



November 26, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20469

Docket ID No. EPA-HQ-OAR-2019-0136

Sent via email to: a-and-r-docket@epa.gov

RE: Supplemental Notice of Proposed Rulemaking. Renewable Fuel Standard Program: Standards for 2020

Dear Administrator Wheeler:

On behalf of the members of the American Coalition for Ethanol (ACE), I appreciate the opportunity to comment on the supplemental notice of proposed rulemaking for the 2020 Renewable Fuel Standard (RFS) program, specifically regarding EPA's request for comments on the proposed approach for prospective reallocation of Small Refinery Exemptions (SREs).

ACE is a grassroots advocacy organization, powered by rural Americans from all walks of life who have built an innovative industry that delivers homegrown biofuel and food for a growing world. Our 500 members include U.S. ethanol biorefineries, investors in biofuel facilities, farmers, and companies that supply goods and services to the U.S. ethanol industry.

While EPA's supplemental proposal is intended to get the RFS back on track, ACE believes it falls short in three areas. First, it does nothing to reallocate the 85 refinery exemptions which eroded more than 4 billion gallons from statutory levels from 2016 through 2018. We acknowledge EPA argues these retroactive SREs are outside the scope of this rulemaking and there may be other ways to rectify this oversight, but that is cold comfort given the fact D6 RIN values have collapsed by 80 percent serving as a disincentive for ethanol blending. Second, the proposal represents a missed opportunity to restore 500 million gallons to the 2016 compliance year as remanded to EPA by the DC Circuit Court in 2017.¹ Third, and most importantly for the purpose of this rulemaking, EPA's "prospective reallocation" methodology betrays what was represented to us and elected leaders who thought they had a deal on how to ensure at least 15 billion gallons in the RFS for 2020 and beyond after a meeting with the President.

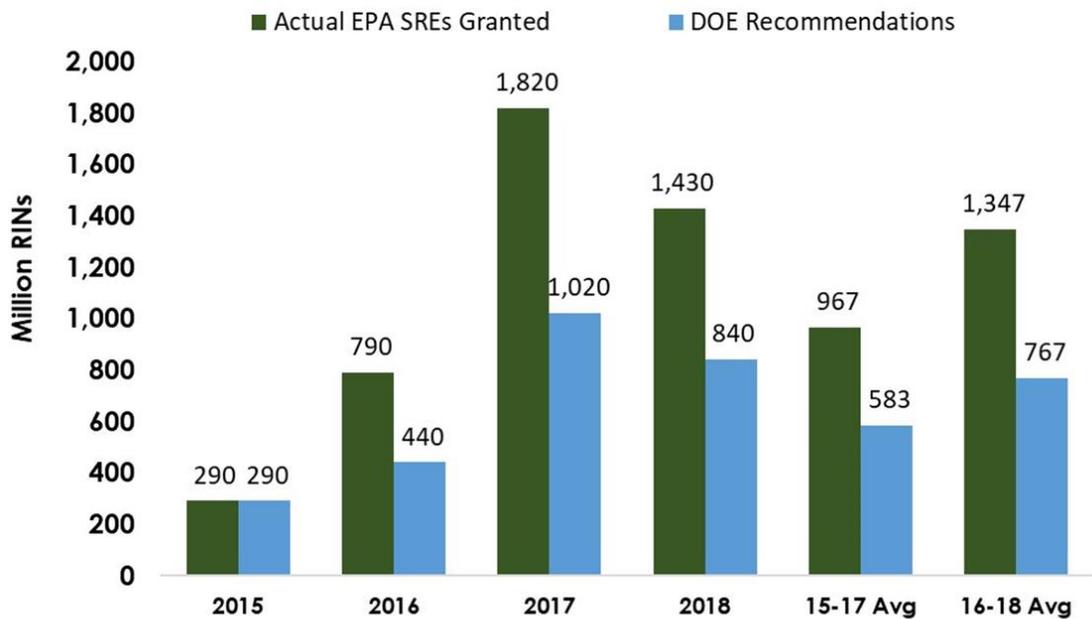
Administration officials pledged to us EPA's supplemental would seek comment on a range of options for prospective reallocation, including our preferred option of accounting for the average of *actual waived volume*, 1.35 billion gallons, from 2016 through 2018. Instead, in a classic bait and switch,

¹ Americans for Clean Energy et al vs EPA. U.S. Court of Appeals for the District of Columbia. Argued April 24, 2017. Decided July 28, 2017.

EPA’s proposal brazenly attempts to paper over the fact that actual waived SRE volumes from 2016 through 2018 were double what the Agency is proposing to reallocate for 2020.

Neither of the two options EPA has proposed for prospective reallocation of SREs is satisfactory. Under the proposed option, only about half of the actual waived volume from 2016 through 2018, approximately 770 million gallons, would be reallocated. Even worse, EPA’s “alternative approach” which relies on the 2015 through 2017 three-year average, would reallocate even less volume, around 580 million gallons, in the future. The chart below from the American Farm Bureau Federation illustrates the stark differences between the options EPA has proposed for reallocation and the actual SRE volume the Agency has waived in the past.

Figure 3. Difference in Estimated RVOs Exempted



Source: EPA



ACE members are furious with EPA’s double-standard: when it came to helping refineries escape RFS obligations, EPA rejected Department of Energy (DoE) recommendations to exercise restraint, but now that EPA must restore volume to the RFS, the Agency is suddenly embracing DoE recommendations because the result will keep a lid on refinery blending obligations going forward.

EPA should not need reminding that the statute enacted by Congress requires EPA to determine and publish annual renewable fuel volume obligations that ensure transportation fuel sold or introduced into commerce, on an annual average basis, contains at least the applicable volume of renewable fuel



determined by the RFS volume tables.² On November 7, U.S. Senator Grassley submitted the following comments to EPA expressing these same concerns: “Six Midwest Senators, Governor Reynolds, President Trump, Vice President Pence, Secretary Perdue, Administrator Wheeler, and many staff participated in a meeting in the Oval Office on September 12, 2019 to discuss the RFS and accounting for small refinery waivers. At the end of our meeting, we left satisfied that small refinery waivers, if granted, would not reduce the 15 billion gallon conventional ethanol RFS level. Let me repeat, in the future regardless of waivers, EPA would make sure 15 billion gallons of conventional ethanol would be mixed with gasoline...the way the rule was written and put out for public comment does not deliver on the same understanding I had leaving the Oval Office about what would be in the proposed rule. At that meeting, we discussed a very specific proposal to consider the three-year rolling average of actual exemptions granted by EPA including the specific numbers. Instead, this proposed rule utilizes the Department of Energy’s recommendations in the waiver process rather than the actual waived gallons.”³

Interagency review documents posted on regulations.gov reveal email exchanges between Trump administration officials reinforcing the point Senator Grassley made about the deal he and others reached with the President about maintaining at least 15 billion gallons for 2020 and beyond. An October 11 interagency reviewer’s comments to EPA indicate (emphasis added): “We do not agree with the inclusion of the alternative as drafted. We believe there is no rationale for using older data and ***the alternative is inconsistent with the WH decision last week to ensure that more than 15 billion gallons of conventional ethanol be blended into the nation’s fuel supply beginning in 2020; We recommend requesting comment on an alternative that is based on the actual SRE issued during the period 2016-2018. This alternative is consistent with the decision to ensure more than 15 billion gallons of conventional ethanol.*** It is also grounded with actual historic data and gives greater consideration and weight to past practices.”⁴

While EPA claims it is proposing to maintain the 15-billion-gallon conventional biofuel blending target for 2020, we have zero confidence the Agency’s plan for prospective reallocation will fulfill this promise for 2020 or future years. It is critical for EPA to finalize a rule which reallocates the actual average of waived volume from 2016 through 2018, 1.35 billion gallons, if there is any hope that the 15-billion-gallon statutory level can be fulfilled.

In addition to our specific comments about the 2020 volume and accounting for future refinery waivers, we are deeply concerned that EPA’s handling of SREs has taken a radical departure from previous precedent and statutory requirements. During RFS compliance years 2016 through 2018, the average number of SRE applications skyrocketed to more than 30 per year and the average approval rate increased to 90 percent. What’s more, EPA has purposefully waited until after the 2016 through 2018 compliance years concluded to approve “retroactive” refinery exemptions. By tilting the scale and the calendar in favor of refineries, the Trump administration has never reallocated the waived blending obligations as required by the statute. Not only has EPA allowed 85 SREs for the 2016

² Clean Air Act Section 211(o)(3)(B)(i)

³ <https://www.grassley.senate.gov/sites/default/files/Grassley%20EPA%20Comment%2011-07-19.pdf>

⁴ EO 12866 Interagency Review: EPA’s Renewable Fuel Standard Program: Standards for 2020, Biomass Based Diesel Volumes for 2021, and Other Changes (RIN 2060-AU42) October 11, 2019



through 2018 RFS compliance years, it has not reallocated the 4.04 billion gallons of statutory volume exempted over that timeframe.

The administration acknowledges this departure from the norm via a June 1, 2018 decision memorandum for the President from Francis Brooke, Special Assistant to the President for Energy and Environmental Policy. The purpose of the decision memo was to seek the President's approval on a plan to implement an agreement reached on the RFS. The plan contained three elements, with the third involving restructuring of small refinery exemptions. Mr. Brooke details in the memo that (emphasis added) ***"EPA will grant future small refinery exemptions based on true disproportionate economic hardship. EPA will also propose a rule, in consultation with USDA and DOE, to restructure the timing of small refinery exemption applications so that all future exemption applications will have to be submitted before EPA sets the RVO for the following year. This rule will also set forth that EPA will reallocate future small refinery exemptions to the RVO."***⁵

While this plan was not implemented, it represents an explicit acknowledgement that EPA has operated outside the legal bounds with respect to the number of SREs it has granted, the timetable used by the Agency to grant the exemptions, and reallocation of the waivers.

By issuing so many retroactive "hardship" waivers, EPA floods the market with RINs which refiners can bank, thereby artificially inflating the size of the RIN carryover. The total RIN supply has ballooned because of the SREs. As a result, D6 RIN prices cratered. Before EPA's dramatic abuse of SREs was made public, D6 RIN prices averaged approximately 70 cents, a strong incentive for refiners to blend ethanol. But by the end of 2018, as the supply of compliance credits swelled and RIN prices cratered, a refiner could buy more than 12 RINs (representing 12 gallons of ethanol for RFS compliance purposes) for the cost of just one gallon of ethanol, creating an even stronger artificial incentive to buy cheap RINs and avoid blending ethanol. So far this year, 2018 vintage D6 RINs are worth approximately 5 to 7 cents while 2019 D6 RINs are trading between 10 and 15 cents. The reality is, at these prices, a refiner's cost of RINs to be in compliance would be one-half of a cent per gallon of gasoline they refined in 2018 – and it would not have been a cost, because it is well documented that refiners make a higher per-gallon profit on non-blended gallons, ostensibly to pay for RINs. If, on the other hand, the RINs for 2018 SREs were reallocated, as required by law, larger refiners would have to buy or turn in approximately 1.5 billion RINs. Today, those RINs would cost about \$120 million dollars. That may sound like a high price to some, but the top 10 U.S. refiners reported net profits of more than \$200 billion dollars in 2018. Reallocation of 2018 RINs represents 1/1700th of their net profit for 2018. In fact, at today's RIN prices, to reallocate the 4 billion gallons lost to SREs would cost refiners \$450 million dollars. If the top 10 refining companies' profits were \$208.5 billion in 2018, reallocation of every RIN for every SRE granted by the Trump EPA would knock that down to a mere \$208 billion.

It should also be noted EPA has repeatedly indicated RIN prices do not cause hardship on refiners because they are able to recover RIN costs through the prices they charge for gasoline and diesel. Here are some examples:

⁵ <https://www.reuters.com/article/us-usa-biofuels-idUSKCN1TF290>



- “Merchant refiners, who largely purchase separated RINs to meet their RFS obligations, should not be disadvantaged by higher RIN prices, as they are recovering these costs in the sale price of their products.” – EPA, May 2015⁶
- “EPA has invested significant resources evaluating the impacts 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.” – EPA, November 2017⁷
- “EPA is not persuaded by arguments that merchant refiners are disadvantaged in comparison to integrated refiners in terms of their cost (RIN) of compliance.” – EPA, November 2017⁸

EPA’s mismanagement of the SRE provision of the RFS has forced ACE and others to petition courts for a remedy. Last year, ACE joined with many allies to petition EPA to account for the retroactive blending obligations waived by the Agency. It has been well more than a year since our petition with no meaningful response from EPA, so on July 31, we asked the U.S. Court of Appeals for the DC Circuit to lift the stay we placed on the petition so we can restart the litigation proceedings.⁹

On October 23, ACE joined the Renewable Fuels Association, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union to challenge the process by which EPA approved 31 SREs for the 2018 compliance year in the DC Circuit Court.¹⁰ Unlike previous years, EPA’s entire decision document was only two pages long and purported to resolve 36 pending petitions for disproportionate economic hardship exemptions — a decision that exempted small refineries from having to blend almost 1.5 billion gallons of renewable fuel.¹¹ Further, the decision memo did not transparently address whether any of the small refineries were eligible to receive extensions of their exemptions and did not include an analysis of ‘disproportionate economic hardship,’ as the statute requires.

While we recognize this supplemental rulemaking will not make the renewable fuels sector and farmers whole for the damage created from the 85 SREs issued and the erosion of 4 billion gallons from the statutory levels, we do encourage EPA to use this opportunity to restore the 500 million gallons back to the 2016 RFS compliance year, which the DC Circuit Court remanded to EPA in 2017.¹²

⁶ EPA Preliminary assessment of RIN market dynamics, RIN prices and their effects. May 2015

⁷ EPA Response to comments: RFS proposed rule for 2018. November 2017

⁸ EPA Denial of petitions for rulemaking to change the RFS point of obligation. November 2017.
<https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TBGV.pdf>

⁹ <https://ethanol.org/news/news/2019/07/31/coalition-seeks-court-action-forcing-epa-to-account-for-lost-biofuel-volumes/>

¹⁰ <https://ethanol.org/news/news/2019/10/23/coalition-challenges-epa-on-2018-refinery-waivers/>

¹¹ <https://www.reuters.com/article/us-usa-biofuels-epa-exclusive-idUSKBN1W91S6>

¹² Americans for Clean Energy et al vs EPA. U.S. Court of Appeals for the District of Columbia. Argued April 24, 2017. Decided July 28, 2017.



EPA's proposed 2020 RVO rule claimed this was not possible due to the "retroactive nature of an increase in the volume requirement" and the "additional burden that such an increase would place on obligated parties." The irony of not restoring this shortfall, as ordered the DC Circuit Court, is that EPA found it could retroactively grant 85 "hardship" waivers for small refineries that have erased 4 billion gallons worth of RFS blending obligations for the 2016 through 2018 compliance years. The "additional burden" placed on refiners, some of which are reporting double-digit profits, by EPA following a court order and the law would pale in comparison to the burdens this demand destruction has placed on rural America. We do not accept that restoring these gallons should not be addressed in this rulemaking and urge EPA to include these levels in the final RVO.

For far too long, farmers and renewable fuel producers who have been trying to help EPA successfully implement the RFS have instead encountered an Agency persistently riding the brakes on the program and constraining opportunities to blend more ethanol. EPA's recent abuse of SREs only makes matters worse by recklessly turning the keys to the RFS to refiners who have taken the program on a joy ride.

We urge the Agency to issue a final rule which reallocates the *actual average volume waived* from 2016 through 2018 and ensures at least 15 billion gallons for the 2020 compliance year. Refiners should no longer be allowed to drive the RFS in the ditch, it's time for EPA to finally take back the keys to the program.

Thank you for your time and consideration of these comments.

Sincerely,

Brian Jennings, CEO
American Coalition for Ethanol