

August 26, 2020

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
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Washington, D.C. 20460
Wheeler.andrew@epa.gov

Dear Administrator Wheeler,

The COVID-19 pandemic has disrupted the U.S. economy in unprecedented ways and created significant uncertainty across rural America. For the U.S. ethanol industry, that uncertainty has been greatly exacerbated by protracted delays and regulatory indecision related to the Renewable Fuel Standard (RFS).

By disregarding statutory deadlines, flouting court decisions, and failing to make timely decisions, the Environmental Protection Agency (EPA) is undermining predictability and confidence in the renewable fuels market and abetting longtime opponents of the RFS who perpetually seek the destabilize the program.

Consequently, I write today imploring EPA to swiftly resolve a litany of unsettled RFS matters in a manner that is consistent with both the purpose of the Clean Air Act and the spirit of President Trump's commitments to farmers and ethanol producers. We need and expect timely decisions and regulatory action, and EPA's current vacillation on RFS issues comes at a moment when market certainty and stability has never been more important. We urge you to act immediately and decisively on the unresolved RFS matters enumerated below.

1. Adopt the recent Tenth Circuit Court decision (*Renewable Fuels Association et al. v. Environmental Protection Agency*) nationwide.

It has been seven months since the U.S. Court of Appeals for the Tenth Circuit overturned three improperly granted small refinery exemptions and set a foundational precedent for EPA's evaluation of all SRE petitions.¹ While EPA has acknowledged the *RFA v. EPA* court decision is already applicable as the "law of the land" in the states that comprise the Tenth Circuit, the agency still has not announced how the decision applies to refineries outside of those states.

In late March, EPA said it "...intends to develop an appropriate implementation and enforcement response to the Tenth Circuit's decision in *RFA v. EPA* once appeals have been resolved and the court's mandate has been issued."² An appeal attempt was resolved on April 7, 2020, when the Tenth Circuit Court voted unanimously to deny a request from oil refiners for a re-hearing, and the court issued its mandate on April 15, 2020. Yet, more than four months later, EPA has not yet communicated its plan for implementing the court decision nationally. EPA's inaction on the Tenth

¹ 948 F.3d 1206 (10th Cir. 2020).

² EPA. "[EPA Announced Steps to Protect the Availability of Gasoline during COVID-19 Pandemic.](#)" March 27, 2020.

Circuit decision is creating significant uncertainty for obligated parties (i.e., refiners), renewable fuel producers, and America's farmers.

2. Deny all pending so-called "gap year" SRE petitions.

Because EPA has needlessly delayed nationwide adoption of the Tenth Circuit's mandate, the agency has given refiners ample time to devise absurd new schemes aimed at circumventing the court decision. Refiners have filed 67 so-called "gap year" SRE petitions in a cynical attempt to feign compliance with the Tenth Circuit decision and claim they are eligible to apply for future exemptions.³ Granting these gap year waivers—some of which date as far back as 2011—would be inconsistent with Congressional intent, judicial precedent, EPA's own policies and regulations, and any sense of fairness to America's farmers and ethanol producers.⁴

While we were encouraged to hear you say you have "some real questions" about the legitimacy of gap year petitions, we see no reason why they will be "trickier" or "harder" to review.⁵ In fact, it should be quite easy for EPA to summarily reject these nonsensical petitions. It is preposterous for refiners who readily complied with their RFS obligations in previous years (and did not ask for an exemption at the time) to now claim they somehow suffered "disproportionate economic hardship" and need relief from those long-past compliance obligations.

In addition, the statute requires that "...the Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition."⁶ On June 18, EPA disclosed that 52 such petitions had already been received, meaning the statutory deadline for issuing decisions on those petitions can be no later than September 16, 2020 (and is likely much earlier based on the actual date of receipt of the petitions).

You recently acknowledged that "...there may be a 90-day statutory deadline to review..." the petitions, but then stated, "I don't know that anybody is going to hold us to that 90-day clock because this is a little unusual."⁷ We agree that the entire concept of gap year waivers is indeed "unusual," but we see no legal basis for EPA to ignore the non-discretionary statutory deadline for acting on these petitions. Rather, the statute clearly specifies that "any petition submitted by a small refinery" is subject to the 90-day deadline.

3. Decide the 31 pending SRE petitions for 2019 and 2020 according to the Tenth Circuit Court criteria.

In addition to the 67 pending "gap year" SRE petitions discussed above, EPA shows 28 pending SRE petitions for the 2019 compliance year and three pending petitions for 2020.⁸ Combined, these 98 SRE petitions have the potential to erase another 4.6 billion gallons of RFS blending requirements, eclipsing the 4.0 billion gallons already lost as a result of the 85 SREs granted for the 2016-2018 compliance years. It seems highly likely that EPA has already missed the 90-day deadline for deciding most or all of the 2019 petitions, and we note that some refiners have already notified EPA of their intent to sue for failing to complete a non-discretionary action under the Clean Air Act.⁹

³ EPA. "RFS Small Refinery Exemptions." Last updated August 20, 2020.

⁴ See [letter](#) from RFA President and CEO Geoff Cooper to EPA Administrator Andrew Wheeler. May 22, 2020.

⁵ Larry Lee. Brownfield. "[EPA's Wheeler Says He Has Questions About SRE Gap Waiver Applications.](#)" August 12, 2020.

⁶ 40 CFR 80.1141(e)(2)

⁷ Larry Lee. Brownfield. "[EPA's Wheeler Says He Has Questions About SRE Gap Waiver Applications.](#)" August 12, 2020.

⁸ EPA. "RFS Small Refinery Exemptions." Last updated August 20, 2020.

⁹ EPA. "[Notices of Intent to Sue the U.S. Environmental Protection Agency.](#)"

We believe EPA is bound to evaluate these pending petitions using the “three-pillar” criteria established by the recent Tenth Circuit decision. First, EPA must reject any 2019 or 2020 SRE petitions that are not seeking to *extend* existing exemptions that have been in continuous effect since 2011. That is, if any refinery seeking a 2019 or 2020 has not had exemptions in each prior year dating back to 2011, they are not eligible for consideration. As discussed above, refiners who do not satisfy this requirement cannot be allowed to circumvent it simply by submitting bogus “gap year” petitions.

Second, EPA may only grant extensions of continuously existing exemptions if the petitioner can demonstrate that “disproportionate economic harm” is caused solely by RFS compliance obligations and not some other economic factors.

Third, refiners who allege that “disproportionate economic harm” is caused solely by the RFS must show that they somehow cannot recoup their compliance costs. This would be difficult given EPA’s position that “...obligated parties, including small entities, are generally recovering the cost of acquiring the credits necessary for compliance with the RFS standards through higher sales prices of the petroleum products they sell. This is true whether they acquire RINs by purchasing renewable fuels with attached RINs or purchase separated RINs.”¹⁰

4. Publish the proposed rule for 2021 Renewable Volume Obligations (RVOs).

Last year, you stated that publishing the annual RVO rule by the November 30 statutory deadline each year “...is critically important to America’s farmers and all stakeholders impacted by the Renewable Fuel Standard program.”¹¹ You noted that meeting the deadline “...provide[s] greater regulatory certainty to farmers and refiners across the country.”¹² We strongly agree.

That’s why we were surprised and disappointed by news reports that the 2021 RVO proposal has been put on hold “indefinitely.”¹³ You seemed to confirm those reports recently, stating “It does not look like we’re going to be on time this year.”¹⁴ It initially appeared that the RVO proposed rule was on schedule, with EPA submitting it to the White House Office of Management and Budget for review on May 13, 2020. But as of this writing, the proposal still has not been published.

The reasons for the delay are unclear. You have suggested the proposal is on hold because EPA is “...still wading through all the data to try to figure out what impacts [COVID-19] is going to have on the RVOs,” and “...people are still not driving as much as previous years and we take that into account when we set the RVO.”¹⁵

But this explanation simply doesn’t add up. As you know, the 2021 RVO must be calculated based on *next year’s* gasoline and diesel fuel consumption (as projected by the Energy Information Administration (EIA)). Current fuel consumption levels or vehicle miles traveled, which remain tempered due to the COVID-19 pandemic, are not relevant considerations for the 2021 RVO. And because the annual RVO is applied as a percentage, the 2020 RFS requirements have already self-adjusted to account for the drop in fuel consumption related to COVID-19.

¹⁰ EPA. “RFS Standards for 2018 and Biomass-based Diesel Volume for 2019: Response to Comments.” December 2017.

¹¹ EPA. “EPA Proposes Renewable Volume Obligations for 2020 On Track to Meet Statutory Deadline.” July 5, 2020.

¹² *Id.*

¹³ Stephanie Kelly. Reuters. “U.S. EPA puts 2021 biofuel blending mandate proposal on hold indefinitely, sources say.” July 2, 2020.

¹⁴ Larry Lee. Brownfield. “EPA’s Wheeler Says He Has Questions About SRE Gap Waiver Applications.” August 12, 2020.

¹⁵ *Id.*

EIA currently projects 140.7 billion gallons of gasoline consumption in 2021—down less than 1 percent from the 142.1 billion gallons consumed in 2019.¹⁶ Similarly, EIA projects 2021 diesel fuel consumption at roughly the same level as 2019. Thus, the volume of gasoline and diesel fuel obligated for renewable fuel blending in 2021 should be virtually the same as the volume obligated in 2019, meaning the impacts of COVID-19 on fuel demand are largely expected to dissipate by the end of 2020. In any case, the impacts of COVID-19 on current fuel consumption is not a valid reason for delaying the 2021 RVO proposal.

5. As ordered by the U.S. Court of Appeals for the D.C. Circuit in *ACEI v. EPA*, restore the 500-million-gallon conventional renewable fuel volume that was illegally waived from the 2016 RFS requirements.

More than three years have passed since the U.S. Court of Appeals for the D.C. Circuit found in *Americans for Clean Energy v. EPA* that the agency had exceeded its statutory authority in attempting to use the general waiver authority to lower 2014-2016 RFS volumes.¹⁷ The court vacated EPA's use of the general waiver and remanded the rule back to EPA for remedy.

On several occasions, EPA has promised to implement the remanded volume. But the agency has never taken action to do so. In its proposed 2020 RVO rule, EPA effectively proposed to disregard the court's order and forgo restoration of the 500-million-gallon remanded volume. But "in light of the many comments received," EPA stated it planned to take action to address the remanded volume "in early 2020."¹⁸ With just four months remaining in 2020, the Agency still has not communicated its intentions for implementing the *ACEI* remand.

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Administrator Wheeler, you are well aware of the economic peril currently facing America's farmers and renewable fuel producers. Mother nature, international trade disputes, and a global pandemic have created a perfect storm that is wreaking havoc across Iowa, Michigan, Minnesota, Ohio, Wisconsin and countless other Midwest states. Today, more than ever, farmers need the certainty and stability that the RFS was intended to provide. We urge you to immediately adopt the Tenth Circuit decision nationally, deny gap year SRE requests, decide the pending 2019 and 2020 SRE petitions, propose the 2021 RVO rule, and restore the 500-million-gallon remanded volume. These actions will return integrity to the RFS and uphold the commitments of President Trump.

Sincerely,



Geoff Cooper
President & CEO

¹⁶ Energy Information Administration. "Short-Term Energy Outlook." August 11, 2020.

¹⁷ 864 F.3d 691 (D.C. Circuit)

¹⁸ 85 Fed. Reg. 7519 (February 6, 2020).