



# Institute for Policy Integrity

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**Subject:** Comments on Proposed 2014 Standards for the Renewable Fuel Standard Program, 78 Fed. Reg. 71,732 (Nov. 29, 2013)

The Institute for Policy Integrity (“Policy Integrity”) at NYU School of Law<sup>1</sup> respectfully submits the following comments on the Environmental Protection Agency’s (“EPA”) Proposed 2014 Standards for the Renewable Fuel Standard Program (“RFS program”). Policy Integrity takes no position on the specific volumes of renewable fuel that EPA proposes to require in 2014. We do note, however, that the proposed volumes fall short not only of the Energy Independence and Security Act’s statutory targets for 2014, but also of the volume requirements that EPA promulgated in 2013.<sup>2</sup> This backsliding highlights the limitations of the RFS program as a tool for driving steady greenhouse gas (“GHG”) emissions reductions in the transportation sector.

As Policy Integrity has argued since 2009, EPA can more effectively and efficiently control GHG emissions from mobile sources by employing its broad authority under Section 211 of the Clean Air Act (“CAA”) to establish a cap-and-trade program for vehicle fuels.<sup>3</sup> Even better, EPA can use its power under Section 115 of the CAA to set a nationwide cap for GHG emissions from both mobile *and* stationary sources.<sup>4</sup> Either scheme will provide a more predictable, effective, and efficient means of achieving the RFS program’s “central policy goal” of reducing GHG emissions.<sup>5</sup>

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<sup>1</sup> No part of this document purports to present New York University School of Law’s views, if any.

<sup>2</sup> While EPA has waived statutory targets for cellulosic biofuel in past years, it has never before done so for the larger “advanced biofuels” and “total renewable fuels” categories. U.S. ENERGY INFO. ADMIN., THIS WEEK IN PETROLEUM, Nov. 20, 2013, <http://www.eia.gov/oog/info/twip/twiparch/2013/131120/twipprint.html>.

<sup>3</sup> See Petition from Inst. for Policy Integrity to U.S. Env’tl. Prot. Agency, “Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels” (June 29, 2009), *available at* <http://policyintegrity.org/documents/7.29.09IPIPetitiontoEPA.pdf> [hereinafter 2009 Petition].

<sup>4</sup> See Petition from Inst. for Policy Integrity to U.S. Env’tl. Prot. Agency, “Petition for Rulemakings and Call for Information under Section 115, Title VI, Section 111, and Title II of the Clean Air Act to Regulate Greenhouse Gas Emissions” (Feb. 19, 2013), *available at* <http://policyintegrity.org/documents/Policy%20Integrity%20Omnibus%20GHG%20Petition%20under%20CAA.pdf> [hereinafter 2013 Petition].

<sup>5</sup> See 2014 Standards for Renewable Fuel Program, Proposed Rule, 78 Fed. Reg. 71,732, 71,734 (proposed Nov. 29, 2013) (to be codified at 40 CFR pt. 80) (listing reduction of GHG emissions as a “central policy goal” of the RFS program, along with “enhanced energy security, economic development, and technological innovation”).

**I. Unlike the RFS program, a cap-and-trade program will reduce GHG emissions to a socially optimal level at the lowest possible cost.**

Economists nearly all agree that the most efficient method to reduce GHG pollution is to give individual polluters maximum flexibility while still creating incentives for economy-wide emissions reductions.<sup>6</sup> A cap-and-trade program achieves these goals by mandating a total cut in emissions and allowing businesses to achieve those reductions in the cheapest manner possible. Under a CAA-based trading system, EPA will “cap” the nation’s total emissions (either from vehicle fuels only, under Section 211, or all regulated sources, under Section 115) at a particular level and distribute a corresponding number of permits, or “emissions allowances,” to upstream emissions sources, such as oil refineries and fuel importers.<sup>7</sup> Sources can then “trade” (i.e., buy and sell) permits with each other, thereby letting the marketplace identify the most efficient allocation of emissions among covered entities. As with any cap-and-trade program, covered entities will pass along some of the cost of their allowances to consumers, who will take increased prices into account when making purchasing decisions.

***A cap-and-trade program will reduce GHG emissions to a socially optimal level.***

A properly calibrated emissions cap is set at the point where the marginal abatement cost (based on reasonable technology projections) is equal to the social cost of carbon—that is, the point where the price of preventing an additional ton of GHG emissions is equivalent to the harm the additional ton of emissions imposes on society. At that level, the cap incentivizes the market to perform all abatement that is cost-benefit justified.

RFS targets, by contrast, are not set by reference to the social cost of carbon and do not ensure that market actors fully internalize the negative effects of their GHG emissions.<sup>8</sup> Indeed, RFS targets cannot guarantee *any* decrease in GHG emissions, much less reduction to a socially optimal level. While vehicle fuel use has declined since 2007 due to a combination of new fuel economy standards, higher gas prices, and a severe recession,<sup>9</sup> economic winds can shift.<sup>10</sup> If demand for vehicle fuel begins to outpace annual increases in the renewable fuel supply and further gains in

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<sup>6</sup> See, e.g., Robert R. Nordhaus, *New Wine Into Old Bottles: The Feasibility of Greenhouse Gas Regulation Under the Clean Air Act*, 15 N.Y.U. ENVT. L.J. 53, 55-56 (2007) (citing Climate Stewardship Act of 2003, S. 139, 108<sup>th</sup> Cong. §§ 311-372 (2003); Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, 1997 U. Chi. Legal F. 293, 297-98 (1997)).

<sup>7</sup> Targeting upstream sources will keep the number of regulated entities relatively low and minimize the administrative burdens of the program.

<sup>8</sup> Cellulosic biofuel targets, for instance, are based on the “projected volume available during [the forthcoming] calendar year.” 42 U.S.C. § 7545(o)(7)(D)(i).

<sup>9</sup> U.S. ENERGY INFO. ADMIN., THIS WEEK IN PETROLEUM, *supra* note 2 (“The total demand for gasoline has been flat or decreasing since 2007 because of greenhouse gas and fuel economy standards for vehicles, fuel prices, and a sharp economic downturn followed by a slow recovery.”).

<sup>10</sup> See, e.g., U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK, Jan. 7, 2014, at 5 available at [http://www.eia.gov/forecasts/steo/pdf/steo\\_full.pdf](http://www.eia.gov/forecasts/steo/pdf/steo_full.pdf) (noting that “motor gasoline consumption grew by 110,000 bbl/d (1.2%) [in 2013], the largest increase since 2004”).

vehicle fuel economy, mobile emissions will rise once again. In the face of macroeconomic uncertainty, a cap-and-trade program better ensures precise and consistent emissions reductions.<sup>11</sup>

***A cap-and-trade program will achieve emissions reductions at the lowest possible cost.***

While a cap-and-trade program establishes a precise target for total emissions, it is indifferent to the means by which reductions are achieved. The RFS program, by contrast, “picks winners” among abatement strategies by prioritizing the development of a low-carbon fuel supply over initiatives to reduce fuel demand (such as greater investment in electric cars or mass transit). Yet there is no reason to believe that renewable fuels will always be the most cost-effective abatement option for the transportation sector. Under certain circumstance, increasing bus ridership may prove a cheaper means of reducing emissions than increasing the supply of butanol.

Oil refineries, of course, are not in the business of operating bus routes or building electric cars. But by putting a price on carbon, a cap-and-trade program incentivizes *all* market actors—not just directly regulated entities—to reduce their emissions. If a refinery subject to a cap wants to increase production, it must either (1) lower its per-gallon emissions rate by using a greater percentage of low-carbon fuel, or (2) purchase additional emissions allowances. Either way, marginal production costs will rise, resulting in higher fuel prices for downstream consumers. These higher prices, in turn, will motivate consumers to adopt their own least-cost strategies for minimizing fuel use, such as taking public transportation, living closer to work, or investing in more fuel-efficient vehicles.<sup>12</sup>

**II. A cap-and-trade program for mobile *and* stationary sources is preferable to one for mobile sources alone.**

A vehicles-only cap-and-trade program will provide greater and more cost-effective emissions reductions than the RFS program, but EPA can maximize efficiency by creating a single cap for mobile *and* stationary sources. A universal cap will lower per-unit compliance costs by expanding the range of abatement possibilities.<sup>13</sup> Buses may generate cheaper emissions reductions than butanol, but capturing methane from landfills may be more cost effective than either. And because a universal cap should still be set at the point where the marginal abatement

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<sup>11</sup> Just as it eliminates the possibility of too little abatement, a cap-and-trade program also ensures that regulated entities are not forced to abate too much. For example, as already discussed, overall demand for vehicle fuel has unexpectedly dropped since the RFS program was enacted in 2007, due in significant part to the recession. Under a cap-and-trade program, regulated entities would receive credit for the “free” emissions reductions accompanying such a decline in demand and would not have to achieve those reductions via other, more expensive means. An RFS target, on the other hand, must be met regardless of overall fuel demand, potentially forcing regulated entities to abate *beyond* the optimal level in times of falling demand.

<sup>12</sup> A cap-and-trade program could more directly encourage downstream innovation by permitting the use of carbon offsets. Under an offset scheme, the emissions-reducing activities of entities not covered by the cap—such as local transportation departments or electric vehicle manufacturers—would generate credits that covered entities could purchase as a (potentially lower-cost) substitute for emissions allowances.

<sup>13</sup> See, e.g., Nathaniel O. Keohane, *Cap and Trade, Rehabilitated: Using Tradable Permits to Control U.S. Greenhouse Gases*, 8 REV. ENVTL. & ECON. POL’Y 42, 49 (2009) (“From an economic perspective, a cap . . . should cover as much of the economy as possible—not just in terms of the volume of emissions or the number of participants, but especially in terms of the variation in abatement opportunities. The broader the program, the greater are the gains from trade, and the lower are the total costs of meeting a given target.”).

cost equals the social cost of carbon, access to lower-cost abatement technologies will allow for a greater overall reduction in emissions.

A universal cap will also eliminate the possibility that emissions will “leak” from mobile to stationary sources.<sup>14</sup> For instance, if increased fuel prices lead consumers to switch to electric cars, vehicle fuel use will decline but electricity generation at power plants will increase (along with the power plants’ GHG emissions). Under a universal cap, such inter-source leakage will be properly accounted for.<sup>15</sup>

### **III. EPA has authority under the CAA to implement a cap-and-trade program for GHG emissions.**

As explained in more detail in Policy Integrity’s 2009 and 2013 petitions, multiple provisions of the CAA empower EPA to cap GHG emissions, either for vehicle fuels only or for both mobile and stationary sources.

#### ***EPA can cap GHG emissions from vehicle fuels under CAA Section 211.***

Section 211(c)(1) of the Clean Air Act provides:

The Administrator may . . . by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution . . . that may reasonably be anticipated to endanger the public health or welfare . . .

In other words, EPA can control or prohibit the manufacture or sale of any fuel that (1) causes or contributes to air pollution that (2) may reasonably be anticipated to endanger the public health or welfare.

GHG emissions generated by vehicle fuels undoubtedly “contribute” to air pollution within the meaning of Section 211(c)(1). The transportation sector accounted for 28% of U.S. GHG emissions in 2011, most of which were “CO<sub>2</sub> emissions resulting from the combustion of petroleum-based products, like gasoline, in internal combustion engines.”<sup>16</sup> EPA has previously found sources

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<sup>14</sup> Leakage is typically discussed in connection with international or interstate trading schemes, but the concern in these contexts is the same: in the absence of a universal cap, emissions may migrate from regulated to unregulated sources. *See, e.g.*, RGGI EMISSIONS LEAKAGE MULTI-STATE STAFF WORKING GRP., POTENTIAL EMISSIONS LEAKAGE AND THE REGIONAL GREENHOUSE GAS INITIATIVE (RGGI): EVALUATING MARKET DYNAMICS, MONITORING OPTIONS, AND POSSIBLE MITIGATION MECHANISMS at 1, <http://www.rggi.org/docs/20080331leakage.pdf>.

<sup>15</sup> Leakage could also be addressed (albeit less efficiently) by separately capping power-plant emissions under Section 111 of the CAA. *See* 2013 Petition at 18.

<sup>16</sup> *Sources of Greenhouse Gas Emissions: Transportation Sector Emissions*, ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/ghgemissions/sources/transportation.html> (last visited Jan. 28, 2014).

responsible for as little as 9%, 4%, 3%, and 1.2% of pollution to be “contributors.”<sup>17</sup> As for the second requirement, EPA expressly concluded in 2009 that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.”<sup>18</sup>

Thus, under the express language of the CAA, EPA may “control or prohibit” the sale of GHG-emitting vehicle fuels.<sup>19</sup> In a cap-and-trade program, this “control” will be exercised by requiring upstream fuel sources to possess a sufficient number of allowances to cover the emissions-generating potential of any fuel they sell. While the word “control” is not explicitly defined in the CAA and is thus open to EPA’s reasonable statutory interpretation, EPA has historically interpreted the term to encompass the use of economic incentives, like emissions allowances, as regulatory tools. For instance, EPA used its authority to “promulgate regulations respecting the *control*” of stratospheric pollutants under Section 615 of the CAA to develop a system of tradable allowances for ozone-depleting substances.<sup>20</sup> Even more relevant, EPA previously invoked its Section 211 authority to implement trading programs for both the lead<sup>21</sup> and sulfur<sup>22</sup> content of gasoline. While the lead and sulfur programs involved tradable credits rather than allowances or permits, they nevertheless support a reading of Section 211(c)(1) as permitting control via a market-based regulatory mechanism like a cap-and-trade program.

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<sup>17</sup> See, e.g., Control of Emissions From Nonroad Large Spark-Ignition Engines, and Recreational Engines (Marine and Land-Based); Final Rule, 67 Fed. Reg. 68,242, 68,245 (Nov. 8, 2002) (“Nationwide, [spark-ignition] engines and vehicles are a significant source of mobile source air pollution. As described below, of all mobile source emissions in 2000 they accounted for about 9 percent of HC emissions, 4 percent of CO emissions, 3 percent of NO<sub>x</sub> emissions, and 2 percent of direct PM emissions. The emissions from Large SI engines contributed 2 to 3 percent of the HC, NO<sub>x</sub>, and CO emissions from mobile sources in 2000. Recreational vehicles by themselves account for about 6 percent of national mobile source HC emissions and about 2 percent of national mobile source CO emissions.”); *id.* at 68,248 (finding snowmobiles “contributed” to the pollution in a nonattainment area by emitting 1.2% of the total daily CO inventory in that area for 2001).

<sup>18</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,510 (Dec. 15, 2009).

<sup>19</sup> Note that Section 211 does not apply to aircraft fuels. See 2009 Petition at 23. Pursuant to Section 601(e) of the Federal Aviation Act, however, the Federal Aviation Administration (“FAA”) is required to implement emissions standards for such fuels if EPA makes an endangerment finding under Section 231 of the CAA. *Id.* Once EPA makes such a finding, FAA can either use its regulatory authority to bring aircraft fuels within a trading system set up by EPA or establish its own system of controls. *Id.* at 24.

<sup>20</sup> Protection of Stratospheric Ozone, 53 Fed. Reg. 30,566 (Aug. 12, 1988) (codified at 40 C.F.R. pt. 82) (emphasis added).

<sup>21</sup> Regulation of Fuels and Fuel Additives; Gasoline Lead Content; Final rule, 50 Fed. Reg. 9,386 (Mar. 7, 1985); Regulation of Fuels and Fuel Additives; Banking of Lead Rights; Final rule, 50 Fed. Reg. 13,118 (Apr. 1, 1985). This program was codified at 40 C.F.R. pt. 80, but is no longer in effect. Under the program, EPA allowed companies to generate “credits” by producing gasoline with lower lead content than the standard required. These credits could then be “banked” for use at a later time as the lead content standards became stricter, or else traded to another company. See *Union Oil Co. of California v. Env’tl. Prot. Agency.*, 821 F.2d 678, 679-682 (D.C. Cir. 1987).

<sup>22</sup> Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6,698 (Feb. 10, 2000) (codified at 40 C.F.R. Parts 80, 85, and 86).

## ***EPA can cap GHG emissions from mobile and stationary sources under CAA Section 115.***

Section 115 of the Clean Air Act addresses international air pollution and requires EPA to respond to U.S. emissions that endanger public health and welfare in foreign countries. The provision creates a mandatory duty to act if three prerequisites are met:

- (1) EPA must have received “reports, surveys or studies” from a “duly constituted international agency.”<sup>23</sup>
- (2) The reports received must give EPA “reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution” that “may reasonably be anticipated to endanger public health or welfare in a foreign country.”<sup>24</sup>
- (3) EPA must determine that a foreign country “has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country.”<sup>25</sup>

If these conditions are satisfied, EPA *must* require any states containing sources of the international air pollution to revise their applicable implementation plans to “prevent or eliminate” the danger to foreign health or welfare.<sup>26</sup>

U.S. GHG emissions easily satisfy the Section 115 criteria. First, EPA has received numerous reports on climate change from a duly constituted international agency, the Intergovernmental Panel on Climate Change (“IPCC”).<sup>27</sup> Second, the IPCC reports make quite clear that U.S. GHG emissions “may reasonably be anticipated to endanger public health or welfare in numerous foreign countries.” The IPCC Fourth Assessment Report (“the Fourth Assessment”), for instance, finds a greater than 90% likelihood that GHG emissions associated with human activities—of which the U.S. is the second-largest source in the world<sup>28</sup>—are driving global climate change.<sup>29</sup> The Fourth Assessment also details numerous harms that are projected to result from global climate change, including impacts related to malnutrition, extreme weather events, cardio-respiratory

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<sup>23</sup> 42 U.S.C. § 7415(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 7415(c).

<sup>26</sup> *Id.* § 7415(b).

<sup>27</sup> Indeed, when EPA issued its 2009 finding that greenhouse gases endanger U.S. health and welfare, the agency relied in part on the IPCC’s reports. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,510 Dec. 15, 2009). In that finding, EPA reasoned that it did not need to independently review the Panel’s reports because EPA took “an active part in [their] review, writing, and approval.” *Id.* at 66,511. EPA went on to state that the Intergovernmental Panel’s assessments “have been reviewed and formally accepted by, commissioned by, or in some cases authored by, U.S. government agencies and individual government scientists. These reports already reflect significant input from EPA’s scientists and the scientists of many other government agencies.” *Id.* See also Statement: Intergovernmental Panel on Climate Change Approves Physical Science Report, Sept. 27, 2013, <http://www.whitehouse.gov/blog/2013/09/27/statement-intergovernmental-panel-climate-change-approves-physical-science-report> (announcing U.S. approval of the Fifth IPCC Working Group Report on the Physical Science Basis of Climate Change and stating that “the U.S. Government is committed to continued participation in IPCC activities”).

<sup>28</sup> IPCC, CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE at 4.2.2 (2007).

<sup>29</sup> IPCC, CLIMATE CHANGE 2006: SYNTHESIS REPORT 27, 39 (2007).

diseases, infectious diseases, food production, coastal erosion, water scarcity, economic development, ocean acidification, and ecosystem resilience in each region of the globe.<sup>30</sup>

Section 115's third requirement—that a foreign country affected by U.S. GHG pollution provide “essentially the same” pollution-prevention rights to the U.S.—is satisfied by the Canadian Environmental Protection Act (“CEPA”) and South African Air Quality Act (“SAQA”), both of which establish legal authority to prevent GHG emissions that negatively impact U.S. health and welfare.<sup>31</sup> Section 166 of the CEPA authorizes Canada’s Federal Minister of Environment to take preventative action if “a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute, to air pollution in a country other than Canada.”<sup>32</sup> The greenhouse gases carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride are all listed in CEPA Schedule 1 as toxic substances, making them subject to regulation under Section 166.<sup>33</sup> In similar fashion, SAQA authorizes South Africa’s Minister of Environmental Affairs to prescribe measures to “prevent, control, or correct” any domestic emissions that may have a “significant detrimental impact on air quality, the environment or health” in a foreign country.<sup>34</sup> SAQA’s preamble emphasizes that “atmospheric emissions of ozone-depleting substances, *greenhouse gases* and other substances have deleterious effects on the environment, both locally and globally.”<sup>35</sup>

With reciprocity established, EPA is not just authorized but obligated to require all U.S. states and territories<sup>36</sup> to revise their implementation plans to address the dangers that GHG emissions pose to foreign health and welfare. As previously discussed, EPA can best exercise this authority by setting either a national GHG emissions cap or state-based emissions budgets at the level where the marginal abatement cost equals the social cost of carbon.<sup>37</sup> Further, while Section 115 does not empower EPA to *mandate* the form of any state’s implementation plan, EPA can certainly *encourage* states to adopt trading systems and to link their individual plans to create a nationwide marketplace for emissions allowances. Section 110 of the CAA explicitly authorizes the use of marketable permits and emissions auctions in state implementation plans.<sup>38</sup> Finally, because EPA has never set direct limits on GHG emissions from vehicle fuels, the states’ plans can

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<sup>30</sup> *Id.* at 48-54.

<sup>31</sup> Section 115’s reciprocity requirement may also be satisfied by existing international agreements such as the United Nations Framework Convention on Climate Change and the European Union’s Emissions Trading System. *See* 2013 Petition at 10-11.

<sup>32</sup> Canadian Environmental Protection Act § 166(1).

<sup>33</sup> *See id.* § 56(1) (noting the applicability of Section 166(1) to Schedule 1 pollutants).

<sup>34</sup> National Environmental Management: Air Quality Act 39 of 2004 (S. Afr.).§ 50(1) (“Transboundary Air Pollution.”)

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> EPA has previously identified significant sources of GHG emissions in all U.S. states and territories. *See, e.g., Greenhouse Gas Reporting Program: Greenhouse Gas Data*, ENVTL. PROT. AGENCY, <http://www.epa.gov/ghgreporting/ghgdata> (last visited Jan. 28, 2014).

<sup>37</sup> While Section 115 refers to the “prevention” or “elimination” of international harm, courts have long recognized EPA’s discretion under the CAA to determine “how much of the regulated harm is too much,” *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 475 (2001), and EPA can consider context when “deciding what risks are acceptable in the world in which we live,” *id.* at 495 (Breyer, J., concurring) (quoting *NRDC v. Envntl. Prot. Agency*, 824 F.2d 1146, 1165 (D.C. Cir. 1987)).

<sup>38</sup> 42 U.S.C. § 7410(a).

encompass both mobile and stationary sources, thus achieving the efficiency benefits of a universal cap.<sup>39</sup>

#### **IV. A cap-and-trade program under the CAA can operate alongside the RFS program.**

Policy Integrity recognizes that EPA is obligated by the Energy Independence and Security Act (“EISA”) to implement the RFS program and that, in the absence of Congressional action, the agency cannot simply abandon annual RFS targets in favor of a more efficient scheme of emissions reduction. However, EPA also has a mandate to effect the policy goals of the Clean Air Act, and nothing in the EISA prevents the agency from operating a cap-and-trade program *in addition to* the RFS program.

While RFS targets may compromise the efficiency of a cap-and-trade program, they will not reduce its efficacy. If the targets are binding—that is, if they are set at a level higher than the market would choose if subject only to an emissions cap—increased renewable use will muscle out more cost-effective abatement options and raise overall compliance costs. If, on the other hand, the targets are not binding, efficiency losses will be limited to unnecessary administrative costs. Under either scenario, emissions can still be reduced to a socially optimal level—just at a somewhat higher cost than if the RFS program were repealed in favor of a market-based approach. Accordingly, EPA need not—and should not—wait for Congressional action before exercising its authority under the Clean Air Act to establish a cap-and-trade program for GHG emissions.

Sincerely,

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<sup>39</sup> Pursuant to Section 211(c)(4)(a), states are authorized to regulate vehicle-fuel emissions so long as the EPA has neither implemented its own controls for the relevant pollutant under Section 211(c)(1), nor issued a formal finding that no controls are necessary. 42 U.S.C. § 7545(c)(4)(A). While EPA has indirectly targeted GHG emissions from vehicle fuels through the RFS program and by setting emissions standards for new motor vehicles under Section 202(a), it has never used its power under Section 211(c)(1) to directly regulate such emissions.