

January 29, 2019

The Honorable Andrew Wheeler  
Acting Administrator, U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N. W.  
Mail Code: 1101A  
Washington, DC 20460

RE: Statutorily-Consistent Approach to “Reset” of Total Renewable Fuel  
Standard under 42 U.S.C. § 7545(o)(7)

Dear Administrator Wheeler:

On behalf of the Renewable Fuels Association (“RFA”), the prominent voice of advocacy for the ethanol industry since 1981, I am writing to you regarding a proposed rule we understand will be released in spring 2019 that would “reset” statutory Renewable Fuel Standard (“RFS”) blending obligations for 2020, 2021 and 2022 and biomass-based diesel blending obligations for 2021 and 2022 pursuant to 42 U.S.C. § 7545(o)(7)(F) (the “Reset Rule”). As the Environmental Protection Agency (“EPA”) completes this rulemaking, RFA expects that EPA will use the Reset Rule not just to reduce required volumes of cellulosic and advanced biofuels based on lower-than-expected production capacity, but also as an opportunity to adjust future implied blending obligations for conventional renewable fuels upward to account for the following:

- 1) the 500 million gallons of renewable fuel improperly waived from the 2016 standards, as required by the D.C. Circuit Court of Appeals’ remand in *Americans for Clean Energy v. EPA*,
- 2) the approximately 232 million Renewable Identification Number (“RIN”) “write-off” as part of the Philadelphia Energy Solutions Refining and Marketing, LLC (“PESRM”) bankruptcy settlement, and
- 3) the 2.25 billion RINs attributable to 48 small refinery exemptions granted for compliance years 2016 and 2017.

As a result of these waivers or exemptions from required volumes, many ethanol plants have recently idled, shut down, or announced layoffs. These compliance exemptions also have hurt demand and prices for American farmers. At a time when trade disputes are dampening export market opportunities, the EPA-induced disruption in domestic ethanol and corn demand is devastating.

Each of the three considerations listed above should be incorporated as part of the Reset Rule’s calculus in setting applicable volumes because 42 U.S.C. § 7545(o)(2)(B)(ii) requires the adjusted volumes to be “based on a review of the implementation of the program during [previous] calendar years” as well as six enumerated factors. Due to the waived or exempted volumes listed above, the RFS *as implemented* has not achieved the applicable volume requirements that EPA set in its annual rules. Furthermore, EPA has a “statutory mandate to ensure that those [volume] requirements are met” and this can only be accomplished if EPA adjusts volumes upwards to account for volume obligations previously exempted by EPA and not accounted for in the subsequent year’s volume requirement. *See Americans for Clean Energy v. EPA*, 864 F.3d 691, 699 (D.C. Cir. 2017) (citing 42 U.S.C. § 7545(o)(3)(B)(i) and *Monroe Energy v. EPA*, 750 F.3d 909, 920 (D.C. Cir 2014) (internal quotations omitted).

Each of these three considerations is discussed in more detail below.

1. *Americans for Clean Energy v. EPA Remand Volumes*

It is our understanding that EPA may incorporate the 500 million gallons of improperly waived renewable fuel into the Reset Rule. If so, RFA is pleased that EPA will finally address this outstanding obligation, which the D.C. Circuit ordered more than 18 months ago. Given the Court’s agreement that these volumes were improperly waived, EPA must now restore them in the upcoming annual volume obligations.

2. *PESRM Bankruptcy Volumes*

The same logic for including the 500-million-gallon remand in the Reset Rule applies to the RINs that PESRM was not required to retire as part of its bankruptcy settlement agreement. PESRM’s Bankruptcy Plan of Reorganization allowed it to evade compliance with a substantial portion – approximately 360 million gallons – of its 2016-18 renewable volume obligations. Although the company owed 467 million RINs for the 2016 and 2017 compliance periods, in addition to about 97 million RINs for the roughly three-month compliance period between January 1, 2018, and the effective date of the settlement agreement,<sup>1</sup> PESRM was required to retire only 138 million RINs for its 2016-17 compliance and 64.6 million RINs toward post-bankruptcy RVO.<sup>2</sup> Treating PESRM’s RIN obligations as just another monetary claim that could be discharged for pennies on the dollar rather than as a regulatory obligation that must be complied with, EPA effectively waived the majority of those remaining volume obligations. Despite the settlement agreement’s language that the terms were fact-specific and would have no precedential value outside of that case, the United States did allow PESRM to use the

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<sup>1</sup> See 83 Fed. Reg. 63,704, 63,709 (Dec. 11, 2018) (citing docket for PES Holdings, LLC, 1:18bk10122, ECF Document Nos. 244 (proposed settlement agreement), 347 (United States’ motion to approve proposed settlement agreement), 376 (order approving proposed settlement agreement), and 510 (Stipulation between the Debtors and the United States on behalf of the Environmental Protection Agency relating to Renewable Identification Number Retirement Deadlines under Consent Decree and Environmental Settlement Agreement) (Bankr. D. Del.)).

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

bankruptcy process to evade a clear regulatory obligation – a forgiveness that is antithetical to the basic tenets of bankruptcy law. Because the PSERM settlement did not “comport [] with the goals of Congress” in passing the RFS to increase the blending of renewable fuels into transportation fuel, EPA should use the Reset Rule to ensure the statutory volumes are met by accounting for the 360 million RIN shortfall due to PSERM’s bankruptcy settlement.

### *3. Small Refinery Exemptions*

So far, EPA issued an unprecedented 48 small refinery exemptions from 2016 and 2017 RFS applicable volume requirements, effectively cutting total renewable fuel blending obligations by 2.25 billion gallons.<sup>3</sup> The practical result of these exemptions has been a flood of RIN credits onto the market, a dramatic collapse in RIN prices, reduced ethanol blending activity in 2018, and historically low ethanol prices.

Although EPA previously has adjusted applicable percentage standards upward to account for small refinery exemptions, EPA now claims it intends to do so only when the small refinery exemptions are granted prior to the date that the standards are promulgated. This policy decision doesn’t relieve EPA of its obligation to ensure the statutory volumes are met, however, even if that adjustment is made in subsequent annual rules. Consistent with this obligation, RFA and other trade organizations also currently have a petition pending before EPA asking the agency to reconsider its regulations at 40 C.F.R. § 80.1405(c) (establishing the equation to calculate the annual renewable fuel percentage standards) to account for retrospective small refinery exemptions—that is, exemptions granted after the date that the annual percentage standards are set. EPA’s consideration of that petition is not mutually exclusive. EPA should compensate for the lost volumes due to small refinery exemptions as part of the Reset Rule, particularly as the Reset Rule will establish volume requirements for more than one year. A multi-year rule would allow EPA to spread out restored exempted volumes over more than one year.

The Reset Rule provides the perfect vehicle for EPA to make appropriate adjustments to ensure the statutory volumes are met. We appreciate your consideration of our request, and we look forward to working with you to develop a Reset Rule that satisfies the Congressional intent behind the RFS program.

Sincerely,

A handwritten signature in black ink that reads "Geoff Cooper". The signature is written in a cursive, slightly slanted style.

Geoff Cooper  
President and Chief Executive Officer

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<sup>3</sup> See <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (estimated RVO exemptions for 2016 and 2017 were 790 million and 1.460 billion, respectively).