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The Hon. Andrew Wheeler
Administrator
Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

June 1, 2020

Dear Administrator Wheeler,

I am writing to seek clarity with respect to your recent comments to the Senate Environment and Public Works Committee (EPW) regarding small refinery exemption petitions for compliance years preceding 2019.¹

As a stakeholder in the Renewable Fuel Standard, the U.S. biodiesel and renewable diesel industry values and relies on your commitment to transparency regarding small refinery exemptions. Retroactive small refinery exemptions destroy demand for biodiesel and renewable diesel and cause severe economic harm to advanced biofuel producers.

In your first appearance as Acting Administrator before the Senate EPW and again in your confirmation hearing to be Administrator, you made commitments to improve transparency and create a dashboard "so that everybody understands what we're doing on the small refinery exemption."² Thank you for making good on that commitment.

Your agency updated the dashboard on May 21, 2020, to indicate it had received one new petition for 2019 and one

¹ Senate Committee on Environment and Public Works (EPW), "[Oversight of the Environmental Protection Agency](#)." May 20, 2020.

² Senate EPW, "[Hearing on the Nomination of Andrew Wheeler to be Administrator of the Environmental Protection Agency](#)." January 16, 2019. See also, Senate EPW, "[Examining EPA's Agenda: Protecting the Environment and Allowing America's Economy to Grow](#)." August 1, 2018.

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new petition for 2020 since the previous update on May 13, 2020. However, in May 20, 2020 testimony to the Senate Energy and Natural Resources Committee, U.S. Department of Energy (DOE) Under Secretary Mark Menezes indicated that EPA received prior year petitions, assuring Sen. Mike Lee (R-UT) “that as EPA sends over these gap filings – if you will – to be consistent with the 10th Circuit decision, we will review them expeditiously, and we will return them as promptly as we can go to the EPA.”³ In your own testimony to the Senate EPW the same day, you assured Chairman John Barrasso (R-WY) that you would take action on such petitions “as soon as we get that information back from the Department of Energy.”

It is concerning, however, that no record of any of these petitions exists on the Agency’s dashboard. On behalf of the U.S. biodiesel industry, I ask that you take immediate steps to disclose receipt of any such petitions and evaluate their validity under the U.S. Court of Appeals for the 10th Circuit’s ruling in *Renewable Fuels Association v. EPA*. Is it your intention to remain transparent and disclose any petitions you have received for years prior to 2019?

Importantly, EPA’s first step upon receiving any petition for a small refinery exemption should be to evaluate its timeliness and validity before transmitting it to the Department of Energy. The 10th Circuit’s January ruling in *RFA v EPA* firmly established that EPA cannot approve “gap” petitions. According to the court, “Congress did not provide an unlimited ‘Exemption’ to every small refinery identified in the DOE study or with a meritorious petition.”⁴ Additionally, the Court stated, “once a small refinery figures out how to put itself in a position of annual compliance, that refinery is no longer a candidate for extending (really “renewing” or “restarting”) its exemption.”

Moreover, the Court rejected hypothetical situations in which “EPA could grant a 2019 petition seeking a small refinery exemption for calendar year 2009 – more than a decade after the fact” or in which EPA would “grant a re-submitted extension petition for an earlier year even though the agency had previously denied that very petition.”⁵ Retroactive petitions for years in which small refineries failed to apply for or attain an exemption cannot be consistent with the 10th Circuit’s ruling.

The 10th Circuit’s ruling is binding, as EPA Associate Deputy Administrator Douglas Benevento acknowledged as recently as March 11, 2020.⁶ On behalf of the U.S. biodiesel industry, I respectfully request that you immediately apply the 10th Circuit

³ Senate Energy and Natural Resources Committee, “[Hearing on Nomination of Mark Menezes to be Deputy Secretary of the Energy Department](#),” May 20, 2020.

⁴ *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1245 (10th Cir. 2020).

⁵ *Id.* at 1248.

⁶ Senate EPW, “[Hearing on Pending Nominations](#),” March 11, 2020.

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Court ruling to all small refinery petitions that have been submitted to the EPA since January 24th of this year.

In addition, allowing "gap filings" would be inconsistent with the RFS statute and EPA's own regulations and guidance. Because Renewable Identification Numbers ("RINs") under the RFS program are only good for one year,⁷ EPA cannot now issue RINs that are many years out-of-date. Nor is there any authority for EPA to create current-year RINs out of thin air based on an exemption granted for a past year. Recognizing the nature of the program, EPA has required small refiners to apply and provide financial information for a small refinery exemption before the compliance deadline for a particular year.⁸ And EPA has consistently taken the position that modifying the standards for past years would be detrimental to the consistency and predictability of the program.⁹ Indeed, allowing gap filings would render the program entirely unpredictable for renewable fuel producers, disincentivizing the investment in renewable fuels that Congress sought to promote through the RFS.

Rather than open a back door to ongoing misinterpretation of the RFS small refinery exemption provision, EPA should work to close the "gaping and ever-widening hole in the statute" that it opened.¹⁰ Since 2017, more than 4 billion gallons of demand for biofuels has been lost due to retroactive small refinery exemptions. Because biodiesel and renewable diesel meet each of the RFS standards, the industry experienced demand loss estimated at several hundred million gallons per year since 2017.¹¹ During 2019, at least 10 biodiesel producers shut down or slashed production due to adverse market conditions, which included the flood of RINs in the market that undercut the value of blending.

Thank you for your consideration and I look forward to hearing from you on this critical matter.

Sincerely,

⁷ 42 U.S.C. § 7545(o)(5)(C).

⁸ Byron Bunker, EPA Office of Air and Radiation, *Financial and Other Information to be Submitted with 2016 Small Refinery Hardship Exemption Requests* (Dec. 6, 2016).

⁹ See, e.g., Brief of Respondent EPA, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir.)

¹⁰ *Renewable Fuels Ass'n v. EPA*, 948 F.3d at 1248.

¹¹ Irwin, S. "[Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction.](#)" *farmdoc daily* (9):45, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, March 14, 2019.

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Kurt A. Kovarik

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Cc:

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