

## A Deal is a Deal - EPA's Bait and Switch Falls Short and Undermines the RFS

### Talking Points for Public Comments

#### Proposed Volumes for 2020 and Biomass-Based Diesel Volume for 2021 RFS Supplemental Notice

**Background:** In response to the outrage expressed by farm and biofuel advocates about EPA's Aug. 9 announcement of 31 Small Refinery Exemption (SRE) approvals for the 2018 Renewable Fuel Standard (RFS) compliance year, the White House engaged with elected leaders about a solution going forward. On Sept. 12, President Trump had a meeting with key U.S. Senators and Iowa Governor Reynolds to strike a verbal deal which would ensure at least 15 billion gallons for 2020 and beyond by beginning to "prospectively reallocate" SRE waived volumes.

On the evening of Oct. 3, the White House held a call briefing industry stakeholders that EPA would ensure at least 15 billion gallons for 2020 by prospectively accounting for the three-year rolling average (implied to be the 2016-2018 three-year timeframe) of actual SRE volume, meaning the agency would apply the average of waived volume from 2016-2018 (approximately 1.34 billion gallons) and prospectively reallocate the gallons to the 2020 Renewable Volume Obligations (RVOs). The next day, on Oct. 4, the White House publicly announced it would seek public comment on this approach; however, the plan was short on details and the outcome dependent upon a new rulemaking process. While the Oct. 4 announcement appeared to be a step in the right direction to offset future SREs, it still did nothing to remedy the damage created from the over 4 billion gallons of RFS blending obligations waived for refineries from 2016-2018 compliance years.

On Oct. 15, EPA released the details of its proposal via a supplemental rulemaking. The proposal fails to live up to the hype. Despite earlier promises EPA would reallocate SREs in 2020 based on the average of actual gallons waived from 2016 to 2018, the agency proposed to take a bizarre and never-before mentioned approach which undercounts past SREs and falls short of ensuring 15 billion gallons of ethanol blending for 2020.

*ACE encourages you to use this background and the following talking points to assist you in submitting comments to EPA during the public comment period to this supplemental rulemaking. It's important to add how this rulemaking personally impacts you, your business, and your community.*

**1. A deal is a deal. We expect EPA to account for actual gallons waived through Small Refinery Exemptions (SREs) from 2016 to 2018 to ensure at least 15 billion gallons for the 2020 RVO.**

- Iowa Governor Reynolds and key U.S. Senators had a deal with President Trump that ensured at least 15 billion gallons of ethanol blending under the RFS beginning in 2020.
- The deal was based on the promise that EPA would account for the three-year rolling average of actual gallons waived through Small Refinery Exemptions (SREs) from 2016 to 2018 (approximately 1.34 billion gallons).
- This deal was verbalized to farm and biofuel stakeholders on a phone call with the White House and EPA on the evening of Oct. 3 and was the basis for several laudatory statements from elected leaders and stakeholder organizations when the plan was officially announced on Oct. 4.
- A deal is a deal. We expect EPA to account for actual gallons waived through SREs from 2016 to 2018 to ensure at least 15 billion gallons of ethanol blending beginning in 2020.

- While this deal does not make farmers and biofuel stakeholders “whole” for all the previous damage done by EPA’s brazen abuse of the RFS, it was a deal our elected leaders struck with President Trump. We expect the final rule to honor the deal.

**2. EPA’s proposal is a bait and switch which falls short and undermines the RFS.**

- This supplemental proposal falls short of EPA’s initial announcement by not adequately addressing the harm caused by granted SREs, and it is understandable that so many are frustrated by what now appears to be a bait and switch.
- The three-year average of actual SREs for 2016-2018 totals 1.34 billion gallons, so this is what one would logically assume EPA would project for 2020 – however, reasonable logic does not apply in this proposal.
- EPA is now proposing it will issue 'partial' SREs for 2020, something DoE has recommended in the past only to be rejected by EPA, and these partial SREs will be the basis for how it reallocates in the future.
- Essentially, EPA is saying it plans to pretend it was issuing partial SREs for 2016-2018, calculate the average volume of their imaginary partial SREs, and apply that volume (approximately 770 million gallons) to the 2020 RVO, only about half of the originally anticipated 1.34 billion gallons.
- Alternatively, EPA is also taking comment on an even worse approach which would assume it was issuing partial SREs for the three-year timeframe of 2015-2017 and apply that volume (approximately 580 million gallons) to the 2020 RVO.
- In other words, EPA wants to re-write history and pretend or assume it was issuing partial SREs during the 2015-2017 or 2016-2018 timeframes and reallocate gallons based upon those faulty and mythical assumptions, limiting how much volume will be reallocated in the future.
- Beyond the fact EPA’s proposal defies the deal President Trump reached with key elected leaders, under either approach described above, the EPA plan would fall short of expectations and not ensure at least 15 billion gallons of ethanol blending for 2020 and beyond.
- In fact, if the volume of SREs EPA approves for 2020 exceeds the three-year rolling average of 1.34 billion gallons from 2016 through 2018, the actual RVO for 2020 will be between 14.3 and 14.5 billion gallons – far short of the promise of at least 15 billion gallons for 2020.
- What’s more, despite EPA historically rejecting DoE recommendations to issue “partial” SREs, the agency now intends to begin approving partial SREs where appropriate starting with 2020.
- This flies in the face of an Aug. 9, 2019 Memorandum on SRE petitions where EPA specifically says it is not granting partial SREs for the 2018 compliance year even when DoE recommended partial exemptions.
- Apparently, EPA changed its mind between Aug. 9 and Oct. 15. We need a better explanation from the agency why.
- The result of this proposal is that the reallocation is 56.9% of what it should have been based on SREs awarded over 2016-2018.
- Restoring the integrity of the RFS requires that SREs are fully accounted for.
- On average, over the last three years, while DoE has recommended only 770 million gallons of biofuels exemptions, the EPA has granted 1.35 billion gallons of exemptions.
- Following DoE recommendations, as detailed in this proposed rule, does not guarantee that future RFS levels will be met. It’s an unbalanced approach for agriculture.
- The bottom line is farmers and ethanol producers may only get back half of the gallons EPA grants in future years.
- The impact on biofuel producers if this proposal is finalized could mean 580 million gallons of biofuel demand eliminated annually – the equivalent of the annual output from more than five ethanol plants.

- The impact on our nation’s farmers if this proposal is finalized could amount to 207 million bushels of corn demand eliminated annually – the equivalent of 1.18 million acres of corn on average on an annual basis.
- 3. EPA’s radical changes in how it handles SREs under the Trump administration have taken a terrible economic toll on rural America and violate statutory authority.**

**Difference in SREs**

- This rule ignores the fact that EPA granted 85 full SREs for the 2016-2018 compliance years, representing 4 billion gallons that still need to be reallocated and instead assumes the agency had followed DoE’s advice to issue partial waivers during that timeframe.
- 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, the Trump administration waited until after the compliance year had closed to approve “retroactive” refinery exemptions, making it impossible for EPA to ensure that the total annual volume obligation is met under this implementation of the program.
- 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, putting renewable fuel plants and American farmers at risk.
- As EPA has noted during this rulemaking process, it will continue issuing SREs in the future. This means EPA is likely to issue retroactive SREs for the 2019 compliance year (it already had five requests as of Oct. 22) and will not reallocate those exemptions.
- We submit that the law requires EPA to ensure those blending obligations will be reallocated to non-exempt refiners.
- Small refinery exemptions – whether granted before, during or after the compliance year, should be accounted for similarly.

**Impact on Rural America**

- Mismanagement of the RFS has undermined the progress of the program and caused economic pain for farmers, renewable fuel producers and rural communities.
- Net farm income has declined by 50 percent from the 2013 high and prices are depressed for farmers and ethanol producers because of man-made limits or waivers on demand for their products.
- Over the past year, USDA has continuously reduced its estimate for corn used in ethanol in the wake of continuing SRE announcements and as more ethanol plants announced they would idle production.
- USDA reduced its estimate by nearly 275 million bushels, or 5 percent, over the last 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.
- If one were to assume, for example purposes, all the 4 billion gallons of waived volume from the 2016-2018 RFS compliance years constitutes ethanol from corn, this is equivalent to losing a 1.4-billion-bushel crop, or the entire market for Minnesota corn farmers in 2018.
- Farmers are already suffering financially from weather-related disasters and the effects of trade wars; those problems are compounded when their markets are further curtailed through EPA’s SREs.
- Approximately 20 ethanol production facilities across the U.S. have either shut down or are operating below capacity. The result is a lost market for hundreds of millions of bushels of corn and the layoff of hundreds of high-skill, high wage jobs in rural communities.
- The severity of demand destruction from EPA’s use of SREs is a topic of debate, but it is without question year-over-year domestic ethanol use declined in 2018 for the first time since 1998,

falling from 14.49 billion gallons in 2017 to 14.38 billion gallons in 2018. The national ethanol blend rate retreated from 10.13 percent in 2017 to 10.07 percent in 2018.

- The best way to spur market-based demand for farmers and improve conditions in rural America is to increase the production and use of renewable fuels. This is even more critical given the uncertainty created by trade wars and efforts to renegotiate trade pacts.

#### RINs

- While rural America suffers, many oil companies have the best of both worlds: fat profit margins and minimal RFS compliance costs.
- 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. 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.
- 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.

#### 4. EPA needs to restore and reallocate waived blending obligations and comply with the DC Circuit Court's order to restore 500 million gallons unlawfully waived from the 2016 RFS.

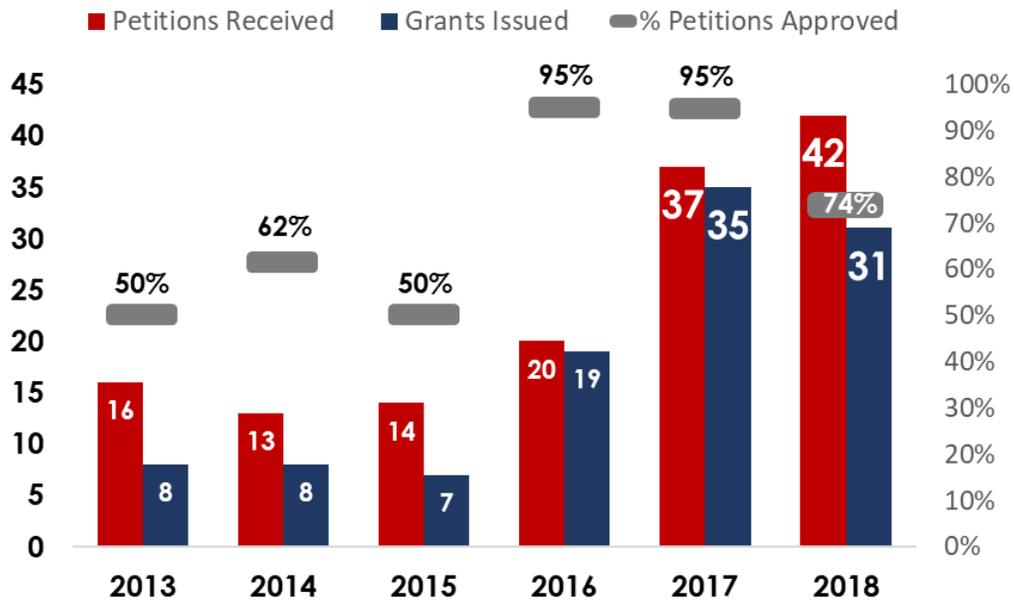
#### E15 Year-Round

- EPA's rule allowing U.S. retailers the ability to offer E15 to their customers all year opens the door for greater market access long-term, but the net effect of E15 year-round is still in the hole when it comes to ethanol demand through the RFS without restoring the waived gallons for small refineries.

#### Litigation/Court Order

- It's unfortunate EPA has chose to do nothing to reallocate the more than 4 billion gallons of RFS blending obligations waived for refineries from the 2016, 2017 and 2018 compliance years, leaving the industry with the need to continue to remedy the situation in the court system.
- An agriculture and biofuels coalition has petitioned EPA in the U.S. Court of Appeals for the DC Circuit to revise its RFS regulations for setting annual percentage standards of renewable fuel to account for SREs the agency issues retroactively.
- EPA's failure to act on the petition hurts American agriculture and renewable fuel producers and pits EPA's support for refineries against another industry critical to rural America.
- EPA's actions are particularly inexcusable given the time-sensitive nature of this annual RVO rulemaking process and percentage standard setting process.
- The 2020 RVO and this supplemental rulemaking is an opportunity to reconsider restoring waived blending obligations, as well as the 500 million gallons back to the 2016 RFS compliance year, which the DC Circuit Court remanded to EPA in 2017 in the *Americans for Clean Energy et al vs EPA* lawsuit.
- The "additional burden" placed on refiners, some of which are reporting double-digit profits, by EPA following a court order and the law pales in comparison to the burden this demand destruction has placed on rural America.
- Restoring biofuel gallons should be addressed in this rulemaking in addition to accounting for future waived gallons in the final 2020 RVO.

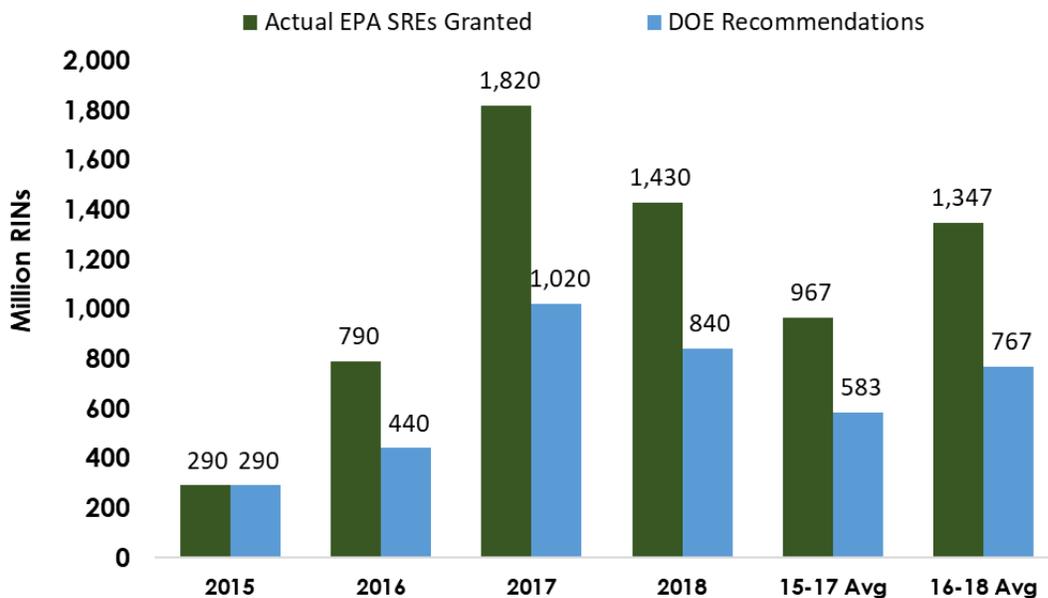
### Figure 1. SREs Requested and Approved by EPA



Source: EPA

Source: <https://www.fb.org/market-intel/epas-small-refinery-waiver-proposal-is-an-unbalanced-approach-for-agricultu>

### Figure 3. Difference in Estimated RVOs Exempted



Source: EPA

**EPA offered a half-empty proposal that cut the effective benefit to farmers in half.**



**OCT. 4**

The President committed to reallocate the 3-year average of ethanol gallons EPA **ACTUALLY** waived, which totaled 1.3 billion gallons of ethanol.



**OCT. 15**

EPA's rule dishonors that deal by using **RECOMMENDED** gallons, which totaled 770 million gallons of ethanol during that period.

Source: National Corn Growers Association