



UNITED TO GROW FAMILY AGRICULTURE

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Via Electronic Filing (www.regulations.gov)

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
EPA Docket Center
Air and Radiation Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
ATTN: Docket ID No. EPA-HQ-OAR-2019-0136

Re: Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes; Proposed rule, 84 Fed. Reg. 36,762 (July 29, 2019)

Dear Administrator Wheeler:

National Farmers Union (NFU) represents family farmers, fishers and ranchers across the country, with formally organized divisions in 33 states. NFU believes that good opportunities in production agriculture are the foundation of strong farm and ranch families, and strong farm and ranch families are the basis for thriving rural communities. Vibrant rural communities, in turn, are vital to the health, security and economic well-being of our entire national economy. The Renewable Fuel Standard (RFS) is one of those important opportunities. As such, NFU's policy calls for strong support of the RFS and *expanding* the mandate for renewable fuels to make up a third of the U.S. fuel supply.¹ NFU appreciates the opportunity to submit these comments on EPA's proposal entitled "Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes," published at 84 Fed. Reg. 36,762 (July 29, 2019) (referred to as "2020 RFS Proposal").

NFU appreciates that EPA's proposal maintains the implied conventional biofuel RFS volume at 15 billion gallons. But EPA's proposal significantly reduces the statutory volume for advanced biofuels and, thereby, the total renewable fuel volume. As such, the overall proposal falls short of preserving the integrity of the RFS—which is to drive the biofuels market and grow the industry. Further, EPA's proposal fails to address the over 4 billion gallons of renewable fuel demand that it has improperly wiped away through small

¹ Policy of the National Farmers Union, Art. VIII.C.3, 2019, <https://nfu.org/policy/>.

refinery exemptions for compliance years 2016-2018, despite oil companies refining record amounts of crude oil while several biofuel companies are having to shutdown production.

Also concerning, EPA proposes to retain the 2016 renewable fuel volume requirement, even though the U.S. Court of Appeals for the D.C. Circuit held that EPA had impermissibly waived 500 million gallons of the statutorily required volume for 2016. As family farmers navigate a severely depressed farm economy, this is a time the administration should be raising expectations for a policy that helps drive America's rural economy. We urge the administration to increase these proposed volumes, reject any calls to further reduce the volumes, and implement the 500 million gallons that EPA had invalidly waived.

In establishing and expanding the RFS program, Congress recognized the contributions biofuels can make to the rural economy.² Biofuels create a price-stabilizing mechanism, encourage much-needed reinvestment in our rural communities, and contribute significantly to net farm income. As such, NFU and its members have a significant interest in EPA's proposal.

NFU and its members are longstanding proponents of the RFS and its proper implementation, because the RFS provides numerous benefits, including the following:

- Reduces emissions of greenhouse gases (GHGs) that drive climate change and emissions of harmful air toxics and other pollutants that contribute to smog and adversely affect human health;
- Creates jobs that cannot be outsourced;
- Reduces U.S. dependence on foreign fuel sources;
- Drives investment in rural communities;
- Opens the transportation fuels market to competition; and
- Lowers transportation fuel prices for consumers.

"As a candidate for President, [President Trump] pledged to support our ethanol industry and to fight for the American farmer like no President has ever fought before."³ He has recognized "the importance of renewable fuels to America's economy and to our energy independence."⁴ He further acknowledged that ethanol "brings down prices at the pump for millions of American drivers."⁵ NFU appreciates EPA's recent actions to facilitate year-

² S. Rep. No. 110-65, at 2-3 (2007).

³ The White House, Remarks by President Trump on Renewable Energy, June 11, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-renewable-energy/>.

⁴ Letter from President Trump to National Ethanol Conference, available at <http://www.ethanolrfa.org/wp-content/uploads/2017/02/White-House-NEC-Letter.pdf>.

⁵ The White House, Remarks by President Trump on Renewable Energy, June 11, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-renewable-energy/>.

round sales of E15 as a positive step forward. Unfortunately, EPA keeps taking giant leaps backwards. Indeed, EPA continues to undermine efforts to promote biofuels, including ethanol, through its small refinery exemptions and in failing to expand its findings to allow mid-level ethanol blends. We urge President Trump and his administration to follow through on their assurances to family farmers and rural residents that this administration will support biofuels and uphold the intent of Congress as it relates to the RFS.

I. Farmers have Significantly Contributed to Enhancing This Country's Economy, Energy Independence and Environment.

Farmers have been the backbone of the growing renewable fuels industry in the United States. In addition to supporting the corn ethanol industry, farmers contribute to advanced biofuel volumes, helping the biofuels industry continue to diversify their feedstocks.

Facing significant hurdles with expanding urban areas and loss of agricultural lands, farmers nonetheless have increased yields, protected the environment, and helped move this country toward energy independence. And, unlike fossil fuel production, farmers have done this in a sustainable way. The expansion of the RFS has only supported these efforts, allowing farmers to continue to innovate and find new ways to bring added value to their farmland and production.⁶ EPA has long recognized the contributions *increasing* biofuel production makes to this country's energy independence.⁷ The Renewable Fuels Association (RFA) estimated that, in 2018, domestic ethanol used in the United States displaced the need for 594 million barrels of imported crude oil to meet U.S. demand.⁸ These energy security benefits stem from reducing the need for imports, diversifying fuel sources, increasing competition at the pump, and supporting innovation.

EPA fails to assess the benefits that increasing the volume requirements provides, addressing only purported costs of the program to refiners. However, the RFS program has reduced costs *to consumers*. In addition, until 2014, the RFS was an exemplary program for reducing GHG emissions and enhancing climate resilience. EPA must implement Congress's "market forcing policy" to achieve those benefits, not implement the program solely in a way to reduce obligated party compliance costs.

⁶ See Keith L. Kline, *et al.*, *Reconciling food security and bioenergy: priorities for action*, Global Change Biology Bioenergy (2016), available at <http://onlinelibrary.wiley.com/doi/10.1111/gcbb.12366/epdf>.

⁷ See, e.g., 75 Fed. Reg. 14,670, 14,839 (Mar. 26, 2010); 77 Fed. Reg. 59,458, 59,470-59,471 (Sept. 27, 2012). EPA found that "on balance, each gallon of fuel saved as a consequence of the renewable fuel standards is anticipated to reduce total U.S. imports of petroleum by 0.95 gallons." 77 Fed. Reg. at 59,470.

⁸ RFA, *Energy Security*, <https://ethanolrfa.org/energy-independence/> (last visited Aug. 29, 2019).

II. EPA Must Ensure At Least the 15-Billion-Gallon Implied Conventional Biofuel Requirement.

A. EPA continues to improperly consider “constraints” in assessing its waiver authority rather than implement Congress’ “market-forcing” policy.

EPA must finalize the proposed 15-billion-gallon implied conventional biofuel requirement for 2020, which was the same in 2019. EPA acknowledges that “the record ... does not indicate that [further reduction] is justified.”⁹ Yet, EPA continues to review “constraints” on use of higher blends of ethanol.¹⁰ EPA states that this analysis is not being considered as part of its cellulosic waiver authority, but further contends “that consideration of the ways that the market could make biofuels available to meet the applicable standards may be generally relevant to whether and how EPA exercises its waiver authorities, such as our consideration of whether the volumes will cause economic harm.”¹¹ This is nonsense. EPA acknowledges that the D.C. Circuit in *Americans for Clean Energy v. EPA (ACEI)*, 864 F.3d 691 (D.C. Cir. 2017), rejected EPA’s focus “on supply of renewable fuel to consumers” when considering its general waiver authority.¹² The statute requires EPA to ensure the volumes. Only if EPA is proposing a general waiver must EPA show that conditions for a waiver exist. EPA’s obligation is to implement the statutory volumes Congress imposed. Instead, EPA is creating uncertainty and limiting the ability of advanced ethanol to be used.

There is simply no basis to contend that so-called “constraints” on ethanol use is somehow relevant to a claim of severe economic harm. It’s the same story EPA repeats every year, yet somehow the ethanol industry continues to meet the requirements and consumers have benefitted from it. The entire supply chain has taken substantial actions to promote use of ethanol and other renewable fuels as envisioned by Congress. EPA acknowledges the so-called E10 blendwall does not exist, since blending has exceeded 10% in 2017 and 2018. While EPA recognizes that there is opportunity for higher blends of ethanol, its analysis fails to mention the expansion of E15 to year-round use.¹³ Data from the Minnesota Department of Commerce showed that the marketplace responded to EPA’s E15 action. Sales of E15 nearly doubled in Minnesota in June 2019—the first month following elimination of the summertime E15 restriction—compared to June 2018.¹⁴ Moreover, the needed incentives come from enforcement of strong and growing RFS volumes. As such, EPA must implement the 15-billion-gallon implied conventional biofuel requirement and

⁹ 84 Fed. Reg. at 36,787.

¹⁰ EPA Mem., *Market impacts of biofuels in 2020*, July 3, 2019 (EPA-HQ-OAR-2019-0136-0067).

¹¹ *Id.* at 1 n.2; 84 Fed. Reg. at 36,787.

¹² 84 Fed. Reg. at 36,788.

¹³ EPA Mem., *Market impacts of biofuels in 2020*, July 3, 2019 (EPA-HQ-OAR-2019-0136-0067).

¹⁴ Ken Colombini, *E15 Sales Up Following Removal of Summertime Barrier, But RFS Refiner Exemptions Suppress Expansion*, Renewable Fuels Association, Aug. 8, 2019, <https://ethanolrfa.org/2019/08/e15-sales-up-following-removal-of-summertime-barrier-but-rfs-refiner-exemptions-suppress-expansion/>.

should continue to support increasing advanced biofuel volume requirements. Because EPA is not ensuring these volumes, these investments are at risk and farmers are suffering.

If EPA is, in fact, concerned with so-called “constraints,” then, as NFU has urged, EPA can take action to facilitate use of mid-level ethanol blends. Instead, EPA appears to be making it more difficult to use higher blends, even in flexible fuel vehicles.¹⁵ Mid-level ethanol blends, however, are a popular fuel for use in these vehicles, and EPA should facilitate their use. Studies also have also shown that RVP concerns are reduced with mid-level ethanol blends, compared to E15, and emissions reductions are greater with increased displacement of fossil fuels. NFU has provided EPA with numerous ways to remove regulatory hurdles to providing these cost-effective, low-carbon, high octane fuels.

- B. EPA should increase the advanced biofuel volume requirement for 2020 and the biomass-based diesel volume requirement for 2021.

U.S. farmers do not just support corn ethanol, which makes up the bulk of the implied conventional biofuel requirement. They also support other biofuels, such as advanced ethanol, cellulosic ethanol, and biomass-based diesel. The “‘fundamental objective’ of the Renewable Fuel Program ‘is clear’”: To increase the use of renewable fuels in the U.S. transportation system.¹⁶ As such, NFU urges EPA to *increase* the proposed volumes for advanced biofuels and reject any calls to further reduce the required volumes.

Except for a modest increase in the cellulosic biofuel requirement from 2019, EPA proposes no increase in the volume requirements for biomass-based diesel or advanced biofuels. In other words, EPA has declined, yet again, to backfill any part of the shortfall in cellulosic biofuel production with other advanced biofuels. EPA acknowledges that higher volumes could be attainable, but claims increasing the advanced biofuel requirement will likely cause diversions in feedstocks.¹⁷ EPA underestimates the agricultural community and continues to misunderstand the commodity market. Farmers have long been able to step up to the plate, increasing yields and finding innovative ways to increase their farm’s production. All the while, U.S. farmers have continued to support sustainable land management and sound environmental practices. As noted above, farmers, particularly family farms, are strong stewards of the land.

In addition, it is not EPA’s job to regulate agricultural commodities, and such concerns ring hollow when other policies of this Administration have had substantial impacts on the traditional markets of home-grown feedstocks that have negatively affected farmers. Ensuring a strong biofuels market would assist farmers, who are facing a significant drop in net farm income in recent years and are facing very real financial difficulties that could at

¹⁵ See Petition for Reconsideration or Rulemaking Submitted On Behalf of Urban Air Initiative, Inc., et al., Aug. 9, 2019, available at https://www.epa.gov/sites/production/files/2019-08/documents/uai_19-1161_ppfr_08092019.pdf.

¹⁶ *ACEI*, 864 F.3d at 700 (quoting 80 Fed. Reg. 77,420, 77,421 (Dec. 14, 2015)).

¹⁷ 84 Fed. Reg. at 36,777.

least be somewhat alleviated if EPA implemented a robust and aggressive biofuels policy as Congress intended.¹⁸

Ignoring the purpose of establishing a mandate, which was intended to move toward increased diversification of energy sources and feedstocks, EPA also contends that increasing these volumes will result in higher cost biofuels. We disagree. It is well-established that ethanol provides a cost-effective means of meeting octane requirements, and analysis shows that biofuels *reduce* costs to the consumers at the pump. Moreover, the creation of a mandate evidences that Congress was aware that new entrants and innovative fuels may be more expensive than petroleum fuels but also provide greater benefits than petroleum-based fuels. EPA does not explain how its elevation of compliance costs over its statutory obligations assists in implementation of the program, meets Congressional intent, or benefits the public.

In placing consideration of purported cost impacts on petroleum-based gasoline and diesel fuel producers above all other considerations, EPA's actions have done the opposite of what Congress intended. EPA's continued focus on compliance costs is also suspect when RIN prices have dropped substantially.¹⁹ Several ethanol and biodiesel plants have reduced production and started to shut down due to EPA's failure to implement Congress' intent, resulting in many layoffs.²⁰ Further, EPA ignores the economic, environmental and energy security benefits attendant with increasing renewable fuel production and use, which Congress recognized and sought to promote in establishing and expanding the RFS. EPA must support advanced biofuels. EPA's inadequate and incomplete review of potentially available advanced biofuels to support higher volumes to make up for the lack of cellulosic biofuel is, in short, arbitrary.

C. EPA must ensure the volumes not a RIN bank.

NFU is also concerned with EPA's decision to ignore the availability of carryover RINs in assessing the applicable volumes and setting standards that are intended to ensure the actual volumes required. Based on EPA's regulations, these RINs are part of the "supply," and should not be used to reduce the actual volumes required. Again, EPA's proposal

¹⁸ Annie Gowan, *Left Behind: Farmers fight to save their land in rural Minnesota as trade war intensifies*, Washington Post, Aug. 3, 2019, <https://www.washingtonpost.com/graphics/2019/national/farm-bankruptcies-rise-as-trumps-trade-war-grinds-on/> ("Net farm income has dropped by nearly half in the past five years, from \$123 billion to \$63 billion.").

¹⁹ EPA has acknowledged that refiners recoup these costs through sales, making EPA's myopic consideration of compliance costs even more suspect.

²⁰ See, e.g., RFA, *Evidence of Demand Destruction from Small Refiner Exemptions*, Aug. 2019, available at <https://ethanolrfa.org/wp-content/uploads/2019/08/Evidence-of-Demand-Destruction.pdf> (noting at least 15 ethanol plants have idled production or permanently closed); POET News Release, *Oil bailouts force POET to lower production: Family farmers and rural communities suffer*, Aug. 20, 2019, <https://poet.com/pr/oil-bailouts-force-poet-to-lower-production>.

improperly focuses on reducing compliance costs. In addition, because EPA can no longer ensure the volumes, EPA also must account for rollover in setting the standards.

In support of its refusal to take action that *may* drawdown the RIN bank, EPA simply states that the RIN bank serves an important purpose as a “programmatically buffer.” But EPA originally indicated it was just intended to address unforeseen circumstances. More important, the statute does not provide for an ongoing RIN bank, limiting the life of credits to 12 months, and it requires EPA to ensure the volumes. EPA previously recognized that the “rollover” effect of these carryover RINs violates the limits on the life of a RIN. Moreover, a significant portion of those RINs result from the retroactive grants of small refinery exemptions. This rewards actors that do nothing to promote biofuel production, choosing instead to play the RIN market. This has adverse impacts on the markets EPA is supposed to “ensure,” creating uncertainty and an intentional oversupply of RINs to reduce RIN prices for those that have done little to nothing to meet the statute’s requirements.

III. EPA Properly Found No Grounds for a General Waiver to Further Reduce the Statutory Volumes, and Any Attempts at Further Reductions Would Require EPA to Follow Proper Procedures.

In the 2020 RFS Proposal, EPA properly found that the circumstances that would justify a waiver of volumes under the general waiver authority do not exist “[a]t this time.”²¹ EPA acknowledges that the waiver provision in the statute includes procedural requirements, and these requirements cannot be met through a general request for comments.²² EPA has made clear in the proposal that it is *not* using the general waiver provision, and, thus, any change in this position would be a new “motion” or request under that provision, requiring public notice and comment and consultation with the U.S. Department of Agriculture (USDA) and the U.S. Department of Energy (DOE) on that motion or request.²³ Moreover, the waiver provisions are limited to requests from States and obligated parties. In short, EPA cannot rely on public comments to support a general waiver without following proper procedures, including, but not limited to, providing interested parties with the opportunity to review and comment on the proposed waiver and the grounds for such waiver.

Regardless, there are no grounds for a general waiver to reduce the volumes beyond what EPA has proposed. General waivers may only occur if severe economic or environmental harm would result otherwise, or if there is insufficient supply of a renewable fuel category to allow the obligated parties to meet the annual requirements. Neither of these criteria can be met. Indeed, EPA’s failure to implement the RFS volumes has resulted in economic harms to farmers, and increasing the volume requirements, which would provide more advanced biofuels, provides additional environmental benefits.

²¹ 84 Fed. Reg. at 36,767.

²² *Id.*; see also 42 U.S.C. §7545(o)(7)(A), (B). In prior proposals, EPA improperly implied that it could seek general comments on further reducing the statutory volumes. 83 Fed. Reg. 32,024, 32,029 (July 10, 2018).

²³ 42 U.S.C. §7545(o)(7); see also 73 Fed. Reg. 47,168, 47,183-47,184 (Aug. 13, 2008).

- A. There is adequate domestic supply for higher volumes than EPA is proposing.

In *ACEI*, the D.C. Circuit made clear that a reduction in the required volumes due to “inadequate domestic supply” can only be based on supply-side factors. As the Court found, the “central problem” with EPA’s inclusion of other factors was that it defied Congress’s “market forcing policy,” which was intended to “overcome constraints in the market’ by creating ‘demand pressure to increase consumption of renewable fuels.’”²⁴ EPA’s proposal obviates that there is sufficient “supply” to meet the proposed volumes, which EPA acknowledges.²⁵ EPA makes no reference to potential supply issues for conventional biofuels, and EPA’s proposal indicates that higher volumes of advanced biofuels are available but not “reasonably attainable,” purportedly due to higher costs of those additional volumes.²⁶

Moreover, Congress intended the RFS to drive innovation and investment by intentionally establishing volume requirements, the waiver of which was clearly intended only for dire circumstances. According to RFA, U.S. ethanol production has exceeded 15 billion gallons for the last three years.²⁷ Additional growth is possible. EPA should (and must) ensure the required volumes to support U.S. producers and promote growth, as Congress intended.

- B. Additional reductions would cause harm to the economy and environment and, thus, using the general waiver authority is not permissible.

Under EPA’s longstanding precedent, the severe harm provision establishes a very high bar and applies when adherence to the statutory volume *would* cause *severe* harm to the *nationwide* economy or environment *as a whole*. Neither of these criteria can be shown here.

1. Concerns regarding compliance costs are not sufficient to show *severe* economic harm.

The waiver authority under Section 211(o)(7)(A) requires a finding of severe economic harm caused by implementation of the RFS program.²⁸ “While the statute does not define the term ‘severely harm,’ the straightforward meaning of this phrase indicates that Congress set a high threshold for issuance of a waiver.”²⁹ Based on this high threshold, EPA

²⁴ *ACEI*, 864 F.3d at 704-13 (citations omitted).

²⁵ 84 Fed. Reg. at 36,767, 36,778 n.71.

²⁶ EPA continues to assert its assessment under the cellulosic waiver authority does not require it to set volumes at “maximum achievable” volumes, indicating higher volumes are “achievable.” 84 Fed. Reg. at 36,778; *see also* 82 Fed. Reg. 34,206, 34,229 n.82 (July 21, 2017) (“It follows that if there are sufficient reasonably attainable volumes of renewable fuel to satisfy a total renewable fuel requirement of 19.24 billion gallons, then there is no basis for a finding that there is an inadequate domestic supply to satisfy a 19.24 billion gallon requirement.”).

²⁷ <https://ethanolrfa.org/statistics/annual-ethanol-production/>.

²⁸ 73 Fed. Reg. at 47,171.

²⁹ *Id.* at 47,172.

has rejected several requests for a waiver under this provision, despite claims of significant economic harms.

In particular, the potential for increased or higher compliance costs is not sufficient to support a finding of severe economic harm. In rejecting waiver requests by several States, EPA recognized that its regulations require refiners and importers “to ensure that the volumes of renewable fuel required under the Act are actually consumed.”³⁰ EPA also has found that obligated parties are earning back their compliance costs through sale of their products, and the expansion of renewable fuel use has resulted in *reduced* costs to consumers. To the extent obligated parties have chosen to rely on purchasing separated RINs to meet their obligations, inaction of the industry to further invest as Congress dictated cannot be considered part of the “implementation” of the program that Congress considered relevant with respect to a waiver. This would turn the program on its head.³¹

In assessing whether to use the general waiver authority, EPA must also consider the lost benefits and the impacts reductions would have on the renewable fuel industry and the local economies that rely on biofuel production.³² One of the key benefits Congress sought through the RFS was to stimulate economic growth in the rural sector. EPA’s recent failure to enforce the RFS program through its expanded use of the small refinery exemptions has already resulted in reduced production, layoffs, and harms to farmers.³³ It has affected demand for agricultural commodities, lowering farm income. Thus, any evaluation of a waiver request must consider the negative impacts on farmers, jobs and fuel prices that would be created by a waiver.

2. Reducing the volumes further would result in lost environmental benefits and, thus, it cannot be shown that the volume requirements will cause severe environmental harm.

Congress sought numerous environmental benefits attendant with increased use of renewable fuels. In particular, family farming goes hand in hand with environmental protection, and NFU takes seriously concerns regarding land stewardship. NFU’s policy embodies the strong sense of responsibility that guides family farmers: “family farmers and ranchers have historically been our best soil and water conservationists when given the

³⁰ 77 Fed. Reg. 70,752, 70,772 (Nov. 27, 2012).

³¹ Moreover, as the D.C. Circuit has recognized, EPA’s regulations and the statute includes other provisions that provide obligated parties means of meeting the requirements, including carryover RINs and carryover deficits. The availability of carryover RINs is an additional reason that the general waiver need not be used. Use of such carryover RINs already further reduce the actual volumes needed in 2020.

³² See 73 Fed. Reg. at 47,172; 77 Fed. Reg. at 70,775. For example, EPA has estimated that a 30-million-gallon biodiesel plant will spend nearly \$140 million on goods and services. 77 Fed. Reg. at 59,477. The loss of this income would be devastating to the local community if that plant were to close.

³³ These exemptions do not indicate that the RFS program is having severe economic harm on the U.S. or any region. EPA’s expanded definition of “disproportionate economic hardship” has essentially read the term “hardship” out of the statute. In any event, EPA has recognized that harms to individual obligated parties does not indicate severe economic harm for the program as a whole.

economic incentives and flexibility necessary to do so.”³⁴ Stable enactment of the RFS volume requirements bolsters price stability, which allows continued improvements in sustainable agriculture, and is a significant factor in considering whether to bring additional acreage into production.

Any assertions that the RFS promotes additional planting does not consider that changes can be attributed to the loss of funding for land retirement programs or that farmers have made great strides in conservation improvements to working lands. Advances in both the popularity and efficacy of practices like nutrient stewardship, soil health, cover cropping, riparian buffer strips, precision agriculture and a myriad of other practices, work against many of the expressed concerns over water quality or habitat regarding additional planting. Properly implemented, the RFS will allow producers, refiners and consumers to establish a strong market for perennial and low-input cropping systems that achieve far greater GHG emission reductions than we are yet experiencing through the program.

NFU disputes assertions that the RFS program is causing land use impacts and harms to the environment. Despite the increasing volume requirements, U.S. cropland acreage has decreased from 2007, when the RFS was expanded. Assertions of land use change as a result of the RFS are generally based on inaccurate satellite data and analysis and cannot show a causal link of any claimed changes to the RFS program.³⁵ A recent study found that biofuels have not caused any significant agricultural land use change.³⁶ Further reductions in the volumes, on the other hand, would without question result in lost benefits that would harm the environment, having particularly significant impacts on farmers.

3. NFU takes seriously the interaction between climate change and agriculture.

The results of climate change, brought on by GHG emissions to the earth’s atmosphere resulting from human activity, are detrimental to both human health and the economy. As a family farm organization, NFU is particularly concerned with the challenges climate change poses to family farmers’ ability to pursue improvements in global food security.

The USDA’s report *Climate Change, Global Food Security and the U.S. Food System* establishes several conclusions with which NFU is extremely concerned. First, the report

³⁴ Policy of the National Farmers Union, Art. VII-A, *supra* n.1.

³⁵ See Joshua Pritsolas and Randall Pearson, *Critical Review of Supporting Literature on Land Use Change in the EPA’s Second Triennial Report to Congress*, Southern Illinois University Edwardsville Laboratory for Applied Spatial Analysis (July 2019), available at <https://ethanolrfa.org/wp-content/uploads/2019/07/SIUE-Review-of-Land-Use-Change-Literature-07-2019.pdf>; D.S. Shresthaa, et al., *Biofuel impact on food prices index and land use change*, 124 Biomass and Bioenergy 43-53 (2019), available at <https://ethanolrfa.org/wp-content/uploads/2019/05/Shreshtha-et-al-Biofuel-impact-on-food-prices-index-and-land-use-change-03-2019.pdf>.

³⁶ D.S. Shresthaa, et al., *Biofuel impact on food prices index and land use change*, 124 Biomass and Bioenergy 43-53 (2019), available at <https://ethanolrfa.org/wp-content/uploads/2019/05/Shreshtha-et-al-Biofuel-impact-on-food-prices-index-and-land-use-change-03-2019.pdf>.

explains that “the potential of climate change to affect global food security is important for food producers and consumers in the United States,” and that “climate risks to food security increase as the magnitude and rate of climate change increases.”³⁷ Anticipated disruptions to agricultural production caused by climate include:

- rising temperatures;
- changes in precipitation;
- increasing frequency of extreme weather events;
- new pest, disease and weed pressures; and
- increases in heat stress on livestock.

The Fourth National Climate Assessment, which was prepared by several U.S. government agencies, reiterated these risks, noting “[r]ural communities, where economies are more tightly interconnected with agriculture than with other sectors, are particularly vulnerable to the agricultural volatility related to climate.”³⁸ These challenges will make it more difficult for American farmers to produce the food, fiber, and fuel upon which the U.S. and world rely.

As formidable as these challenges may be, farmers, ranchers and rural communities can contribute to climate resilience and help circumvent serious harms to the economy and human health. “Effective adaptation can reduce food-system vulnerability to climate change and reduce detrimental climate change effects on food security....”³⁹ A recent report by the United Nations Intergovernmental Panel on Climate Change also identified the need for action at local levels and adaptation as needed to address climate change impacts.⁴⁰ “Rural residents, and the lands they manage, have the potential to make important economic and conservation contributions to climate change mitigation and adaptation, but their capacity to adapt is impacted by a host of demographic and economic concerns.”⁴¹ We want to achieve this goal, and enactment of the RFS volume targets put forth by Congress will help.

³⁷ M.E. Brown, *et al.*, *Climate Change, Global Food Security, and the U.S. Food System*, U.S. Global Change Research Program, at 111-112 (2015), available at http://www.usda.gov/oce/climate_change/FoodSecurity2015Assessment/FullAssessment.pdf.

³⁸ U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II Impacts, Risks, and Adaptation in the United States, Chapter 10: Agriculture and Rural Communities* (2018), <https://nca2018.globalchange.gov/chapter/10/>.

³⁹ Brown, *supra* n.37, at 112.

⁴⁰ Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5°C* (2018), <http://ipcc.ch/report/sr15/>.

⁴¹ <https://nca2018.globalchange.gov/chapter/10/>.

a. Direct Climate Benefits

With GHG emissions from the transportation fuel sector continuing to increase,⁴² ethanol provides GHG emissions reductions. The RFS program has provided greater GHG reductions than EPA had estimated.⁴³ While the carbon intensity of gasoline *is increasing* with greater use of unconventional fossil fuels, energy use in ethanol production and lifecycle GHG emissions have decreased with changes in farming practices and increased intensification (*e.g.*, higher yields).⁴⁴ As EPA has found, the land use, land-use change, and forestry sector resulted in a net increase in carbon stocks (*i.e.*, net CO₂ removals).⁴⁵ This has occurred despite the loss of cropland and the struggle to retain existing agricultural lands against the ongoing pressures from urban and industrial expansion.

The RFS, when implemented properly, offers farmers and consumers a way to reduce GHG emissions by producing and utilizing transportation fuels with lower lifetime emissions than transportation fuels derived from fossil sources. As feedstock production practices and advanced biofuel technology continue to advance, the RFS should ensure that these new fuels, with even greater GHG improvements, find some safe footing in the monopolistic consumer transportation market. Once the policy succeeds in opening the transportation fuels market to competition, significantly greater GHG reductions should be expected. These reductions, combined with price advantages that can be expected as production and distribution expand, could knock out a substantial portion of the transportation sector's

⁴² EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017, at ES-12 (2019), available at <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2017>.

⁴³ Life Cycle Associates, *GHG Emissions Reductions due to the RFS2: A 2018 Update*, Feb. 6, 2019, available at <https://ethanolrfa.org/wp-content/uploads/2019/02/LCARFSGHGUpdatefinal.pdf>.

⁴⁴ See, *e.g.*, Jan Lewandrowski, *et al.*, *The greenhouse gas benefits of corn ethanol – assessing recent evidence*, Biofuels (2019), DOI: 10.1080/17597269.2018.1546488 (finding corn ethanol's current GHG profile at 39–43% lower than gasoline and noting opportunities to produce ethanol in 2022 with emissions that are 47.0–70.0% lower than gasoline); Environmental and Energy Study Institute, *Research Finds Widespread Use of E15 Would Reduce CO₂ Emissions* (Mar. 27, 2015), <http://www.eesi.org/articles/view/research-finds-widespread-use-of-e15-would-reduce-co2-emissions> (“GREET analyses estimate that corn ethanol greenhouse gas emissions are on average 34 percent lower than those of regular gasoline.”); see also ICF, *A Life-Cycle Analysis of the Greenhouse Gas Emissions of Corn-Based Ethanol*, Report prepared for USDA (Jan. 2017), available at https://www.usda.gov/oce/climate_change/mitigation_technologies/USDAEthanolReport_20170107.pdf.

⁴⁵ EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017, *supra* n.42, at 6-1; see also Bruce A. Babcock and Zabid Iqbal, *Using Recent Land Use Changes to Validate Land Use Change Models*, Iowa State University Center for Agricultural and Rural Development, Executive Summary (2014), available at <http://www.card.iastate.edu/products/publications/pdf/14sr109.pdf> (“The contribution of this study is to confirm that the primary land use change response of the world's farmers from 2004 to 2012 has been to use available land resources more efficiently rather than to expand the amount of land brought into production. ... Our conclusion that intensification of agricultural production has dominated supply response in most of the world does not rely on higher yields in terms of production per hectare harvested. Any increase in yields in response to higher prices would be an additional intensive response.”); RFA, *USDA Data Show Cropland Reductions in Counties with Ethanol Plants from 1997-2012*, April 3, 2017, available at <http://www.ethanolrfa.org/wp-content/uploads/2017/04/USDA-Data-Show-Cropland-Reductions-in-Counties-with-Ethanol-Plants-from-1997-2012-1.pdf>.

total emissions. These emissions reductions will mitigate the climate change-driven hazards to agricultural production discussed above.

Strong and ambitious RFS requirements increases the opportunity to mitigate climate disturbances to agriculture and promote the growth of markets for cellulosic and advanced biofuels. Keeping those volumes at a lower level to purportedly address compliance costs allows obligated parties to continue to avoid the investments in distribution the statute requires of them. Declining such ripe opportunities to enhance climate resiliency places food security in greater jeopardy.

b. Indirect Climate Benefits

While the potential GHG emission reductions resulting directly from the RFS are significant, the policy has much more potential to contribute to climate resiliency than the directly attributable lowered emissions. The RFS is popular among farmers and rural communities. These are important demographics to encourage farmers to engage in climate resilience because of the importance of land use.

Land use in the United States has long served as a sink for GHG emissions. As noted, EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2017, shows the capture of GHG through this "sink" associated with land use continues to increase. Land ownership in the U.S. is highly dispersed. Reaching landowners to encourage climate-smart land management practices, in the numbers needed to meet important emissions reduction goals, will be a challenge. Offering farmers a way to achieve value for participating in climate change, as a properly implemented RFS would, supports these goals.

Consumers, like farmers, also are likely to be called upon to contribute to climate resilience. Like farmers, consumers receive value while engaging in climate change mitigation through the RFS. The RFS has saved consumers money at the pump. Implementing volume requirements that match those in the statute would save consumers more money, and opening the transportation fuels market to competition would save consumers even more. In addition, building further renewable fuel infrastructure would deter the price volatility that oil is particularly subject to.

Setting a strong RFS also would require obligated parties to make additional infrastructure investments, as envisioned by Congress. Lower volume requirements than those set in the statute allows obligated parties to continue to ignore Congress's directives, thereby impeding future climate resilient actions.

4. Risk to Climate Benefits

Rare is the proactive environmental policy that so clearly benefits so many farmers, rural communities and consumers. NFU is especially concerned with farmers; the RFS is an important opportunity to establish trust regarding climate resilience among a population

that is prone to regard federal policy with skepticism and may be vulnerable to a variety of confusing climate messages.

Farmers, the first step in biofuel production, require the certainty that is supposed to come with the RFS program to make the necessary decisions to do their part to contribute to expanded use of renewable fuel, as does the rest of the industry. Farmers and rural communities have made business decisions and invested significant assets based on the reasonable expectation that EPA would fulfill its responsibility to provide the appropriate incentives to grow the renewable fuels industry. EPA should support incentives that would allow farmers and stakeholders to take action to meet climate resiliency goals.

These benefits, which Congress sought, enforce NFU's belief that EPA does not have the authority to use its general waiver authority. In fact, the direct and indirect environmental benefits of the RFS compel EPA to set a higher volume than in the proposal, moving closer to the statutory levels.

IV. EPA Must Ensure the Volume Requirements, Even if it Requires Upward Adjustments in Later Years.

A. EPA's proposal to retain the 2016 renewable fuel volume requirement, despite the D.C. Circuit's holding, is unlawful and arbitrary.

In November 2015, EPA finalized a 2016 RFS requirement that included an implied requirement of 14.5 billion gallons of conventional biofuels.⁴⁶ This included a 500-million-gallon reduction of the statutory requirement of 15 billion gallons, which EPA attempted to base on its general waiver authority, arguing "inadequate domestic supply." In July 2017, the D.C. Circuit held, in *ACEI v. EPA*, that EPA erred in reducing the 2016 requirement from its statutory level, rejecting EPA's assertion of general waiver authority. The 2016 RFS was remanded back to EPA to essentially enforce the statutory requirement of 15 billion gallons for 2016. It is now 2019, and EPA has proposed to retain the 2016 volume requirement the D.C. Circuit found invalid. EPA's proposal is, simply put, unlawful.

EPA must justify its use of the waiver authority in response to the D.C. Circuit's remand. Rather than do so, EPA claims that it must, instead, consider the "burden on obligated parties" if implementing the 2016 volume requirements, which it found would be "unduly burdensome and inappropriate" to implement the *statutorily* required volume through a higher standard.⁴⁷ But EPA acknowledges that it could *prospectively* add the 500 million gallons onto future year obligations, like it did with the 2009 biomass-based diesel volume

⁴⁶ 80 Fed. Reg. at 77,422, 77,439.

⁴⁷ 84 Fed. Reg. at 36,788.

requirement. NFU, among others, has urged EPA to take appropriate action since the D.C. Circuit's decision. EPA cannot raise purported concerns based on its delay as an excuse.⁴⁸

While other biofuels also meet this requirement, ethanol production alone has easily exceeded 15 billion gallons. Indeed, with RIN prices at their current level, the increased use of E15 year-round, and U.S. Energy Information Administration's (EIA) estimate of increased gasoline use in 2020, any claim of undue burdensomeness is unsupported, particularly in light of recent reports of biofuel plant closings and slowdowns in production.⁴⁹ As the D.C. Circuit has found, EPA has authority to act as directed by Congress, even if its action is delayed.⁵⁰ The 500 million gallons are a volume requirement EPA has failed to implement. By adding these volumes onto future volume requirements, EPA would be meeting its obligation to ensure the statutory volumes, *and* obligated parties would have ample time to prepare for their obligations. While NFU is not opposed to EPA considering reasonable measures to implement the 500 million gallons, such as allowing use of prior-year RINs as EPA did for the 2009 biomass-based diesel volume, it does not believe EPA has authority to ignore Congress's directive and the D.C. Circuit's findings.

EPA's only argument as to why it was not proposing to add the 500 million gallons to later years is that it is not appropriate to require the use of carryover RINs and drawdown of the carryover RIN bank, which EPA calls a "programmatically buffer."⁵¹ But EPA's job is not to maintain the RIN bank as high as it can,⁵² and EPA makes no assessment on whether a reduction of bank would, in fact, have "unduly burdensome" impacts. EMTS data (as of August 10, 2019) shows more than 2.5 billion 2018 RINs still available.⁵³ There is nothing magical about having 2.5 billion RINs being banked, and, even if EPA allows all 500 million gallons to be met with prior-year RINs, that still leaves 2 billion RINs in the "bank." EPA's EMTS data (as of August 10, 2019) shows remaining RINs each year since 2010, with almost 112 million 2017 RINs still "available," which is a significant increase from prior years. In other words, the RIN bank has not been depleted in any year, and there is simply no evidence that a mere reduction in the bank would have severe impacts on refiners.

In fact, EPA refuses to reduce the RIN bank as a means of simply trying to reduce compliance costs. But, setting aside that RIN prices have already dropped substantially, a potential increase of compliance costs does not make an action unreasonable. In short, EPA

⁴⁸ Claims of problems that might arise from EPA's identified potential remedies, such as rescinding the 2016 RFS or reopening the 2017 RFS, are red herrings. 84 Fed. Reg. at 36,788.

⁴⁹ "EIA forecasts U.S. crude oil production will average 12.3 million b/d in 2019 and 13.3 million b/d in 2020, both of which would be record levels." EIA Short-Term Energy Outlook, Forecast Highlights, release date Aug. 6, 2019, <https://www.eia.gov/outlooks/steo/>.

⁵⁰ *NPRA v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

⁵¹ 84 Fed. Reg. at 36,789.

⁵² EPA capped use of carryover RINs at 20% in an attempt to limit rollover of RINs, which EPA agreed, at the time, violated the limits on the life of a credit. This does not make the RIN bank untouchable so long as the RIN totals remain below 20% of the volume requirement.

⁵³ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/available-rins>.

must implement the 500-million-gallon requirement that it impermissibly waived, even if it may reduce the RIN bank. Although we believe EPA can, and must, add the full 500 million gallons to the 2020 volume requirement, EPA did not even consider spreading the 500 million gallons over more than one year (*e.g.*, 250 million added to 2020 and 2021). If, in fact, EPA was concerned about burdens from imposing an additional 500 million gallons, this would reduce these concerns. EPA's failure to consider other options and choosing instead to ignore the D.C. Circuit's remand and Congress's directives was arbitrary.

- B. EPA must account for small refinery exemptions and must require small refineries to come into compliance.

While former EPA Administrator Pruitt was complaining of RIN speculation and lack of transparency, he was allowing oil companies to manipulate the system by buying RINs, then seeking exemptions, and then making a profit from RINs without taking actions to fulfill the goals of Congress. That is not the purpose of the RFS program. Indeed, it is ironic that many of these same small refineries complain of "windfall profits" by those companies that are complying with and exceeding the requirements of the RFS program. Unfortunately, these actions have continued under the Wheeler EPA.

NFU has written to EPA about its concerns with the reported expansion of the small refinery exemptions and asking EPA to stem the tide of these exemptions.⁵⁴ EPA has chosen to ignore these requests.

EPA is required to "ensure" transportation fuel sold in the United States includes the minimum applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel.⁵⁵ It is important to note that these are, in fact, *minimum* volumes that are meant to be achieved. As such, any reduction in the demand (*i.e.*, what would have been required but for the small refinery exemptions) goes against Congress's directives. In fact, Congress gave EPA limited waiver authority to reduce these minimum applicable volumes.⁵⁶ To use this waiver authority, EPA must comply with procedural and substantive statutory requirements. EPA has not done so in approving such a higher number of small refinery exemptions, which has substantially reduced the obligations for 2016, 2017 and now 2018. All told, since 2017, EPA has essentially, and impermissibly, waived over 4 billion gallons of the volume requirements.

While NFU acknowledges that the statute provides for exemptions for small refineries, defined as a refinery whose average aggregate daily crude oil throughput does not exceed 75,000 barrels per day,⁵⁷ these were intended to be "temporary" and based on "disproportionate economic harm." It is hard to fathom how a refinery can show disproportionate economic harm, *after* it has shown it can comply with the program.

⁵⁴ NFU Letter to EPA, Apr. 4, 2018 (attached).

⁵⁵ 42 U.S.C. §7545(o)(2)(A)(i); *see also id.* §7545(o)(3)(B)(i).

⁵⁶ 42 U.S.C. §7545(o)(7).

⁵⁷ 42 U.S.C. §7545(o)(1)(K), (o)(9).

Moreover, there is no indication that Congress sought to reward small refineries that took no action to come into compliance,⁵⁸ and that have voluntarily chosen to rely solely or substantially on separated RINs. It cannot be that Congress intended for small refineries to seek new exemptions so many years into the program. Nor should small refineries be allowed to game the system by coming in and out of the program based on market fluctuations (or a change in administration).

Given the lack of information, it is not clear what grounds EPA is claiming to grant these exemptions. Recent reports indicate, however, that EPA is granting these exemptions without any showing of “economic hardship” and even against the recommendations of the DOE. Simply because a particular refinery may face different impediments does not, by itself, equate to disproportionate economic *hardship*. Regardless, EPA is required to account for these small refinery exemptions when it sets the standards.⁵⁹ If EPA continues to insist that it can, and should, receive and/or grant exemption requests after the standards are set, EPA must consider how to address these lost volumes in setting the standards. EPA’s assertion that comments on EPA’s handling of small refinery exemptions and the formula in 40 C.F.R. §80.1405 are beyond the scope of the rulemaking is incorrect. EPA’s retroactive exemptions change the estimates of covered transportation fuel, which EPA is required to consider in setting the standards. They also impact the ability of the standards that EPA sets to ensure the minimum volume requirements.

A key problem is that EPA is granting these exemptions *after* the volumes have been set and even *after* the compliance deadlines have passed. EPA previously asserted that it could do so because Congress allows for some uncertainty in the volume obligations.⁶⁰ But, here, EPA is, in fact, intentionally reducing the volume requirements by not accounting for the exempted volumes in setting the standards. In so doing, EPA is failing to ensure the volumes and is improperly waiving additional volumes. These additional waivers are significant. In addition, allowing “unretiring” of RINs, which is not allowed in the regulations and on which EPA has impermissibly never sought notice and comment, represents an improper reduction in the required volumes, and allows RINs to be rolled over into later years, which violates the limits on the life of a credit. But EPA and its implementing regulations and standards are required to “ensure” the applicable volumes

⁵⁸ The American Petroleum Institute (API) has acknowledged that “refiners have had ample time to adjust their businesses to operate” under the RFS. *See* API Aug. 31, 2017 Comments at 2 (EPA-HQ-OAR-2017-0091-3647); *see also id.* (“It is no longer appropriate for EPA to grant RFS compliance exemptions to small refineries or small refiners.”).

⁵⁹ 40 C.F.R. §80.1405(c).

⁶⁰ Recently EPA has contended that it can grant retroactive exemptions because the statute provides for petitions based on disproportionate economic hardship “at any time.” But EPA has never subjected this interpretation to notice and comment and, in fact, has alleged different meaning of this phrase in different cases. As such, EPA’s interpretation is not entitled to deference. Further, EPA has indicated it can require that requests be submitted in time to account for them in setting the standards, including in a document listing imposing deadlines as a possible means of addressing concerns regarding the small refinery exemptions. Instead, EPA waited until August 2019 to grant 31 exemptions for compliance year 2018.

are met. Even if there were some grounds to grant these exemptions, EPA can no longer avoid its obligation to follow Congress's directives.

We also are concerned that EPA is not following through with comments made before the Senate Environment and Public Works Committee that EPA was looking at increasing transparency and, importantly, considering strategies for addressing reallocation of these lost volumes. EPA must adjust its process in the future to ensure that these exemptions do not reduce the applicable volumes required under the RFS. We look forward to working with you to address this important issue.

V. EPA **Must** Provide More Transparency on Small Refinery Exemptions.

When NFU wrote to then Administrator Pruitt in April of 2018, we urged EPA to provide more transparency regarding the small refinery exemptions, including finalizing EPA's 2016 proposal in the Renewables Enhancement and Growth Support (REGS) Rule to codify a determination that basic information regarding small refinery exemption requests and decisions be made publicly available. The 2020 RFS Proposal indicates that EPA is considering finalizing this proposal. NFU fully supports this action, but also believes EPA must actually provide the public with copies of the decisions and, as appropriate, provide public notice for any policy changes on its handling of these exemptions.

EPA's lack of transparency in how it processes small refinery exemptions and the extent of those exemptions has caused market uncertainty and volatility. EPA has improperly withheld this information for too long, declining to respond to even requests from Congress, and has delayed in responding to litigation on its failure to respond to several Freedom of Information Act Requests. In fact, before a panel of the U.S. Court of Appeals for the D.C. Circuit, EPA's counsel merely indicated EPA treated these decisions as confidential because of claims from small refineries, but counsel representing small refineries agreed that EPA could provide copies of the decisions, redacting any confidential business information.⁶¹ Indeed, several small refineries have already revealed that they have sought or obtained exemptions, and thereby waived, their confidential business information claims. They have done so in SEC filings, litigation, and other submissions to EPA that have been made public, such as comments and notices of intent to sue. Refiners should not be entitled to claim confidential business information if they are willing to publicly provide that information in situations when it may benefit them. We also understand some have formally waived their claims as noted in litigation involving pending Freedom of Information Act requests in the D.C. district court.

Providing copies of the decisions, not just the names of the refineries, would help the market understand the basis for EPA's decisions and better ensure compliance with the program. Moreover, EPA cannot hide behind claims of confidential business information to

⁶¹ [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/2F4A4722F193B4C5852583F3005B7A28/\\$file/18-1202.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/2F4A4722F193B4C5852583F3005B7A28/$file/18-1202.mp3).

avoid procedural requirements to undergo notice and comment rulemaking when creating new policies or amending its rules and regulations.

Conclusion

The RFS is an important policy with far-reaching direct and indirect benefits, particularly for farmers but also for consumers. NFU strongly encourages EPA to enforce the 15-billion-gallon implied volume requirement for conventional biofuels and to increase the advanced biofuel volume requirements for 2020. Recent wavering on the RFS has caused enormous setbacks in advanced biofuels, including cellulosic biofuel development, and, consequently, delayed important GHG emission reductions. But EPA can still regain some lost ground, and NFU would be supportive of and most grateful for such efforts. In particular, EPA must address the volatility, uncertainty, and harms to the biofuels industry and farmers being created by its handling of small refinery exemptions. NFU believes EPA can make adjustments that would continue to allow exemptions while not undermining the RFS volumes. EPA's failure to do so means that it must make up for the lost volumes. Not only does EPA have discretion to do so, it is obligated to do so.

NFU believes EPA must increase its efforts at addressing climate change and supporting actions that strengthen the climate resilience of agriculture and the food system. We stand ready to offer any support and assistance EPA may find helpful regarding these matters. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Johnson". The signature is fluid and cursive, with a large initial "R" and "J".

Roger Johnson
President

Attachment

Comments of the National Farmers Union on

Renewable Fuel Standard Program: Standards for 2020 and
Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards,
and Other Changes; Proposed rule, 84 Fed. Reg. 36,762 (July 29, 2019)

Docket EPA-HQ-OAR-2019-0136



April 4, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460|
Pruitt.scott@Epa.gov

Re: Small Refinery Exemption

Dear Administrator Pruitt:

Recent reports indicate that you are receiving an increasing number of requests for small refiner exemptions under the Renewable Fuel Standard (RFS) program. Additional requests are expected after a report that the U.S. Environmental Protection Agency (EPA) granted an exemption to one of the nation's largest oil refining companies for its 2016 obligation.¹ EPA has reportedly granted "hardship waivers" to three of Andeavor's refineries despite the corporation's net profits of \$1.5 billion last year.² "Hardship waivers" were not designed for large corporations who net billions in profit each year. The National Farmers Union (NFU) is deeply disturbed by these reports, and requests that EPA cease granting these waivers.

NFU is a staunch proponent of the RFS and its benefits to family farmers and their communities. Exempting refiners from RFS compliance essentially waives away demand for corn at a time when family farmers need to significantly cut into corn oversupply and is certainly contrary to the intent of the RFS. Your actions appear to fly in the face of the Administration's numerous promises to family farmers and rural communities to support the RFS.

EPA is required to "ensure" transportation fuel sold in the United States includes the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-

¹ Jarrett Renshaw and Chris Prentice, *Exclusive: EPA gives giant refiner a 'hardship' waiver from regulation*, Reuters, Apr. 3, 2018, <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P>.

² *Id.*

based diesel.³ Congress gave EPA limited waiver authority to reduce the applicable volumes.⁴ To use this waiver authority, EPA must comply with procedural and substantive statutory requirements. EPA has utilized this authority in reducing the statutory volumes for renewable fuel and, since 2016, has set the RFS volumes based on what it found were “reasonably attainable.”⁵ EPA also found that the volumes it was using to set the standards would not have significant economic impacts on small refiners.⁶

Separately, the statute provided a temporary exemption from the annual RFS requirements for small refineries, defined as a refinery whose average aggregate daily crude oil throughput does not exceed 75,000 barrels per day.⁷ This exemption can be extended based on a finding by the U.S. Department of Energy (DOE) or based on a petition from the small refinery. These extensions are to be based on a finding that compliance with RFS obligations will impose a “disproportionate economic hardship” on the refinery. EPA is required to account for these small refinery exemptions when it sets the standards.⁸

Reports indicate that up to 30 small refinery exemption requests may be pending at EPA,⁹ which can be compared to the 13 requests EPA indicated it received for the 2014 standards.¹⁰ The statute, however, only allows for “extensions” of these exemptions, not for “new” exemptions years after the temporary one expired. This exemption was to allow small refineries more time to prepare, but the RFS program has been in effect for over ten years. The American Petroleum Institute (API) acknowledges “refiners have had ample time to adjust their businesses to operate” under the RFS.¹¹ It cannot be that Congress intended for small refineries to seek new exemptions so many years into the program. Nor should small refineries be allowed to game the system by coming in and out of the program based on market fluctuations (or a change in administration). Given the lack of information, it is not clear what grounds EPA is claiming to grant these exemptions.

Even more troubling, EPA is granting these exemptions *after* the volumes have been set (and apparently even *after* the compliance deadlines have passed in the case of Andeavor’s small refinery exemptions).¹² In so doing, this results in a reduction of the applicable volumes set by EPA, improperly waiving additional volumes.

³ 42 U.S.C. § 7545(o)(2)(A)(i); *see also id.* § 7545(o)(3)(B)(i).

⁴ *Id.* §7545(o)(7).

⁵ *See, e.g.*, 82 Fed. Reg. 58,486, 58,513-58,514 (Dec. 12, 2017).

⁶ *See, e.g., id.* at 58,526. Several studies, including EPA’s own analysis, have concluded that RIN costs are largely recovered by refineries.

⁷ 42 U.S.C. §7545(o)(1)(K), (o)(9).

⁸ 40 C.F.R. §80.1405(c).

⁹ We believe the bulk of these requests relate to the 2017 volume requirements.

¹⁰ 81 Fed. Reg. 89,746, 89,803 (Dec. 12, 2016). As further discussed below, EPA has not provided the public with complete information on the small refinery exemptions. However, EPA has indicated that only 13 small refineries received extensions based on the DOE study. 80 Fed. Reg. 77,420, 77,510 n.222 (Dec. 14, 2015).

¹¹ *See* API Aug. 31, 2017 Comments at 2 (EPA-HQ-OAR-2017-0091-3647).

¹² It is unclear if this request was made to eliminate a deficit carryover from 2016 into 2017. If so, this also potentially allows the refinery to avoid the statutory limits on when it can carry a deficit.

These additional waivers appear to be significant. According to the U.S. Energy Information Administration (EIA), the three “small refineries” owned by Andeavor represent over 2.3 billion gallons of production capacity,¹³ resulting in a reduction of the 2016 RFS requirements by almost 200 million ethanol-equivalent gallons.¹⁴ This approval also comes *after* the U.S. Court of Appeals for the District of Columbia Circuit held that EPA misapplied its waiver authority when it set the 2016 renewable fuel volume requirement.¹⁵ And, this is in addition to the 390 million RINs that already did not need to be retired based on exemptions previously granted for 2016.¹⁶ Estimates indicate that the requests that have been submitted could represent a reduction of approximately 1 billion gallons of renewable fuel for 2017.¹⁷ But, EPA and its implementing regulations are required to “ensure” the applicable volumes are met. Even if there were some grounds to grant these exemptions, EPA can no longer avoid its obligation to follow Congress’s directives.

These exemptions also have a deleterious impact on volumes needed in later years, given the ability of obligated parties to use prior-year RINs. EPA has acknowledged that the grant of these exemptions, after the fact, allow additional RINs to enter the market.¹⁸ Even API has noted that “[s]mall refinery exemptions, especially when granted retroactively, introduce additional uncertainty and RIN market disruptions.”¹⁹ Reducing the actual volumes required and market uncertainty have significant adverse impacts on the rural economy. It also punishes those that have responded to Congress’s directives and EPA’s own requirements, rewarding those that have refused to acknowledge this country’s need for diverse sources of energy, including renewable energy.²⁰

Equally concerning is that these actions have purportedly been taken without any transparency, which violates central tenets of responsible governance. We cannot hold our officials accountable for their actions when they are taken behind closed doors. Indeed, the

¹³ EIA, List of U.S. Refineries, 2017, available at *Oil Crude and Petroleum Products Explained: Refining Crude Oil*, https://www.eia.gov/energyexplained/index.cfm?page=oil_refining#tab4 (last updated June 22, 2017). One of the Andeavor refineries is listed by EIA as having 73,800 barrels/day capacity, just under the 75,000 barrel/day threshold for small refiners under the RFS.

¹⁴ This is based on an average yield for gasoline and diesel fuel production for U.S. refineries based on EIA data (https://www.eia.gov/dnav/pet/pet_pnp_pct_dc_nus_pct_a.htm).

¹⁵ EPA must still “true-up” the 2016 renewable fuel volume requirement in light of the Court’s decision.

¹⁶ 82 Fed. Reg. at 58,393 n.28.

¹⁷ Renewable Fuels Association, *EPA Actions on the RFS are Destroying Demand for Ethanol and Corn* (Mar. 2018), available at [http://www.ethanolrfa.org/wp-content/uploads/2018/03/EPA-Demand-Destruction .pdf](http://www.ethanolrfa.org/wp-content/uploads/2018/03/EPA-Demand-Destruction.pdf).

¹⁸ 82 Fed. Reg. at 58,393 n.28, 58,494. Reuters reported that Andeavor sold some 100 million RINs to its competitors in recent weeks that could have been used to meet these obligations. See *supra* n.1.

¹⁹ API Feb. 12, 2018 Letter, available at <http://www.api.org/~media/Files/News/Letters-Comments/2017/API-Letter-2-12-18.pdf>.

²⁰ While acknowledging its obligation to ensure the applicable volumes, EPA declined to consider comments on its process and the impacts of granting the small refinery exemptions after it sets the standards. EPA, *Renewable Fuel Standard Program Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, EPA-420-R-17-007, at 217 (Dec. 2017).

statute requires public notice and comment for waivers under the statute, but EPA is granting these exemptions (and therefore waivers) without any public input.

This Administration has provided little, if any, information on small refinery exemptions, which is causing speculation and market disruptions that you have indicated needs to be addressed.²¹ NFU supports the request submitted by the Renewable Fuels Association in January of this year for more information on the small refinery exemptions, and greater transparency and public input on the process.²²

In short, NFU asks that EPA cease granting these waivers or act to adjust for these additional waivers and comply with its obligations under the statute. EPA should also adjust its process in the future to ensure that these exemptions do not reduce the applicable volumes required under the RFS. We look forward to working with you to address this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Johnson". The signature is fluid and cursive, with the first name "Roger" and last name "Johnson" clearly distinguishable.

Roger Johnson

President

²¹ The prior Administration provided some guidance on how it handles small refinery exemptions, but EPA has not updated its small refinery exemption webpage since May 2017. <https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-standard-exemptions-small-refineries> (last updated May 16, 2017).

²² EPA has already indicated that it did not deem all information regarding the requests constituted confidential business information. 81 Fed. Reg. 80,828, 80,909 (Nov. 16, 2017) (proposing to “codify a *determination* that basic information related to EPA actions on petitions for RFS small refinery and small refiner exemptions may not be claimed as confidential business information”) (emphasis added). This would also provide more information on RIN availability and provide greater transparency in the RIN market. Thus, it is unclear why EPA has declined to provide more information to the public, even in light of Freedom of Information Act requests. *See supra* n.1.