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Via Electronic Filing ([www.regulations.gov](http://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, and Response to the Remand of the   
2016 Standards; Supplemental Notice of Proposed Rulemaking,   
84 Fed. Reg. 57,677 (Oct. 28, 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]](#footnote-1) NFU appreciates the opportunity to submit these comments on EPA’s Supplemental Notice to 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. 57,677 (Oct. 28, 2019) (referred to as “Supplemental Proposal”).[[2]](#footnote-2)

In the Supplemental Proposal, EPA proposes to account for small refinery exemptions that may be granted for compliance year 2020 by projecting the aggregate total of exemptions for that year as part of its formula for setting the standards. Under the proposal, EPA would revise how it estimates total transportation fuel use by projecting the volume of exempted transportation fuel due to small refinery exemptions using a 3-year rolling average of the relief recommended by the U.S. Department of Energy (“DOE”). EPA proposes to look at DOE recommendations for exemptions for compliance years 2016-2018 or alternatively for compliance years 2015-2017. But EPA has substantially expanded the exemptions granted under the RFS program for compliance years 2016-2018. And, DOE has apparently recommended “partial” exemptions when the refinery could not meet both prongs of its “disproportionate economic hardship” test,[[3]](#footnote-3) but EPA has admittedly granted full exemptions in those cases.[[4]](#footnote-4) *See* EPA-HQ-OAR-2019-0136-0347.

In 2018, due to the impacts of EPA’s actions on farmers, NFU joined the Renewable Fuels Association’s petition for reconsideration referenced in the Supplemental Proposal (EPA-HQ-OAR-2019-0136-0349). As such, NFU appreciates and agrees with EPA’s finding that it should take action to account for small refinery exemptions when setting the standards. As EPA recognizes, the expansion of small refinery exemptions in recent years “constitute[s] a significant portion of the total volume of obligated fuel.” 84 Fed. Reg. at 57,680. Due to the retroactive nature of the exemptions, this expansion has resulted in a reduction of the required volumes. *Id.* at 57,679. As EPA explains, for example, the 31 small refinery exemptions EPA granted for the 2018 compliance year (all of which were granted “after the percentage standards for 2018 had been established” *and* after the compliance deadlines for that year) “reduced the obligated volume of gasoline and diesel for 2018 by 13.42 billion gallons, effectively reducing the required volume of total renewable fuel for 2018 by 1.43 billion RINs.” *Id.* This reduction violates the limits on EPA’s waiver authority. As EPA also now recognizes, it must take action to “ensure” the volume requirements in light of expected small refinery exemptions for compliance year 2020. While we agree that EPA has authority to take action, NFU believes EPA is required to take action to meet its statutory obligations. Because EPA is also in violation of the statute, however, EPA also must address the reduction in volumes from prior year exemptions.

While NFU acknowledges that EPA’s proposal is a positive step toward addressing the harms being caused by EPA’s small refinery exemptions, it fails to accurately account for lost gallons and betrays President Trump’s promise to rural America. By using these deflated recommendations, EPA would cut hundreds of millions of gallons from the 2020 targets alone. This is wholly insufficient to address the uncertainty created by EPA’s retroactive exemptions and the loss of demand that has led to numerous ethanol and biodiesel plants to slow down production and even shut down, which directly impacts farmers. In establishing and expanding the RFS program, Congress recognized the contributions biofuels can make to the rural economy.[[5]](#footnote-5) 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 Supplemental Proposal.

To help ease the burden facing American farmers, EPA must, at a minimum, use the rolling average of actual volumes exempted from the three most recently completed compliance years in the final rule as promised by the administration. It should also codify the criteria to be used in granting small refinery exemptions and create cutoff dates to remove the ongoing uncertainty that additional exemptions will be granted and continue to flood the market with previously retired RINs.[[6]](#footnote-6) Further, EPA can, and must, address the impacts from small refinery exemptions granted in earlier years by adding the volumes lost to later year volume requirements. Finally, to facilitate compliance with the RFS, EPA should work toward removing barriers to using E15 and mid-level ethanol blends, supporting the national policy to move away from fossil fuels. NFU urges 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. EPA Must Ensure the Volume Requirements, even if it Requires Upward Adjustments in Later Years.

NFU agrees with EPA’s finding that it needs to revise how it accounts for small refinery exemptions when setting the standards to “ensure that the renewable volumes established … are achieved.” 84 Fed. Reg. at 57,679. While we agree that EPA has authority to do so, we further believe EPA is required to do so in order to meet its EPA’s statutory obligation to ensure the applicable volumes each year.

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.[[7]](#footnote-7) 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.[[8]](#footnote-8) 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. Since EPA’s expansion of the small refinery exemptions, the volume requirements have not been met.[[9]](#footnote-9) EPA admits that it has reduced the volumes through small refinery exemptions and that these volumes “constitute a significant portion of the total volume of obligated fuel.”[[10]](#footnote-10) 84 Fed. Reg. at 57,680.

Despite EPA’s acknowledgement that the required volumes have been reduced by EPA’s small refinery exemptions, which was done beyond EPA’s authority, EPA has repeated the claims of obligated parties that blending of ethanol into gasoline has not been reduced as a result of the small refinery exemptions. This is incorrect.[[11]](#footnote-11) As EPA now acknowledges, the exemptions have resulted in loss of demand by reducing the volumes, which artificially increases the RIN bank. The small refinery exemptions have resulted in a slowdown and shutdown of ethanol production. As a result, the USDA has continuously reduced its estimate for corn used in ethanol over the past year. “Moreover, corn used for ethanol production fell by 229 million bushels from the 2017/18 marketing year and is at the lowest level since the 2015/16 marketing year.”[[12]](#footnote-12) Further, the volume requirements are *minimums*, and Congress sought *increases* in production. And, the uncertainty in the market Congress sought to promote and stabilize through the RFS undermines the incentives to promote other biofuels, which Congress sought to diversify*.*

Thus, 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 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. The Supplemental Proposal, however, is only one step in meeting EPA’s obligations and addressing the harms associated with EPA’s expansion of small refinery exemptions under the RFS program.

Although EPA attempts to (again) limit the scope of comments applicable to the Supplemental Proposal, NFU also believes EPA should address the adverse impacts of prior-year exemptions, which continue to be felt today. The most straightforward way to do so would be to add the volumes lost as a result of EPA’s retroactive small refinery exemptions to the volume requirements of later years. As noted, the reduction in the volume requirements via retroactive small refinery exemptions violates EPA’s obligation to “ensure” the volume requirements and exceeds EPA’s waiver authority. While EPA raises concerns that an increase in the volume requirement will result in a drawdown of the “RIN bank,” the artificial increase in supply of prior-year RINs from these exemptions undermines the incentives created by Congress. Moreover, as the D.C. Circuit has found, EPA has authority to act as directed by Congress, even if its action is delayed.[[13]](#footnote-13) By adding the lost volumes from small refinery exemptions 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.

II. EPA’s Proposed Projection of 2020 Exemptions Likely Underestimates Actual Exemptions and is Arbitrary.

EPA’s Supplemental Proposal would project the transportation fuel that may be exempted by EPA under the small refinery exemptions to “ensure” the volumes it sets for 2020. But, EPA’s proposed methodology for projecting small refinery exemptions underestimates their impact based on speculative policy changes in the future. EPA is arbitrarily proposing to use DOE recommendations to project total aggregate potential volumes, despite the fact that EPA has not followed DOE recommendations and that EPA asserts it is not required to follow DOE recommendations. 84 Fed. Reg. at 57,681 n.19. Indeed, because EPA keeps its decisions confidential, there is no way for the public to meaningfully comment on the reliability of EPA’s projections.[[14]](#footnote-14) Therefore, even assuming EPA has authority to grant retroactive exemptions, EPA’s proposal still does not adequately “ensure” the volume requirements.

In fact, EPA has no basis to rely on projected volumes that are significantly less than actual volumes exempted by EPA for 2016-2018. EPA has substantially expanded small refinery exemptions in recent years and has done so without public participation. In an August 2019 memorandum, EPA interpreted the statute as only providing for “full” exemptions, yet it proposes to project exemptions based on recommendations for “partial” exemptions, indicating a potential policy change in the future.[[15]](#footnote-15) EPA acknowledges that the August 2019 memorandum was a change in position from prior years where EPA may have denied an exemption to refineries that could not meet both parts of the DOE test for disproportionate economic hardship. This inconsistent (and uncodified) interpretation of its statutory authority cannot represent a reasonable basis for EPA’s projection. Indeed, EPA appears to claim, notwithstanding its statutory interpretation in the August 2019 memorandum, it retains authority to grant partial exemptions “based on a particular small refinery’s circumstances.” 84 Fed. Reg, at 57,681. This would indicate that, even where DOE recommended no exemption at all, EPA may choose to grant a “partial” (and even a “full”) exemption.

Moreover, there is no reason to believe the public will become aware of any such change in policy due to the lack of transparency in EPA’s exemption decisions. Prior to the Supplemental Proposal, the public only became aware of the August 2019 memorandum because EPA submitted it as part of litigation.[[16]](#footnote-16) The market, therefore, has no assurance that EPA will not continue to grant significant exemptions at a higher rate than in EPA’s proposed projection. Indeed, EPA shows that there continue to be pending applications for exemptions for compliance year 2018 (as of October 18, 2019). As such, obligated parties will continue to believe that exemptions to be granted will be higher than EPA’s projections, negatively impacting the biofuels market.

Short of making up the lost volumes in later years, EPA should base its projection on actual data, not speculation. While obligated parties may raise concerns regarding potentially imposing a higher burden on non-exempt refineries, they have also urged EPA to base RFS projections on actual data. Moreover, the volume requirements are minimums, and the statute expressly requires compliance provisions that ensure the volumes are met. Some imprecision in projections is different than intentionally underestimating potential exemptions. In the latter case, EPA will continue to undermine the incentives created by Congress to *increase production of biofuels*.

Inexplicably, EPA includes an alternative proposal to use the average of DOE recommendations for 2015-2017 rather than 2016-2018 (the years for which EPA has the most recent data). This makes little sense where EPA has substantially expanded the program for compliance year 2016 onward based on an admittedly different approach.[[17]](#footnote-17) The number of exemption requests grew from 14 for compliance year 2015 to 42 for compliance year 2018 with the number of exemptions granted increasing from 7 in 2015 to 35 in 2017. There is no rationale for relying on data from a compliance year that utilized a different methodology for granting exemptions to project future exemptions, unless EPA indicates it will return to that methodology.[[18]](#footnote-18)

In sum, EPA has failed to support its proposed projection, which will allow small refinery exemptions to continue to create uncertainty and volatility in the market. At a minimum, EPA must use an average of actual exemptions granted for 2016-2018 rather than DOE recommendations.

III. If EPA Seeks to Rely on DOE Recommendations, it Must Codify this Interpretation and Outline the Criteria for Granting “Partial” Exemptions to Provide More Certainty to its Projections.

If, as EPA claims, it has discretion to grant “partial” exemptions, notwithstanding the August 19, 2019 memorandum, it should codify its new approach through notice-and-comment rulemaking. The problem with EPA’s handling of small refinery exemptions stems from the lack of transparency or real guidelines for how EPA will consider and grant small refinery exemptions, including the timing of seeking those exemptions. Instead, EPA has attempted to maintain substantial flexibility in granting exemptions, removing any real limits, despite Congress’s clear intent to have limited exemptions and to incentivize the entire transportation fuel market to incorporate renewable fuels.[[19]](#footnote-19)

EPA’s failure, in particular, to provide set deadlines by when an exemption may be sought renders EPA’s projections meaningless. Obligated parties may delay in their requests to reduce the projections used by EPA where EPA has asserted such requests may be submitted “at any time.” As noted, EPA shows two exemption requests still pending at EPA for compliance year 2018. But EPA has never provided any explanation why a small refinery would not be aware of potential “disproportionate economic hardship” as a result of the RFS program prior to the compliance year. Regardless, it is hard to fathom how a refinery can show disproportionate economic hardship due to the RFS program, *after* the compliance year is over. There certainly can be no such grounds after the refiner has actually shown compliance. Indeed, EPA has purportedly sought to address RIN speculation, but EPA allows refiners with small refineries 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.

EPA, therefore, should implement provide clear criteria and process for seeking and obtaining small refinery exemptions through regulation. President Trump recently issued an Executive Order promoting public participation even in the case of guidance.[[20]](#footnote-20) In *Advanced Biofuels Association v. EPA*,the D.C. Circuit also raised concerns with the secrecy behind EPA’s handling of small refinery exemptions. We believe EPA can do so without unduly restricting its ability to consider case-specific information. This would provide more benefit to a properly functioning RIN market, as EPA contends it seeks to support.

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 RFS volume requirements. Not only does EPA have discretion to do so, it is obligated to do so. At a minimum, EPA must finalize a proposal that would adjust the standards based on projected small refinery exemptions for the applicable year using the most recent 3-year rolling average of actual volumes exempted by EPA.

However, NFU urges EPA to provide more transparency on the criteria and process for granting small refinery exemptions. EPA’s proposed projections are highly suspect without providing clear rules that *will be* followed. Significantly, this includes providing the market with assurances that EPA will enforce the volume requirements, including adding lost volumes onto later year obligations to fulfill Congress’s directives.

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. NFU has provided EPA with a long list of recommended actions to continue to show support for renewable fuels, particularly mid-level ethanol blends. Mid-level ethanol blends provide substantial environmental, economic and energy security benefits. Given the cost-effectiveness of mid-level ethanol blends, this would facilitate compliance and reduce costs, which appears to be EPA’s intent, without undermining the biofuels industry. 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,

1. Policy of the National Farmers Union, Art. VIII.C.3, 2019, <https://nfu.org/policy/>. [↑](#footnote-ref-1)
2. NFU submitted comments on the July 2019 proposal for the 2020 standards. *See* EPA-HQ-OAR-2019-0136-0197. [↑](#footnote-ref-2)
3. The two prongs of DOE’s test evaluate (1) “disproportionate structural impact metrics” (a refinery’s percentage of diesel production, access to credit, local market acceptance of renewable fuels, etc.) and (2) “disproportionate economic impact metrics” (the firm’s relative refining margin, the degree to which the refiner can blend renewable fuels. The second prong assigns scores for three “viability metrics.” The U.S. Court of Appeals for the Tenth Circuit in *Sinclair Wyoming Ref. Co. v. EPA*, 887 F.3d 986 (10th Cir. 2017), only held that EPA could not condition the exemption on showing impacts to the long-term viability of the refinery. It did not, however, remove the requirement that the refinery show an economic *hardship*. EPA has never explained to the public how meeting only one part of the DOE test meets the definition of “disproportionate economic hardship.” [↑](#footnote-ref-3)
4. Because EPA treats DOE recommendations as “confidential business information,” *see, e.g.,* EPA-HQ-OAR-2019-0136-0350, the public has no way to verify the information provided by EPA. [↑](#footnote-ref-4)
5. S. Rep. No. 110-65, at 2-3 (2007). [↑](#footnote-ref-5)
6. NFU does not believe EPA has authority “unretire” RINs. Where Congress required regulations to address compliance and RFS credits, EPA must undertake notice-and-comment rulemaking. This is particularly true where the regulations prohibit a RIN that was retired to be used again. We are also concerned with the number of pending challenges to EPA’s denials of exemptions, which may, again, result in the impermissible generation of “new” RINs if EPA subsequently grants the exemption and allows “reinstatement” of any RINs that may have been retired. Creating clear rules for seeking and obtaining exemptions is consistent with the statutory language and creates a better functioning RIN market. [↑](#footnote-ref-6)
7. 42 U.S.C. §7545(o)(2)(A)(i); *see also id.* §7545(o)(3)(B)(i). [↑](#footnote-ref-7)
8. 42 U.S.C. §7545(o)(7). [↑](#footnote-ref-8)
9. EPA’s EMTS data shows actual reported obligations by obligated parties have fallen short of the required volumes.  *See* EPA, *Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program*, Table 2, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and> (data current as of Oct. 10, 2019). This can be tied to EPA’s exemptions where, for example, EPA’s data showed the volumes were met prior to its August 2019 decision to grant 31 exemptions for compliance year 2018, which EPA acknowledges reduced the volume obligations by 1.43 billion ethanol-equivalent gallons. [↑](#footnote-ref-9)
10. All told, since 2017, EPA has essentially, and impermissibly, waived over 4 billion gallons of the volume requirements. [↑](#footnote-ref-10)
11. *See, e.g.,* Letter from Renewable Fuels Association to EPA, Sept. 25, 2019, *available at* <https://ethanolrfa.org/wp-content/uploads/2019/09/RFA-Letter-to-EPA_092519.pdf>. [↑](#footnote-ref-11)
12. American Farm Bureau Federation, *EPA’s Small Refinery Waiver Proposal Is an Unbalanced Approach for Agriculture*, Oct. 21, 2019, <https://www.fb.org/market-intel/epas-small-refinery-waiver-proposal-is-an-unbalanced-approach-for-agricultu>. [↑](#footnote-ref-12)
13. *NPRA v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).  [↑](#footnote-ref-13)
14. This stands in stark contrast to EPA’s recent proposal to limit the use of scientific studies to support agency rulemakings where the public cannot access the underlying data. [↑](#footnote-ref-14)
15. If such is the case, then EPA has failed to support its grant of “full” exemptions for compliance year 2018 exemptions, rendering that action invalid. [↑](#footnote-ref-15)
16. Where EPA did not claim that the memorandum contained any confidential business information, it is unclear why EPA did not provide a copy of the memorandum to the public with the announcement of its decision. NFU again urges EPA to finalize its proposal to provide greater transparency on its small refinery exemption decisions. [↑](#footnote-ref-16)
17. The D.C. Circuit recently acknowledged this change in methodology, which was done without public participation, in *Advanced Biofuels Association v. EPA*, No. 18-1115, Judgement at 4 (D.C. Cir. Nov. 12, 2019) (Doc. #1815176). [↑](#footnote-ref-17)
18. NFU supports a return to the more rational approach EPA took with respect to small refinery exemptions, where the request was denied unless both aspects of DOE’s test were met. This makes sense because the statute requires a finding of disproportionate economic *hardship.* [↑](#footnote-ref-18)
19. The small refinery exemptions were intended to be “temporary” and based on “disproportionate economic hardship.” As previously noted in NFU’s comments, 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.”). [↑](#footnote-ref-19)
20. Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents, Oct. 9, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>. [↑](#footnote-ref-20)