



UNITED TO GROW FAMILY AGRICULTURE

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Via Electronic Filing (www.regulations.gov)

The Honorable Andrew Wheeler
Acting 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-2018-0167

Re: Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020; Proposed rule, 83 Fed. Reg. 32,024 (July 10, 2018)

Dear Acting 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 2019 and Biomass-Based Diesel Volume for 2020," published at 83 Fed. Reg. 32,024 (July 10, 2018) ("2019 RFS Proposal").

We appreciate 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. Also concerning, EPA requests comments on whether it has authority to further reduce its proposed volumes.² As family farmers navigate a severely depressed farm economy, this is a time the administration should be raising expectations

¹ Policy of the National Farmers Union, Art. VIII-C, 2018, <https://nfu.org/2018policy/>.

² EPA does not have any such authority.

for a policy that drives America's rural economy. We urge the administration to increase these proposed volumes and reject any calls to further reduce the volumes.

In establishing and expanding the RFS program, Congress recognized the contributions biofuels can make to the rural economy.³ President Trump has recognized "the importance of renewable fuels to America's economy and to our energy independence."⁴ 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;
- 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.

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. 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 ensuring the advanced biofuel volumes can be met.

In 2015, the output of America's farms contributed \$136.7 billion to this country's Gross Domestic Product (GDP).⁵ While contributing to the overall economy, numerous communities rely primarily on agriculture and these related industries.

³ S. Rep. No. 110-65, at 2-3 (2007).

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 USDA Economic Research Service, Ag and Food Sectors and the Economy, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy.aspx> (last updated May 2, 2018). "The overall contribution of the agriculture sector to GDP is larger than this because sectors related to agriculture ... rely on agricultural inputs in order to contribute added value to the economy." *Id.*

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 2017, 15.8 billion gallons of domestic ethanol used in the United States displaced an amount of gasoline refined from 560 million barrels of imported crude oil, further reducing U.S. dependence on imported petroleum.⁸

EPA continues to decline to assess a number of benefits that increasing the volume requirements provides, yet spends time addressing 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.

II. NFU Supports EPA's Proposal to the Extent it Retains the 15 Billion Implied Conventional Biofuel Requirement and Includes Increases in Advanced Biofuels Compared to 2018.

A. EPA continues to improperly focus on "constraints" rather than Congress' "market-forcing" policy.

NFU believes that EPA must finalize the proposed 15-billion-gallon implied conventional biofuel requirement for 2019 and that EPA should increase the advanced biofuel requirement. EPA's proposal does not reference any constraints to "supply" for meeting this volume requirement. EPA's proposal also acknowledges the D.C. Circuit's decision in *Americans for Clean Energy v. EPA (ACEI)*, 864 F.3d 691 (D.C. Cir. 2017), that rejected EPA's focus "on assessing the supply of renewable fuel to consumers."⁹ Yet, EPA continues to

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*, <http://www.ethanolrfa.org/issues/energy-security/> (last visited Aug. 7, 2018). The United States imported more than 2.9 billion barrels of crude oil in 2017, meaning 42 percent of the oil processed by U.S. refineries was imported. *Id.*

⁹ 83 Fed. Reg. at 32,027.

review “constraints” on use of higher blends of ethanol.¹⁰ It’s the same story EPA repeats every year, yet somehow the ethanol industry continues to meet the requirements. The entire supply chain continues to take substantial actions to promote use of ethanol and other renewable fuels as envisioned by Congress. The so-called E10 blendwall has been exceeded, as EPA estimates an average ethanol blend above 10% in 2017, and EPA recognizes that there is opportunity for higher blends of ethanol.¹¹ The needed incentives, however, come from enforcement of strong and growing RFS volumes. As such, EPA must implement the 15-billion-gallon implied conventional biofuel requirement, and should continue to support increasing advanced biofuel volume requirements.

B. NFU Supports An Increasing Advanced Biofuels Volume Requirement for 2018 and An Increasing Biomass-Based Diesel Volume Requirement for 2020.

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. NFU urges EPA to *increase* the proposed volumes and reject any calls to further reduce the required volumes.

The “‘fundamental objective’ of the Renewable Fuel Program ‘is clear’”: To increase the use of renewable fuels in the U.S. transportation system.¹² We appreciate that, unlike in 2018, EPA proposes an increase in the advanced biofuel volume requirement for 2019 from the volume it set for 2018. This is a improvement over EPA’s handling of advanced biofuels in 2018, and we applaud EPA for providing for increases in advanced biofuels.

The advanced biofuel increase, however, only reflects the increase for “non-cellulosic” biofuels and EPA’s projected increase in cellulosic biofuels. In other words, EPA has declined, again, to backfill any part of the shortfall in cellulosic biofuel production with other advanced biofuels. EPA asserts, in so doing, it will likely cause diversions in feedstocks. This, at a time when USDA projects burdensome stocks of all major crops used for biofuels.¹³ 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. We believe EPA must consider the economic, environmental and energy security benefits

¹⁰ EPA Mem., *Market impacts of biofuels in 2019*, June 26, 2018 (EPA-HQ-OAR-2018-0167-0025). In so doing, EPA limits the potential contribution of

¹¹ *Id.* at 2.

¹² *ACEI v. EPA*, 864 F.3d at 700 (quoting 80 Fed. Reg. 77,420, 77,421 (Dec. 14, 2015)).

¹³ See USDA, *World Agricultural Supply and Demand Estimates*, WASDE 580 (Aug. 10, 2018).

attendant with increasing renewable fuel use. EPA should continue to support advanced biofuels.

We do appreciate EPA's recent approval of distillers sorghum oil as an additional feedstock, but believe EPA must review and approve new pathways on a more timely basis. The agricultural industry continues to consider possible feedstocks for biofuels, but the delays in EPA's approvals and EPA's failure to provide for robust volumes have slowed down those efforts.

We are also concerned with EPA's decision to ignore the availability of carryover RINs in assessing the applicable volumes. Based on EPA's regulations, these RINs are part of the "supply," and should not be used to reduce the actual volumes required. EPA has yet to explain why the purported "programmatic buffer" should take precedence over statutory requirements. This is particularly true when 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 part of EPA's proposal improperly focuses on reducing compliance costs, rather than enforcing Congress's market-forcing policy.

- C. There are no grounds for a general waiver, and any additional waiver requires EPA to follow proper procedures.

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."¹⁴ Yet, EPA still requests "comment on whether further reductions under the general waiver authority *could* be justified."¹⁵ As an initial matter, the waiver provision in the statute includes procedural requirements that cannot be met through a general request for comments.¹⁶ EPA has made clear in the proposal that it is *not* using the general waiver provision, and, thus, any change in this position (or any comments submitted requesting such a waiver) 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.¹⁷ Moreover, the waiver provisions are limited to requests from States and obligated parties. If EPA does not have grounds for such a general waiver to make its own motion, it sends questionable signals to the market when EPA appears to go on a fishing expedition to manufacture a reason to seek a waiver. In short, EPA cannot rely on public comments to support a general waiver without following the proper procedures. It must provide interested parties with the opportunity to review and comment on the proposed waiver and the grounds for such waiver.

¹⁴ 83 Fed. Reg. at 32,029.

¹⁵ *Id.* (emphasis added).

¹⁶ 42 U.S.C. §7545(o)(7)(A), (B).

¹⁷ *Id.*; see also 73 Fed. Reg. 47,168, 47,183-47,184 (Aug. 13, 2008).

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.¹⁸ Neither of these criteria can be met.

1. 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.’”¹⁹ EPA’s proposal obviates that there is sufficient “supply” to meet the proposed volumes. EPA makes no reference to potential supply issues for conventional biofuels, and EPA’s proposal indicates that the proposed advanced biofuel volumes are “attainable.”²⁰

EPA has previously found that volumes set under the general waiver provision are to be “maximum reasonably achievable volumes.”²¹ Finding no domestic supply concerns, EPA now proposes only to use its authority under the cellulosic biofuel waiver provision, reducing the overall renewable fuel volume solely based on the reduction in advanced biofuels.²² By not using the maximum achievable volumes, this means more supply is available.²³

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. While we dispute EPA’s finding that the rate of growth in biofuel use has slowed, EPA admits that growth is possible. As such, it should (and must) promote that growth.

¹⁸ 42 U.S.C. §7454(o)(7)(A).

¹⁹ *ACEI*, 864 F.3d at 704-13 (citations omitted).

²⁰ EPA appears to also believe the proposed volumes are “reasonably attainable,” 83 Fed. Reg. at 32,040, indicating that higher volumes are available, albeit, in EPA’s mind, at a potentially higher cost.

²¹ 83 Fed. Reg. at 32,040. As noted, the D.C. Circuit has made clear that such standard can only consider factors affecting *supply* to obligated parties, not demand-side factors.

²² 83 Fed. Reg. at 32,048.

²³ *See, e.g.*, 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.”).

2. 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.

- a. 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.²⁴ "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."²⁵ Based on this high threshold, EPA has rejected several requests for a waiver under this provision, despite claims of significant economic harms.

In particular, the potential for 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."²⁶ 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.²⁷

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.²⁸ One of the key benefits Congress sought

²⁴ 73 Fed. Reg. at 47,171.

²⁵ *Id.* at 47,172.

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

²⁷ 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 2019.

²⁸ See 73 Fed. Reg. at 47,172; 77 Fed. Reg. at 70,775; see also EPA May 22, 2012 Denial of API/AFPM/WSPA Waiver Request at 16 n.52. 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. Failure to support a growing industry would likely result in such closure.

through the RFS was to stimulate economic growth in the rural sector. EPA's effective waivers through expanded use of the small refinery exemptions has had negative impacts on the biofuels industry and farmers. 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.

- b. 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.²⁹ 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 economic incentives and flexibility necessary to do so."³⁰ 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.

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.

- c. 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.

²⁹ Total agricultural land in the United States continues to shrink. U.S. farmers continue to work on increasing yields, reducing crop failures, and making more out of less land.

³⁰ Policy of the National Farmers Union, Art. VII-A, *supra* n.1.

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 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."³¹ 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.

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. The report found that, throughout the food system, "effective adaptation can reduce food-system vulnerability to climate change and reduce detrimental climate change effects on food security..."³² We want to achieve this goal, and enactment of the RFS volume targets put forth by Congress will help.

i. Direct Climate Benefits

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.³³ 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

³¹ 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.

³² *Id.* at 112.

³³ *Assessment: Role of E15 in Reducing GHG Emissions*, Steffen Mueller, Energy Resources Center and Director of the Agriculture and Bioenergy Research Center at the University of Illinois, Mar. 18, 2015, available at <http://www.eesi.org/articles/view/research-finds-widespread-use-of-e15-would-reduce-co2-emissions>. More recent and updated lifecycle analysis continue to show even greater GHG emissions reductions by replacing petroleum fuels with biofuels than EPA's 2010 estimates. See, e.g., ICF, *A Life-Cycle Analysis of the Greenhouse Gas Emissions of Corn-Based Ethanol (for U.S. Department of Agriculture)* (Jan. 12, 2017), available at https://www.usda.gov/oce/climate_change/mitigation_technologies/USDAEthanolReport_20170107.pdf; see also 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.").

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 expands, could knock out a substantial portion of the transportation sector's 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, especially when the future of more contentious attempts by EPA to reduce GHG emissions is so unclear, places food security in greater jeopardy.

ii. 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 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. EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2016 (published 2018), 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.

b. 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 and enforce incentives that would allow farmers and stakeholders to take action to meet climate resiliency goals. Farmers in particular may prove hard to enroll in these efforts after experiencing unnecessary hardship while trying to participate in the RFS.

NFU argues that EPA does not have the authority to use its general waiver authority, and that 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.

III. EPA Must True Up Volume Requirements.

A. EPA must take action to address the D.C. Circuit's remand of the 2016 renewable fuel volume requirement.

In November 2015, EPA finalized a 2016 RFS requirement that included an implied requirement of 14.5 billion gallons of conventional biofuels. 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 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.

We are concerned that EPA's 2019 RFS proposal fails to address the court-ordered remand of 500 million gallons in forfeited demand from the 2016 RVO. EPA provides no valid reason for its delay, stating only that it is "currently considering a number of issues raised by the need to respond to the court's remand."³⁴ But, EPA already has precedent for how it should handle volumes it has not implemented in a timely manner (e.g., EPA can simply add the volume to the 2019 requirement as EPA did with respect to the missed 500 million

³⁴ 83 Fed. Reg. at 32,027.

gallons of biomass-based diesel EPA missed for 2009 and added to the volume required for 2010). There is no reason for EPA to further delay this action.

- 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.

In a July 12, 2018 letter to Senator Grassley, EPA confirmed that it had granted more than double the number of small refinery exemptions for 2016 and 2017 than it had granted in prior years and that those exemptions have been granted *after* the compliance deadline for those years. NFU wrote to Administrator Pruitt, noting its concerns with the reported expansion of these exemptions and asking EPA to stem the tide of these exemptions. EPA appears to have expanded these exemptions even further.

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.³⁵ Congress gave EPA limited waiver authority to reduce these minimum applicable volumes.³⁶ 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 resulted in a reduction in the volumes required for 2016 and 2017.

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,³⁷ 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. Moreover, there is no indication that Congress sought to reward small refineries that took no action to come into compliance,³⁸ 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

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

³⁶ 42 U.S.C. §7545(o)(7).

³⁷ 42 U.S.C. §7545(o)(1)(K), (o)(9).

³⁸ The American Petroleum Institute (API) acknowledges “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).

what grounds EPA is claiming to grant these exemptions. Regardless, EPA is required to account for these small refinery exemptions when it sets the standards.³⁹

More important, EPA is granting these exemptions *after* the volumes have been set and even *after* the compliance deadlines have passed. In so doing, this results in a reduction of the applicable volumes set by EPA, improperly waiving additional volumes. These additional waivers are significant, as EPA estimates a substantial growth in carryover RINs applicable to 2018 from these exemptions,⁴⁰ as well as EPA's forgiveness of a significant portion of Philadelphia Energy Solutions Refining and Marketing's RVOs. While EPA purports to claim the growth in the RIN bank is positive for the program, it represents an improper reduction in the required volumes for 2018, and allows RINs to be rolled over into 2019, which violates the limits on the life of a credit. 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.

While EPA asserts that it is not taking comment on the small refinery exemptions, EPA does seek comment on RIN market operations. Recent testimony before the Subcommittee on the Environment in the House Energy and Commerce Committee verified that the recent volatility in the RIN market has been the result of EPA's recent handling of the small refinery exemptions, particularly the lack of transparency and the retroactive nature of those exemptions.⁴¹ The piecemeal reports of these exemptions has caused speculation and market disruptions.⁴² We appreciate that you recently testified before the Senate Environment and Public Works Committee that EPA is looking at increasing transparency, and considering strategies for addressing reallocation of these lost volumes. We remain concerned with EPA failure to clarify what information is confidential business information, and the proposed dashboard, without addressing how the volumes will be made up, will only serve as continued downward pressure on biofuel demand and RIN prices.⁴³ Thus, EPA's statements at the hearing only further solidify the "win" for refineries, without providing the biofuels industry with any real timeline or process for addressing its concerns. Thus, EPA must adjust its process in the future to ensure that these exemptions

³⁹ 40 C.F.R. §80.1405(c).

⁴⁰ EPA estimates an additional 1.46 billion RINs from avoided obligations for 2017 and 790 million RINs from avoided obligations for 2016. 83 Fed. Reg. at 32,029.

⁴¹ See, e.g., Testimony of Gabriel E. Lade Center for Agricultural and Rural Development Iowa State University before the Subcommittee on Environment, House Energy and Commerce Committee, July 25, 2018, <https://docs.house.gov/meetings/IF/IF18/20180725/108610/HHRG-115-IF18-Wstate-LadeG-20180725.pdf>.

⁴² 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).

⁴³ 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). This would also provide more information on RIN availability and provide greater transparency in the RIN market.

do not reduce the applicable volumes required under the RFS. We look forward to working with you to address this important issue.

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 requirement for conventional biofuels and to increase the advanced biofuel volume requirements for 2019. 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.

NFU appreciates EPA's efforts addressing climate change and the climate resilience it brings to 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