



February 7, 2022

The Honorable Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Docket No. EPA-HQ-OAR-2021-0566-001

Dear Administrator Regan:

On behalf of more than 40,000 dues-paying corn farmers nationwide and more than 300,000 corn growers who contribute to corn checkoff programs in their states, the National Corn Growers Association (NCGA) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposal to change agency interpretation of the Clean Air Act's small refinery provisions and apply that interpretation to deny pending small refinery exemption (SRE) petitions under the Renewable Fuel Standard (RFS).

As producers of the sustainable, primary feedstock for low carbon ethanol, corn farmers support a robust RFS and sound administration of annual volume standards. The RFS is a successful energy and economic policy for consumers, our environment and for farmers. EPA's proposed approach to adjudicating SREs will improve RFS integrity, enabling greater carbon and pollutant reductions, expanding our energy supply to lower consumer costs, and supporting rural economic growth going forward. Resolving pending petitions will help restore RFS stability and reliability, which have been severely impacted by the recent abuse of unjustified retroactive SREs and failure to reallocate projected exempted gallons in annual RFS volumes prior to 2020.

NCGA, as a petitioner in *Renewable Fuels Association et al. v EPA (RFA)*, agrees with the U.S. Circuit Court of Appeals for the Tenth Circuit's opinion that EPA previously exceeded agency authority in extending exemptions for small refineries based on economic factors other than RFS compliance. The Tenth Circuit also found EPA granted SREs without accounting for the agency's established position that all RFS obligated parties recover Renewable Identification Number (RIN) costs through the price of the products they sell. Based on the Tenth Circuit's decision, RFS compliance must cause a refinery's disproportionate economic hardship (DEH), and EPA must reconcile its position on RIN cost passthrough when granting SREs. Therefore, EPA is compelled to change its interpretation and approach for pending petitions, as well as the 2018 petitions the D.C. Circuit Court of Appeals recently remanded to EPA.

EPA's proposal and denial of pending waivers offers a path forward. NCGA urges EPA to finalize this proposal without delay to close the chapter on RFS waiver abuse, and our complete comments follow.

Sincerely,

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National Corn Growers Association

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Proposed Adjudication

EPA is proposing to deny 65 pending SRE petitions spanning the 2016 through 2021 RFS compliance years, including 29 for 2019, 28 for 2020 and 3 for 2021.

For the 2016, 2017 and 2018 compliance years, EPA granted 85 SRE petitions, which waived 4.04 billion ethanol-equivalent gallons retroactively from RFS volume requirements. In the three years prior to 2016, EPA granted waivers totaling just 690 million ethanol-equivalent gallons, illustrating the large increase in RFS exemptions granted during those three more recent years.

EPA sets RFS volume obligations annually, and the law requires EPA to ensure those volumes are met. When EPA granted retroactive refinery waivers without reallocating those waived gallons to other obligated parties, EPA effectively reduced the total annual renewable fuel requirement.

As a result of the expansion of RFS waivers, instead of continued growth in ethanol consumption and ethanol's blend rate within fuel, both measurements declined year-over-year for the first time between 2017 and 2018, even as total fuel consumption increased. SREs reduced demand for higher ethanol blends as the substantial increase in carryover RINs resulting from waivers provided a very strong incentive to purchase RINs for compliance rather than blend additional volumes of biofuels. Waivers also directly impacted ethanol production and corn demand. In the fall of 2019, several ethanol plants idled production after the 2018 SREs were granted. Ethanol prices dropped to maintain markets, and corn use for ethanol declined.

To address the harm caused by the expansion of retroactive waivers, NCGA urged EPA to include projections for exempt gallons in the RFS volume formula when setting annual volume standards, and NCGA also joined legal actions regarding EPA's authority to expand these SREs, including as a petitioner in *RFA*. The Tenth Circuit's decision in *RFA* and the subsequent Supreme Court decision in *HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.* required EPA to change its approach on SREs from the policy the prior administration followed.

NCGA recognizes the thorough and thoughtful process EPA has taken to propose this new approach to SREs, consistent with *RFA*, and apply it to deny the pending waivers. NCGA supports EPA's proposed denial of the 65 pending SRE petitions, following EPA's analysis of them and additional supplemental information that refineries submitted, based on the agency's new statutory interpretation.

Most recently, the U.S. Circuit Court of Appeals for the District of Columbia remanded 36 SREs granted in 2019 for the 2018 RFS compliance year to EPA, which requires EPA to review and issue decisions on those petitions again. NCGA believes EPA must apply the same statutory interpretation to those remanded SREs as EPA applies to the 65 pending SREs addressed in this proposal.

Since EPA must change its interpretation on SREs in response to the *RFA* decision and proposes to apply that new interpretation to the 65 pending petitions, EPA must also apply the same interpretation to the remanded petitions. It would be inconsistent for EPA to apply a different statutory interpretation to the 65 pending SREs and the 36 recently remanded SREs. EPA must apply the same statutory interpretation to all undetermined SREs, and, therefore, deny the remanded SREs.

Requirement for RFS As Cause of DEH

The Clean Air Act allows the EPA Administrator to temporarily exempt small refineries from RFS obligation for DEH, and EPA's prior approach permitted exemptions for refineries demonstrating DEH for any reason. The statute, however, requires a finding that compliance with the RFS volume requirements would impose a DEH. The Tenth Circuit concluded, "the language of these provisions indicates that renewable fuels compliance must be the cause of any disproportionate hardship."¹

As such, NCGA strongly agrees with EPA's proposed conclusion that compliance with the RFS program must cause the DEH to warrant an exemption. EPA's proposal complies with the statute and aligns with the Tenth Circuit Court's decision. A small refinery may experience disproportionate hardship for other reasons, but unless the RFS causes that DEH, the refinery is not eligible for an extension of the initial RFS exemption provided for all small refineries.

When EPA applies the requirement that the RFS must be the cause of DEH to approve an exemption, EPA must then determine whether the RFS is causing the DEH. EPA has determined that the RFS did not cause DEH and, therefore, proposes to deny the pending exemptions. NCGA agrees with EPA's proposed denial.

Proportional Obligation and Uniform Means of Compliance

We agree with EPA's proposed finding that the structure of the RFS program places a proportional requirement on all obligated parties based on their gasoline and diesel fuel production volume. The RFS volume requirements are applied as a percentage standard to fuel production. Obligated parties that produce large volumes have a larger obligation than obligated parties that produce smaller fuel volumes, but the same obligation is put on all gasoline and diesel refiners and importers in proportion to their production volume.

Furthermore, we agree with EPA's proposed finding that the structure of the RIN program provides equal access to the same means of compliance for all obligated parties. The development of the RIN system in the RFS provided compliance flexibility to obligated parties, which could opt to purchase and blend renewable fuel into fuels they produce or opt to purchase RINs from other parties without adding blending capability. The RIN market incentivizes renewable fuel blending to meet volume requirements as the price of RINs moves freely in response to supply and demand. When SREs expanded, refineries that received exemptions benefitted from sale of the surplus RINs they no longer needed for RFS compliance. Furthermore, the large volume of retroactive SREs blunted the market signals from the RIN market and disrupted the ability of the RIN market to incentivize biofuel blending. Unjustified exemptions make access to the means of compliance unequal for obligated parties, and EPA's proposal corrects the disproportionate benefit granted to refineries receiving exemptions.

¹ *RFA* 948 F.3d at 1253

Costs

In *RFA*, the Tenth Circuit found that EPA acted arbitrarily and capriciously in granting exemptions without accounting for consistency with EPA's long-held position that all obligated parties under the RFS recover any compliance costs through the price of the products they sell. EPA first published results of an assessment that reached this conclusion on RIN cost passthrough in 2015 after examining market data.²

EPA re-stated this finding in multiple subsequent annual RFS volume rulemakings and responses to comments, including in 2017, "EPA has invested significant resources evaluating the impact of high RIN prices on refiners. After reviewing the available data, EPA has concluded that refiners are generally able to recover the cost of RINs in the prices they receive for their refined products, and therefore high RIN prices do not cause significant harm to refiners. In light of these findings, EPA does not have the statutory authority to reduce the required renewable fuel volumes for 2018 in an effort to achieve lower RIN prices."³

EPA also considered this issue in addressing petitions to change the RFS point of obligation in 2017, again concluding that RIN costs and RIN discounts were reflected in the market prices of both petroleum fuels and blended fuels. The D.C. Circuit Court of Appeals upheld EPA's determination on the petitions, including EPA's findings on RIN costs.

Finally, in evaluating the SRE petitions addressed by the proposal, EPA again evaluated available market data to determine whether more recent data continues to support EPA's prior conclusion, along with data provided by small refinery petitioners. As addressed in the proposal, EPA determined that the new data either could not be used to draw conclusions regarding RIN market dynamics or supported EPA's conclusions that RIN costs are passed through in product prices and that blended fuels are discounted by the value of RINs. EPA also concluded that its findings hold true in both large and small fuel markets and for large and small refineries, giving no obligated parties a structural advantage or disadvantage from the RFS program.⁴

Fuel markets are competitive markets, and EPA found, "no correlation between refining margins and RIN prices, nor do we see any advantage or disadvantage relative to large refineries."⁵ Exempting small refineries from RFS obligations, however, resulted in small refineries having higher refining margins than large refineries or the average of all refineries.

Corn farmers are not obligated parties or RIN market participants, but we are fuel consumers, in addition to feedstock providers. In addressing how refineries, including small refineries, pass along their RIN costs in the price of their products, we note that passthrough does not equate to the RFS increasing the price of fuel or high RIN prices increasing finished fuel prices. While ethanol is generally less expensive than unblended gasoline, the counterbalance to RIN costs is the RIN value that further lowers

² "A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects," Dallas Burkholder, Office of Transportation and Air Quality, US EPA, May 14, 2015.

³ "Renewable Fuel Standard Program – Standards for 2019 and Biomass-Based Diesel Volume for 2019 – Responses to Comments," Environmental Protection Agency (EPA-420-R-17-007), December 2017, Page 199.

⁴ "Proposed RFS Small Refinery Exemption Decision," Environmental Protection Agency (EPA-420-D-21-001), December 2021, Page 29.

⁵ "Proposed RFS Small Refinery Exemption Decision," Page 30.

the net cost of ethanol. With this dynamic, the RFS does not increase finished fuel costs for consumers, as EPA points out.

“In fact, what has happened is that the high RIN prices have increased the production cost of gasoline blendstock (i.e., the RIN cost passthrough described in the preceding section) while simultaneously lowering the net cost of ethanol in almost equal proportion (the RIN discount), resulting in little change in the actual cost of E10 to consumers.”⁶ Or in other words, the price of RINs is a wash when it comes to the price to consumers purchasing fuel at retail.

The RFS provides consumer benefits. A 2019 economic analysis on the impact of the RFS on oil and gasoline prices concludes the RFS has lowered gas prices by an average of 22 cents per gallon, saving the typical American household \$250 per year. The same analysis found that, without ethanol in the fuel supply, gas prices would increase by more than \$1 per gallon.⁷

Finally, while EPA’s analysis largely focuses on 10 percent ethanol blends, the standard for most fuel in the marketplace, consumers also benefit from lower retail fuel prices when ethanol is blended at higher levels, such as 15 percent (E15) or as E85 flex-fuel. For example, E15 is often available to consumers for at least three cents and up to more than 10 cents less per gallon.

Lack of Economic Harm and DEH

Based on EPA’s market analysis, the Clean Air Act statute, and the Tenth Circuit’s decision in *RFA*, NCGA agrees with EPA that compliance with the RFS program does not impose economic harm to obligated parties and, therefore, the RFS does not cause DEH for small refineries any obligated parties. EPA may only grant a SRE petition and extend an exemption when a small refinery demonstrates it is experiencing DEH caused by the RFS.

As such, we support EPA’s proposed decision to deny all pending SRE petitions, and we believe EPA must apply the same interpretation to the 36 remanded petitions for policy consistency, resulting in subsequent denial.

⁶ “Proposed RFS Small Refinery Exemption Decision,” Page 35.

⁷ Verleger, Philip K. Jr., “The Renewable Fuel Standard Program: Measuring the Impact on Crude Oil and Gasoline Prices,” accessed at <https://ethanolrfa.org/file/1949/Verleger-RFS-Impact-on-Oil-and-Gasoline.pdf>