjustments to the RVO to reapportion small refiner exemptions is **stricken.** *(Key pages from the June 22 draft are attached).*

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3 https://www.washingtonexaminer.com/policy/energy/pruitt-gets-hit-from-all-sides-over-ethanol-mandate
4 https://www.epa.gov/senior-leaders-calendars/calendar-scott-pruitt-former-administrator
**June 25**: An email is sent from the White House to EPA notifying the agency that “OMB concluded its review.”

**June 26**: A day after the OMB review is completed, the 2019 RVO proposal is released in “pre-publication” form. Consistent with the June 22 final draft, the total RVO for renewable fuel has been reduced back to the original 10.88%, the language regarding a “new approach” for effectively reapportioning small refiner exemptions has been completely stricken, and the original language regarding small refinery exemptions is reinserted.

Adding insult to injury, EPA noted that it “…is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas…and any such comments will be deemed beyond the scope of this rulemaking.”

**July 5**: President Trump announces that he has accepted Pruitt’s resignation.
Hi Chad,

Attached are the revised clean and RLSO versions of the rule for your review. Please let us know if you hear anything on timing so we can get all the necessary ducks in a row.

Thanks,

Tia
VII. Percentage Standards for 2019

The renewable fuel standards are expressed as volume percentages and are used by each obligated party to determine their Renewable Volume Obligations (RVOs). Since there are four separate standards under the RFS program, there are likewise four separate RVOs applicable to each obligated party. Each standard applies to the sum of all non-renewable gasoline and diesel produced or imported. The percentage standards are set so that if every obligated party meets the percentages by acquiring and retiring an appropriate number of RINs, then the amount of renewable fuel, cellulosic biofuel, BBD, and advanced biofuel used will meet the applicable volume requirements on a nationwide basis.

Sections II through V provide our rationale and basis for the proposed volume requirements for 2019. The volumes used to determine the proposed percentage standards are shown in Table VII-1.

<table>
<thead>
<tr>
<th>Table VII-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volumes for Use in Determining the Proposed 2019 Applicable Percentage Standards</td>
</tr>
<tr>
<td><strong>Cellulosic biofuel</strong></td>
</tr>
<tr>
<td><strong>Biomass-based diesel</strong></td>
</tr>
<tr>
<td><strong>Advanced biofuel</strong></td>
</tr>
<tr>
<td><strong>Renewable fuel</strong></td>
</tr>
</tbody>
</table>

For the purposes of converting these volumes into percentage standards, we generally use two decimal places to be consistent with the volume targets as given in the statute, and similarly two decimal places in the percentage standards. However, for cellulosic biofuel we use three decimal places in both the volume requirement and percentage standards to more precisely capture the smaller volume projections and the unique methodology that in some cases results in estimates of only a few million gallons for a single producer.

A. Calculation of Percentage Standards

To calculate the percentage standards, we are following the same methodology for 2019 as we have in all prior years. The formulas used to calculate the percentage standards applicable to producers and importers of gasoline and diesel are provided in 40 CFR 80.1405. 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 projected gasoline and diesel volumes are provided by EIA, and include projections of ethanol and biodiesel used in transportation fuel. Since the percentage standards apply only to the non-

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139 The 2019 volume requirement for BBD was established in the 2018 final rule.
renewable gasoline and diesel produced or imported, the volumes of renewable fuel are subtracted out of the EIA projections of gasoline and diesel.

Transportation fuels other than gasoline or diesel, such as natural gas, propane, and electricity from fossil fuels, are not currently subject to the standards, and volumes of such fuels are not used in calculating the annual percentage standards. Since under the regulations the standards apply only to producers and importers of gasoline and diesel, these are the transportation fuels used to set the percentage standards, as well as to determine the annual volume obligations of an individual gasoline or diesel producer or importer under §80.1407.

As specified in the RFS2 final rule,\(^\text{140}\) the percentage standards are based on energy-equivalent gallons of renewable fuel, with the cellulosic biofuel, advanced biofuel, and total renewable fuel standards based on ethanol equivalence and the BBD standard based on biodiesel equivalence. However, all RIN generation is based on ethanol-equivalence. For example, the RFS regulations provide that production or import of a gallon of qualifying biodiesel will lead to the generation of 1.5 RINs. The formula specified in the regulations for calculation of the BBD percentage standard is based on biodiesel-equivalence, and thus assumes that all BBD used to satisfy the BBD standard is biodiesel and requires that the applicable volume requirement be multiplied by 1.5 in order to calculate a percentage standard that is on the same basis (i.e., ethanol-equivalent) as the other three standards. However, BBD often contains some renewable diesel, and a gallon of renewable diesel typically generates 1.7 RINs.\(^\text{141}\) In addition, there is often some renewable diesel in the conventional renewable fuel pool. As a result, the actual number of RINs generated by biodiesel and renewable diesel is used in the context of our assessing volumes for purposes of deriving the applicable volume requirements and associated percentage standards for advanced biofuel and total renewable fuel, and likewise in obligated parties’ determination of compliance with any of the applicable standards. While there is a difference in the treatment of biodiesel and renewable diesel in the context of determining the percentage standard for BBD versus determining the percentage standard for advanced biofuel and total renewable fuel, it is not a significant one given our approach to determining the BBD volume requirement. Our intent in setting the BBD applicable volume is to provide a level of guaranteed volume for BBD, but as described in Section VI.B, we do not expect the BBD standard to be binding in 2019. That is, we expect that actual supply of BBD, as well as supply of conventional biodiesel and renewable diesel, will be driven by the advanced biofuel and total renewable fuel standards.

**B. Small Refineries and Small Refiners**

In CAA section 211(o)(9), enacted as part of the Energy Policy Act of 2005, and amended by the Energy Independence and Security Act of 2007, Congress provided a temporary exemption to small refineries\(^\text{142}\) through December 31, 2010. Congress provided that small refineries could receive a temporary extension of the exemption beyond 2010 based either on the results of a required DOE study, or based on an EPA determination of “disproportionate

\(^{140}\) See 75 FR 14670 (March 26, 2010).

\(^{141}\) In some cases a gallon of renewable diesel generates either 1.5 or 1.6 RINs.

\(^{142}\) A small refiner that meets the requirements of 40 CFR 80.1442 may also be eligible for an exemption.
economic hardship” on a case-by-case basis in response to small refinery petitions. In reviewing petitions, EPA, in consultation with the Department of Energy, evaluates whether the small refinery has demonstrated disproportionate economic hardship, and may grant refineries exemptions upon such demonstration.

EPA has granted exemptions pursuant to this process in the past. However, at this time no exemptions have been approved for 2019, and has historically not accounted for small refinery exemptions in calculating therefore we have calculated the percentage standards unless they were granted prior to EPA establishing the for 2019 without any adjustment for exempted volumes. EPA is maintaining its approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards. EPA is taking a different approach in this proposed rule. In calculating the 2019 that apply to all gasoline and diesel produced or imported in 2019. EPA is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards: we propose to project the exempted small refinery volume for 2019 based on the actual exempted small refinery volume for compliance year 2017.

EPA’s proposed approach implements CAA section 211(o)(3)(B)(i), which states that EPA “shall determine and publish . . . the renewable fuel obligation that ensures that the requirements of [the RFS program in CAA section 211(o)(2)] are met.” Our grant of small refinery exemptions affects the amount of transportation fuel subject to the renewable fuel obligation for that year. Projecting the total exempted volume based on the most recent exemption data is an appropriate way to address this effect and facilitate the satisfaction of the RFS program requirements formulas in CAA section 211(o)(2).

In addition, this approach is a reasonable interpretation of our regulations, which accounts for the “amount of gasoline” and “amount of diesel projected to be produced by exempt small refineries” in 2019. 40 CFR 80.1405(e) (GE and DE) (emphasis added). To “project” means to estimate a future value based on present data. 143 We recognize that there is some level of uncertainty with projecting the exempted volume for 2019, as petitions for 2019 small refinery exemptions have not yet been submitted to or evaluated by EPA. We further recognize that higher or lower projections of the exempted small refinery volume for 2019 would result in higher or lower applicable percentages for obligated parties. EPA proposes to estimate 2019 exempted volumes based on present data: the exempted volumes for compliance year 2017 at the time of this action. 144 Use of this data is appropriate because 2017 is the most recent year for which EPA has granted small refinery exemptions at this time. We recognize that there are different ways in which EPA could develop these projections. We request comment on alternative methods for projecting the exempted small refinery volume for 2019.

EPA solicits comment on this new interpretation of our regulations, 40 CFR 80.1405(c) (GE and DE). In addition, in a separate, future action, EPA may consider changes to our regulations that would allow EPA to more precisely account for exempted small refinery volumes in establishing the percentage standards. Any comments related to, and any such or any

144 In the final rule, EPA anticipates using the most up-to-date 2017 exemption data available at that time.
other change to our percentage standard regulations are comments will be deemed beyond the scope of this action, although they may inform the separate, future action rulemaking.

C. Proposed Standards

The formulas in 40 CFR 80.1405 for the calculation of the percentage standards require the specification of a total of 14 variables covering factors such as the renewable fuel volume requirements, projected gasoline and diesel demand for all states and territories where the RFS program applies, renewable fuels projected by EIA to be included in the gasoline and diesel demand, and exemptions for small refineries. The values of all the variables used for this final rule are shown in Table VII.C-1.\textsuperscript{145}

\textsuperscript{145} To determine the 49-state values for gasoline and diesel, the amount of these fuels used in Alaska is subtracted from the totals provided by EIA because petroleum based fuels used in Alaska do not incur RFS obligations. The Alaska fractions are determined from the June 30, 2017 EIA State Energy Data System (SEDS), Energy Consumption Estimates.
Table VII.C-1
Values for Terms in Calculation of the Proposed 2019 Standards\(^{146}\) (billion gallons)

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>RFV(_{CB})</td>
<td>Required volume of cellulosic biofuel</td>
<td>0.381</td>
</tr>
<tr>
<td>RFV(_{BBD})</td>
<td>Required volume of biomass-based diesel</td>
<td>2.10</td>
</tr>
<tr>
<td>RFV(_{AB})</td>
<td>Required volume of advanced biofuel</td>
<td>4.88</td>
</tr>
<tr>
<td>RFV(_{RF})</td>
<td>Required volume of renewable fuel</td>
<td>19.88</td>
</tr>
<tr>
<td>G</td>
<td>Projected volume of gasoline</td>
<td>143.76</td>
</tr>
<tr>
<td>D</td>
<td>Projected volume of diesel</td>
<td>56.46</td>
</tr>
<tr>
<td>RG</td>
<td>Projected volume of renewables in gasoline</td>
<td>14.74</td>
</tr>
<tr>
<td>RD</td>
<td>Projected volume of renewables in diesel</td>
<td>2.83</td>
</tr>
<tr>
<td>GS</td>
<td>Projected volume of gasoline for opt-in areas</td>
<td>0.00</td>
</tr>
<tr>
<td>RGS</td>
<td>Projected volume of renewables in gasoline for opt-in areas</td>
<td>0.00</td>
</tr>
<tr>
<td>DS</td>
<td>Projected volume of diesel for opt-in areas</td>
<td>0.00</td>
</tr>
<tr>
<td>RDS</td>
<td>Projected volume of renewables in diesel for opt-in areas</td>
<td>0.00</td>
</tr>
<tr>
<td>GE</td>
<td>Projected volume of gasoline for exempt small refineries</td>
<td>8,180.00</td>
</tr>
<tr>
<td>DE</td>
<td>Projected volume of diesel for exempt small refineries</td>
<td>5,440.00</td>
</tr>
</tbody>
</table>

Projected volumes of gasoline and diesel, and the renewable fuels contained within them, were derived from the April 2018 version of EIA’s Short-Term Energy Outlook.

Using the volumes shown in Table VII.C-1, we have calculated the proposed percentage standards for 2019 as shown in Table VII.C-2.

\(^{146}\) See “Calculation of proposed % standards for 2019” in docket EPA-HQ-OAR-2018-0167.
Table VII.C-2  
Proposed Percentage Standards for 2019

<table>
<thead>
<tr>
<th>Fuel Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cellulosic biofuel</td>
<td>0.225209%</td>
</tr>
<tr>
<td>Biomass-based diesel</td>
<td>1.8672%</td>
</tr>
<tr>
<td>Advanced biofuel</td>
<td>2.8967%</td>
</tr>
<tr>
<td>Renewable fuel</td>
<td>11.7610.88%</td>
</tr>
</tbody>
</table>