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November 29, 2019

**Attention:** Docket ID No. EPA-HQ-OAR-2019-0136

The Honorable Andrew Wheeler, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

VIA EMAIL: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov)

**Re:** Comments on Proposed Rule; 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. 57677; October 28, 2019).

Dear Administrator Wheeler,

The Renewable Fuels Association (RFA) submits the attached comments in response to the U.S. Environmental Protection Agency's (EPA) Supplemental Notice of Proposed Rulemaking related to the 2020 Renewable Fuel Standard (RFS) renewable volume obligations (RVOs) (84 Fed. Reg. 57677; October 28, 2019).

RFA is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of fuel ethanol by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA serves as the premier forum for industry leaders and supporters to discuss ethanol policy, regulation, and technical issues. RFA's members work to help America become cleaner, safer, more energy secure, and economically vibrant.

The Clean Air Act establishes that EPA "...*shall* promulgate regulations to *ensure* that gasoline sold or introduced into commerce in the United States, on an annual average basis, contains the applicable volume of renewable fuel..." as specified in the law.<sup>1</sup> The Congressional intent of this provision is indisputable and unambiguous. Unfortunately, the Agency has forsaken the law in recent years by failing to *ensure* the Congressionally directed renewable fuel volume requirements are enforced. EPA issued 85 retroactive small refinery exemptions (SREs) for the 2016-2018 compliance years, undercutting the statutory renewable fuel volumes by a

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<sup>1</sup> Clean Air Act Section 211(o)(2)(A)(i) (emphasis added)

total of 4.04 billion gallons (BG). For conventional renewable fuels like corn starch-based ethanol, Congress specifically established an annual requirement of 15 BG beginning in 2015. However, due to the massive increase in SREs, EPA has enforced, on average, a conventional renewable fuel requirement of just 13.78 BG annually for 2016-2018.

It is an undeniable fact that the surge in SREs has caused demand loss and economic hardship for U.S. ethanol producers. At least 20 ethanol plants have been temporarily idled or permanently closed since early 2018 when EPA began to massively expand the volume of SREs. In response to lost demand opportunities, President Trump committed to bring integrity back to the RFS and pledged to ensure enforcement of standards requiring “close to 16 billion [gallons]” of conventional renewable fuel blending.<sup>2</sup> Following the President’s commitment, EPA announced it would “ensure that *more than* 15 billion gallons of conventional ethanol be blended into the nation’s fuel supply beginning in 2020,” and that all future RVO rules will “include accounting for relief expected to be provided for small refineries.”<sup>3</sup>

Unfortunately, EPA’s supplemental proposal *does not* ensure that a 15-BG conventional renewable fuel requirement in 2020 and beyond will truly require “more than” 15 BG of actual blending. In fact, if past is prologue, EPA’s proposal could result in the 15-bg requirement sliding backward to a requirement for just 14.4 BG in 2020, erasing another 600 million gallons of blending requirements and exacerbating the economic pain experienced by biofuel producers.<sup>4</sup>

As described more fully in the attached comments, we strongly urge EPA to ensure the law is upheld and the President’s commitment is honored. This can only be achieved if EPA finalizes an approach that uses the three-year average of *actual* exempted volumes—not the three-year average of the Department of Energy’s recommendations—as the basis for projecting exemptions in 2020 and beyond.

Sincerely,



Geoff Cooper  
President & CEO

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<sup>2</sup> Reuters. “Trump says ethanol deal will be around 16 billion gallons.” October 7, 2019. <https://www.reuters.com/article/us-usa-biofuels/trump-says-ethanol-deal-will-be-around-16-billion-gallons-idUSKBN1WM298>

<sup>3</sup> U.S. Environmental Protection Agency. “President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels.” October 4, 2019. <https://www.epa.gov/newsreleases/president-trump-delivers-key-promise-american-farmers-epa-usda-announce-agreement>

<sup>4</sup> If EPA uses the 2015-2017 average of DOE SRE recommendations (one approach in the supplemental proposal) but issues exemptions equal to the actual 2016-2018 SRE average, the real RVO would be just 14.4 bg.



**COMMENTS OF**  
**THE RENEWABLE FUELS ASSOCIATION (RFA)**  
**IN RESPONSE TO**  
**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 FEDERAL REGISTER 57677 (OCTOBER 28, 2019)**

**DOCKET ID: EPA-HQ-OAR-2019-0136**

The Renewable Fuels Association (RFA) appreciates that the U.S. Environmental Protection Agency (EPA) has issued a supplemental proposal aimed at restoring integrity to the Renewable Fuel Standard (RFS) and putting an end to the damage caused by the massive increase in small refinery exemptions (SREs).

By proposing to include projections of the volume of gasoline and diesel exempt (i.e., due to expected SREs) in Renewable Volume Obligation (RVO) calculations, the supplemental proposal takes an important step forward. However, the supplemental proposal still does not fully address the problems with the Agency's recent approach to SREs. It ultimately fails to ensure the statutory requirement of 15 billion gallons (BG) of conventional biofuels will truly be enforced in 2020 and beyond. We strongly urge EPA to get the RFS back on track by finalizing an approach that uses the three-year average of *actual* exempted volumes—not the three-year average of the Department of Energy's (DOE) recommendations for exempted volumes—as the basis for projecting exemptions in 2020 and beyond.

- I. We agree that EPA has the authority—and the statutory obligation—to project the volume of gasoline and diesel that will be exempt due to small refinery exemptions.**

EPA's supplemental notice proposes to include projected volumes of exempt gasoline and diesel in the percentage standard calculations for the 2020 RVO. Doing so would effectively

“redistribute exempted volumes” of renewable fuel blending to non-exempt obligated parties.<sup>1</sup> According to EPA, including projected exemptions is “...a reasonable measure to appropriately account for volumes that may become exempted after the promulgation of the final rule...and furthers Congressional intent to ‘ensure’ the renewable fuel volumes are met.”<sup>2</sup>

We agree and strongly support EPA’s general proposal to include projected volumes of exempt gasoline and diesel in the annual RVO calculations for 2020 and beyond. Further, we strongly agree that EPA is bound by the Clean Air Act to publish a renewable fuel obligation each year “that ensures that...statutory volume requirements are met.”<sup>3</sup> In other words, because the statutory volume of required conventional renewable fuel is 15 BG annually in 2020 and beyond, EPA must take action to “ensure” the Congressionally specified minimum volume of 15 BG is met. This means any volumes expected to be exempt must be prospectively restored in order to keep the statutory RFS volume whole.

This has not occurred in recent years. EPA’s abuse of retroactive SREs reduced the conventional renewable fuel requirement for 2016, 2017, and 2018 from the statutory volume of 15 BG to an average of just 13.78 BG—or eight percent below the levels required by Congress. EPA expressly acknowledges that granting retroactive SREs without prospective offsets results in erosion of the Congressionally mandated volume requirements: “...should we grant SREs without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program, potentially impacting the volume of renewable fuel used in the U.S.”<sup>4</sup>

The only way to “ensure that...statutory volume requirements are met” is to prospectively offset the expected volume of exempted gasoline and diesel in the manner proposed by EPA in the supplemental notice. Thus, while we strongly disagree with the variables that EPA proposes to use to ensure the RFS is kept whole in 2020 and beyond (for reasons detailed in the following sections of these comments), we generally support the approach outlined.

**II. EPA’s projection of exempted gasoline and diesel should be based on a three-year average of the *actual* exempted volume, not the exempted volume recommended by DOE.**

While we support EPA’s proposal to include projected volumes of exempt gasoline and diesel in the RVO calculation, we strongly oppose the Agency’s suggestion that the projection

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<sup>1</sup> 84 Fed. Reg. 57680

<sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C. § 7545(o)(3)(B)(i).

<sup>4</sup> 84 Fed. Reg. 57680

be based on “...exempt volumes of gasoline and diesel in previous years *had EPA followed DOE’s recommendations without deviation.*”<sup>5</sup> The proposal to base the projection on DOE recommendations rather than actual exempted volumes stands in stark contrast to the approach agreed upon by the President and outlined on October 4, 2019, by EPA Administrator Andrew Wheeler. Commenting on the upcoming supplemental proposal, Administrator Wheeler said “...we are putting forth 15 billion gallons plus an additional amount based upon ***what we’ve given out in the last three years*** in waivers...”<sup>6</sup> Clearly, Administrator Wheeler was referencing *actual* exempted volumes from 2016-2018. He made no mention of any intent by EPA to use the DOE recommendations.

Unfortunately, using the DOE recommendations as the basis for projected volumes of exempt gasoline and diesel would *not* ensure the statutory volume of 15 BG is met in 2020 or beyond. In recent years, EPA has not followed DOE recommendations on SREs, particularly in cases where DOE recommended that partial exemptions be given. In fact, former Secretary of Energy Rick Perry confirmed that “EPA has *never* granted a 50 percent exemption” despite receiving numerous recommendations to do so from DOE.<sup>7</sup> Thus, the *actual* volume of gasoline and diesel exempted from an RVO by EPA has substantially exceeded the volume recommended for exemption by DOE. Based on data provided in the supplemental proposal, EPA exempted 76 percent more gasoline and diesel from RFS compliance, on average, in 2016-2018 than was recommended by DOE.

Moreover, EPA has repeatedly asserted it does not have the ability or authority to grant partial exemptions, as often recommended by DOE. As recently as August 9, EPA has taken the position that it may only exempt small refineries from RFS obligations “...*in full*, and not grant partial relief.”<sup>8</sup> The supplemental proposal suggests EPA could change its position on partial exemptions, but such a shift would mark a radical and unlikely departure from recent Agency practice.

Additionally, the supplemental proposal makes no guarantee that EPA will truly follow DOE’s recommendations regarding SREs for the 2020 compliance year or beyond. Instead, EPA says only that it will consider following DOE’s recommendations to grant partial exemptions “under appropriate circumstances,” without defining what those circumstances might be.<sup>9</sup> After

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<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> Jeff Angelo. “EPA Makes a Big Announcement on Ethanol.” WHO Radio. October 4, 2019.

<https://whoradio.iheart.com/content/2019-10-04-the-epa-makes-a-big-announcement-on-ethanol/>

<sup>7</sup> Letter to Sen. Charles Grassley from Secretary of Energy Rick Perry. July 19, 2019. Available at:

<https://www.grassley.senate.gov/sites/default/files/2019-07-19%20DoE%20to%20CEG%20%28Small%20Refinery%20Economic%20Hardship%20Analysis%29.pdf>.

<sup>8</sup> “Decision on 2018 Small Refinery Exemption Petitions,” Memorandum from Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation to Sarah Dunham, Director, Office of Transportation and Air Quality. August 9, 2019.

<sup>9</sup> 84 Fed. Reg. 57681

stating that it will begin to consider DOE recommendations on SREs, EPA then suggests that it could “deviate from this policy in adjudicating 2020 SRE petitions,” noting that “other economic factors,” “judicial resolution of pending decisions,” and “subsequent Congressional direction” could cause EPA to again disregard DOE recommendations. In short, there is no assurance whatsoever in the supplemental proposal that EPA would faithfully and consistently adhere to DOE recommendations when SRE petitions are decided. Thus, there is no way EPA can legitimately say—as Administrator Wheeler did in a recent interview—that this proposal would ensure that “...after the small refineries are exempted, the final number will still end up being 15 billion gallons.”<sup>10</sup>

We remain concerned that if EPA finalized the proposed approach, it would use DOE recommendations to project exempted gasoline and diesel volumes, but ultimately exempt more volume than DOE recommended. This scenario would result in continued erosion of the conventional renewable fuel volume obligation to a level below 15 BG. Indeed, if EPA finalized its alternative proposal to use 2015-2017 DOE recommendations as the basis for its projection of 2020 exemptions (for which there is absolutely no rationale), but then actually exempted a volume commensurate with the 2016-2018 actual exemptions, the RFS would truly require only 14.4 BG of conventional renewable fuel in 2020.

Such an approach would undermine commitments made by both EPA (which said its supplemental proposal would “ensure that more than 15 billion gallons of conventional ethanol be blended into the nation’s fuel supply beginning in 2020”<sup>11</sup>) and President Trump himself (who said, “We’ve come to an agreement and it’s going to be...getting close to 16 billion [gallons]”<sup>12</sup>). Achieving “more than 15 billion gallons” or “close to 16 billion gallons” of conventional renewable fuel blending could only be possible in 2020 if EPA were to use the *actual* three-year average to project expected exemptions.

For these reasons, we urge EPA to finalize an approach that uses the three-year average of actual exempted volumes—not DOE’s recommendations—as the basis for projections of exempted gasoline and diesel in 2020 and beyond. Accordingly, we believe the definitions of gasoline and diesel “projected to be exempt” (represented by GE<sub>i</sub> and DE<sub>i</sub>,

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<sup>10</sup> Chuck Abbott. “Ethanol Plan to ‘Net Out’ at 15 Billion Gallons – EPA’s Wheeler.” Successful Farming. October 9, 2019. <https://www.agriculture.com/news/business/ethanol-plan-to-net-out-at-15-billion-gallons-epa-s-wheeler>

<sup>11</sup> U.S. Environmental Protection Agency. “President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels.” October 4, 2019. <https://www.epa.gov/newsreleases/president-trump-delivers-key-promise-american-farmers-epa-usda-announce-agreement>

<sup>12</sup> Reuters. “Trump says ethanol deal will be around 16 billion gallons.” October 7, 2019. <https://www.reuters.com/article/us-usa-biofuels/trump-says-ethanol-deal-will-be-around-16-billion-gallons-idUSKBN1WM298>

respectively) found in 40 C.F.R. § 80.1405 should be further modified as follows (deletions are designated by strikethrough and additions are designated by underscore):

$GE_i$  = The total amount of gasoline projected to be exempt in year  $i$ , in gallons, per §§ 80.1441 and 80.1442, where the projection shall equal the mean of the total amount of gasoline exempt in years  $i$  minus 2,  $i$  minus 3, and  $i$  minus 4.

$DE_i$  = The total amount of diesel fuel projected to be exempt in year  $i$ , in gallons, per §§ 80.1441 and 80.1442, where the projection shall equal the mean of the total amount of diesel fuel exempt in years  $i$  minus 2,  $i$  minus 3, and  $i$  minus 4.

In the case of the upcoming 2020 RVO final rule, for example, “year  $i$ ” represents 2020, while “years  $i$  minus 2,  $i$  minus 3, and  $i$  minus 4” represent 2018, 2017, and 2016, respectively.

**III. EPA’s apparent concern about “over-project[ing]” is not a sufficient reason to use DOE recommendations in lieu of actual, historical exempted volumes as the basis for projecting exemptions.**

EPA’s supplemental notice hints at the Agency’s concern with using actual exemptions as the basis for projections: “If we over-project the volume of gasoline and diesel produced by exempt small refineries in 2020, the actual required volumes of renewable fuel will be higher than the volumes used in calculating the percentage standards.”<sup>13</sup> Given EPA’s recent history regarding SRE adjudication and the supplemental notice’s explicit acknowledgement that EPA may continue to “deviate” from DOE recommendations, this outcome seems highly unlikely. Still, even if this scenario were to occur, EPA would have ample justification to enforce volume obligations slightly higher than the volumes used when the percentage standards were set.

First, EPA has already eroded the 2016-2018 RFS volumes by more than 4 billion gallons (this volume does not include likely additional volume losses resulting from adjudication of pending 2019 SREs). Thus, any minor increase in blending requirements for 2020 and beyond that might occur if EPA “over-projects” exempted volumes would be a drop in the bucket compared to actual lost blending obligations from previous SREs. Relatedly, the Clean Air Act directs EPA to “...ensure that gasoline sold or introduced into commerce in the United States, *on an annual average basis*, contains the applicable volume of renewable fuel...”<sup>14</sup> Therefore, if EPA fails to ensure the statutory volumes are met in any given year (as it did in 2016-2018), the statute requires the Agency to enforce future standards that ensure all of the applicable volumes are met “on an annual average basis.” Because the actual enforced RVOs in the past several

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<sup>13</sup> 84 Fed. Reg. 57680

<sup>14</sup> Clean Air Act Section 211(o)(2)(A)(i) (emphasis added)

years have been well below the statutory levels, ensuring the statutory volumes are met on an “average basis” would require—or, at the very least, allow—EPA to finalize RVOs for 2020-2022 that could very well result in enforcement of volume obligations slightly above statutory levels. That is, if recent RVOs have been well below the statutory volumes, then future RVOs will need to be above the statutory volumes in order to ensure the standards are met “on an annual average basis.”

Second, obligated parties are quite familiar with circumstances where the actual volume obligation ends up being slightly higher than what was initially projected by EPA when the percentage standards were set; this has occurred in the past when actual gasoline and diesel consumption is higher than EPA’s projected levels of consumption when the RVO was set. Obligated parties have demonstrated they have the ability to react accordingly to situations where actual blending obligations slightly outpace the levels expected when the RVO was finalized.

Third, the current size of the bank of surplus RIN credits is at record-high levels. We continue to strongly disagree with EPA’s position that the size of the RIN bank is an appropriate consideration in setting annual RVOs. However, to the extent that EPA continues to incorrectly view the size of the RIN bank an appropriate consideration in setting RVOs, the Agency surely must take notice of the unprecedented volume of surplus RINs available today. EPA acknowledges that “carryover RINs can be used for compliance purposes,” and in the past EPA has used the availability of carryover RINs to “...justif[y] maintaining the advanced and total renewable fuel volume requirements for that year at the levels specified in the statute.”<sup>15</sup>

In summary, EPA’s apparent concern about “over-projecting” the volume of exempted gasoline and diesel is not an appropriate justification for using DOE recommendations in lieu of actual exempted volumes to project expected exempted volumes.

**IV. EPA’s final rule should clarify that *all* future RFS volume-setting rulemakings will include projections of exempted gasoline and diesel based on the three-year average of actual exempted volumes.**

While the proposed amendments to 40 C.F.R. § 80.1405 appear to establish a permanent SRE redistribution fix, we encourage EPA to more explicitly clarify in the final rule that the Agency will project exempted gasoline and diesel as part of the RVO calculation in *all* future RFS volume-setting rulemakings. This will help provide more certainty that RFS requirements in 2020 and beyond will be fully enforced and not eroded by retroactive SREs.

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<sup>15</sup> 84 Fed. Reg. 36767

## V. Conclusion

In closing, the supplemental proposal unfortunately does not remedy the harm caused by EPA's recent abuse of the SRE program. The Agency must finalize a rule that utilizes *actual* exempted volumes—not DOE recommendations—as the basis for projected volumes of exempt gasoline and diesel in 2020 and beyond. Thank you for the opportunity to comment on this important issue. Please do not hesitate to contact us should you have questions.