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Via Electronic Filing (www.regulations.gov)

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
EPA Docket Center
Air Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
ATTN: Docket ID No. EPA-HQ-OAR-2021-0324

Re: Renewable Fuel Standard (RFS) Program: RFS Annual Rules; Proposed rule, 86 Fed. Reg. 72,436 (Dec. 21, 2021)

Dear Administrator Regan:

North Dakota Farmers Union (NDFU) appreciates the opportunity to comment on Docket No. EPA-HQ-OAR-2021-0324—Renewable Fuel Standard (“RFS”) Program: RFS Annual Rules, published at 86 Fed. Reg. 72,436 (Dec. 21, 2021) (“RFS Proposal”). NDFU, the largest general farm organization in North Dakota, represents more than 50,000 farm, ranch, and member families. The RFS program is important to the success of family farmers, because biofuels create a price-stabilizing mechanism, encourage much-needed reinvestment in our rural communities, and contribute significantly to net farm income. In light of these substantial and needed benefits, NDFU supports full implementation of the RFS as written and dictated by the original congressional mandate. We oppose any reductions to ethanol use requirements by administrative agencies and Congress.

EPA stated that the RFS Proposal was intended to get the RFS program “back on track,”¹ and NDFU appreciates EPA’s efforts in that regard. Along those lines, NDFU is pleased that the RFS Proposal would maintain the implied conventional biofuel RFS volume at 15 billion gallons for compliance year 2022 and finally includes restoration of the improperly waived 500 million gallons of renewable fuel volume requirements from 2016.² Unfortunately, EPA also proposes to retroactively lower the already finalized 2020 volume requirements and underestimates the total renewable fuel volume for 2021. As such, the overall proposal falls short of preserving the integrity of the RFS—which is to drive the biofuels market and grow the industry. NDFU is calling for standards that protect investments and move the program forward for 2021 and 2022. We urge EPA to withdraw the retroactive cut on 2020 volumes and enforce the current standards.

The RFS program and biofuels are key components to meeting this Administration’s goals to reduce carbon emissions and support rural economies. EPA must reject calls to further reduce the volume requirements and must ensure robust volume requirements that will further the goals of Congress. Indeed, more must be done to continue to promote the biofuels industry, such as easing the

¹ Todd Neeley *EPA Sends RFS Volumes Proposal to OMB* The Progressive Farmer Aug 26 2021

<https://www.dtnpf.com/ag/culture/web/ag/news/business-np/arts/2021/08/26/epa-says-vo-umes-proposals-des-gned>

² NDFU also supports EPA’s proposed denial of a pending summary refinery exemption requests. EPA’s findings in its proposed denial would correct errors made by the prior Administration which brought instability and uncertainty to the program and undermined Congressional intent.

restrictions on use of mid-level ethanol blends (e.g., E30) that are a cost-effective low carbon fuel that benefits farmers, rural communities, consumers, the environment, and the national economy.

**I.
THE RFS PROGRAM IS A KEY COMPONENT OF THIS NATION'S POLICY TO ADDRESS THE
CHALLENGES ASSOCIATED WITH CLIMATE CHANGE, AND FARMERS STAND READY TO HELP
TACKLE THOSE CHALLENGES.**

NDFU and its members are longstanding proponents of the RFS and its proper implementation, because the RFS provides numerous benefits, such as, but not limited to:

- Reduces emissions of greenhouse gases (GHGs) that drive climate change and emissions of harmful air toxics and other pollutants that contribute to smog and adversely affect human health;
- Creates jobs that cannot be outsourced;
- Reduces U.S. dependence on foreign fuel sources;
- Drives investment in rural communities;
- Opens the transportation fuels market to competition; and
- Lowers transportation fuel prices for consumers.

Rare is the proactive environmental policy that so clearly benefits so many farmers, rural communities, and consumers. Farmers, the first step in biofuel production, require the certainty that the RFS program was intended to provide. Farmers and rural communities have made business decisions and invested significant assets based on the reasonable expectation that EPA would fulfill its responsibility to provide the appropriate incentives to grow the renewable fuels industry. EPA should support incentives that would allow farmers and stakeholders to take action to meet climate resiliency goals.

A. NDFU Takes Seriously the Interaction Between Climate Change and Agriculture.

As a family farm organization, NDFU is particularly concerned with the challenges climate change poses to family farmers' ability to pursue improvements in global food security. The USDA's report *Climate Change, Global Food Security and the U.S. Food System* establishes several conclusions with which NDFU is concerned. First, the report explains that "the potential of climate change to affect global food security is important for food producers and consumers in the United States," and that "climate risks to food security increase as the magnitude and rate of climate change increases."³ Anticipated disruptions to agricultural production caused by climate change include rising temperatures, changes in precipitation, increasing frequency of extreme weather events, new pest, disease and weed pressures, and increases in heat stress on livestock. These challenges will make it more difficult for American farmers to produce the food, fiber, and fuel upon which the U.S. and world rely.

As formidable as these challenges may be, farmers, ranchers and rural communities can contribute to climate resilience and help circumvent serious harms to the economy and human health. Strong and ambitious RFS requirements increases the opportunity to mitigate climate disturbances to agriculture and promote the growth of markets for cellulosic and advanced biofuels. The RFS, when implemented properly, offers farmers and consumers a way to reduce GHG emissions by producing and utilizing transportation fuels with lower lifetime emissions than transportation fuels derived from fossil sources. As feedstock production practices and advanced biofuel technology continue to advance, the RFS should ensure that these new fuels, with even greater GHG improvements, find some safe footing in the monopolistic consumer transportation market. Once the policy succeeds in opening the transportation

³ M E Brown *et al.* *Climate Change, Global Food Security, and the U.S. Food System* U.S. Global Change Research Program at 111-112 (2015) available at http://www.usda.gov/oce/c_mate_change/FoodSecurity2015Assessment/Fu_Assessment.pdf

fuels market to competition, significantly greater GHG reductions should be expected. These reductions, combined with price advantages that can be expected as production and distribution expand, could knock out a substantial portion of the transportation sector's total emissions. These emissions reductions will mitigate the climate change-driven hazards to agricultural production discussed above.

B. Farmers have Significantly Contributed to Enhancing This Country's Economy, Energy Independence and Environment.

Farmers are the backbone of the growing biofuels industry in the United States. In addition to supporting the corn ethanol industry, farmers contribute to advanced biofuel volumes, helping the biofuels industry continue to diversify their feedstocks. The biofuels industry continues to innovate to help move this country toward decarbonization, such as converting ethanol into sustainable jet fuel. Farmers stand ready to significantly contribute to these efforts.

Facing significant hurdles with expanding urban areas and loss of agricultural lands, farmers nonetheless have increased yields, protected the environment, and helped move this country toward energy independence. The expansion of the RFS allows farmers to continue to innovate and find new ways to bring added value to their farmland and production.⁴ EPA has long recognized the contributions *increasing* biofuel production makes to this country's energy independence.⁵ The Renewable Fuels Association (RFA) estimated that, in 2020, the use of ethanol in the U.S. fuel supply reduced crude oil imports by nearly 500 million barrels.⁶ These energy security benefits stem from reducing the need for imports, diversifying fuel sources, increasing competition at the pump, and supporting innovation. The RFS program also has resulted in significant environmental benefits, particularly regarding GHG emissions reductions. An analysis of the program through 2020 showed significant GHG reductions with cumulative carbon dioxide savings of 980 million metric tonnes.⁷ The industry continues to reduce its GHG emissions, with the ethanol industry pledging to reach net zero emissions by 2050.⁸

II.

EPA MUST PUT THE RFS PROGRAM BACK ON TRACK TO ACHIEVE THE ECONOMIC, ENVIRONMENTAL AND ENERGY SECURITY BENEFITS SOUGHT BY CONGRESS.

A. 2020 Standards: EPA Must Withdraw Its Proposal to Retroactively "Reset" the 2020 Volumes and Enforce the Current Requirements.

In December 2019, EPA announced the final standards for compliance year 2020, and parties were to comply with the requirements by March 2021.⁹ In setting the 2020 standards, EPA utilized its cellulosic waiver authority to reduce the cellulosic biofuel, advanced biofuel, and total renewable fuel volumes. In other words, EPA already has reduced the statutory volumes for 2020.

⁴ See Keith L. Kneetel et al. *Reconciling food security and bioenergy: priorities for action* (Obama Change Biology Bioenergy) (2016) available at <http://onlinelibrary.wiley.com/doi/10.1111/qcbb.12366/epdf>

⁵ See, e.g., 75 Fed. Reg. 14,670-14,839 (Mar. 26, 2010); 77 Fed. Reg. 59,458-59,470-59,471 (Sept. 27, 2012). EPA found that "on balance each gallon of fuel saved as a consequence of the renewable fuel standards is anticipated to reduce total U.S. imports of petroleum by 0.95 gallons." 77 Fed. Reg. at 59,470.

⁶ RFA, *Ethanol Promotes Energy Independence* <https://ethanolrfa.org/ethanol-101/energy-independence> (last visited Jan. 20, 2022).

⁷ Life Cycle Associates, *GHG Emissions Reductions due to the RFS2-A 2020 update* at (2021) available at https://ethanolrfa.org/files/748/LCA_-_RFS2-GHG-Update_2020.pdf

⁸ RFA, *July 27, 2021 Press Release: RFA Pledge to President: Ethanol to Achieve Net Zero Emissions by 2050 or Sooner* <https://ethanolrfa.org/media-and-news/category/news-releases/article/2021/07/rfa-pledge-to-president-ethanol-to-achieve-net-zero-emissions-by-2050-or-sooner>

⁹ EPA extended the 2020 compliance deadline until the next quarterly reporting deadline after the 2019 compliance deadline for small refiners which is the next quarterly reporting deadline after the effective date of the 2021 RFS standards (typically 60 days after publication of the final rule in the Federal Register).

When EPA finalized the 2020 standards, it acknowledged that small refinery exemptions had adversely impacted the volume requirements. This is because, in recent years, EPA substantially expanded the number of exemptions granted and has granted the exemptions retroactively and, as such, did not account for them in setting the standards. But, as EPA acknowledged, Congress required *prospective* standards, and EPA finalized the standards using its “best estimate based on the record and [EPA’s] intended small refinery policy for 2020.”¹⁰

Over two years after finalizing the 2020 standards and well after the end of the compliance year, EPA now claims it is reconsidering those standards and proposes to revise them. It is telling, however, that EPA does not assert the existing 2020 standards are somehow unlawful. Instead, it contends that unforeseen events warranted reconsideration. EPA is incorrect, and its proposal would not put the RFS program back on track. Rather, it creates an unlawful precedent that continues to call into question the enforceability of the volume requirements and standards set by EPA. This would set the program backwards.

1. EPA may not use its reset authority retroactively to revise the 2020 standards.

Because EPA’s revised 2020 standards would further reduce the statutory volumes for advanced biofuels and renewable fuels beyond the cellulosic waiver reduction, EPA is proposing to use its “reset” authority to revise the advanced biofuel and renewable fuel volumes.¹¹ The problem is, however, that the general waiver provision is the only means for EPA to further reduce these volumes, and EPA has expressly declined to use that authority (for good reason).

The reset authority outlined in 42 U.S.C. §7545(o)(7)(F) refers to modifying “the applicable volumes set forth in the table concerned,” which are the statutory volumes. Nothing in the statute indicates that Congress intended EPA to use the reset authority to revise previously set standards.

EPA acknowledges that the reset authority was triggered for cellulosic biofuel and advanced biofuel years earlier on December 11, 2018, for compliance year 2019. The statute requires EPA to promulgate a rule to modify the volumes one year after the waiver was issued, which was due by December 2019. EPA is seeking to revise the 2020 standards over three years after the waiver was issued, well after the deadline by when it was required. As such, to the extent EPA is relying on the waivers in 2019, EPA is incorrect.

2. The standard-setting process is based on projections with the obligation of EPA being able to “ensure” the volumes are met, even if that means compliance may be difficult.

Congress required EPA to set the annual percentage standards by November 30 of the year prior to compliance. 42 U.S.C. §7545(o)(3)(B)(i). These standards are prospective in nature and to be based on projections of gasoline and diesel fuel demand, as well as biomass-based diesel and cellulosic biofuel production. *Id.* §7545(o)(3)(A). Even though the standards are required to “ensure” the requirements of paragraph (2) are met, which, in turn, requires “at least” the specified applicable volume, *id.* §§7545(o)(3)(B)(i), (o)(2)(A)(i), EPA has previously declined to “true up” the actual volume obligations if they fall short of the volume requirements. This can occur when actual gasoline and diesel fuel demand is less than EPA projected, making the percentage standards too low. EPA has long acknowledged that the projections it uses, which are largely based on data from the U.S. Energy Information Administration, are not 100% precise, and EPA has argued that some imprecision is inherent in projections, even though the statute requires EPA to ensure that “at least” the volume requirements are met.

¹⁰ Renewable Fuel Standard Program - Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments at 165 (2019) (EPA-HQ-OAR-2021-0324-0227)

¹¹ For cellulosic biofuel, EPA’s proposal to use both the cellulosic waiver authority and its reset authority neither are available to retroactively revise already reduced statutory volumes.

EPA is proposing to retroactively “adjust” the 2020 standards, purporting to use its “reset” authority based on “significant and unanticipated events.” 86 Fed. Reg. at 72,438. These events include the reduced gasoline demand as a result of the COVID-19 pandemic and the “potential” that the exempted volumes through the small refinery exemption will be lower than projected. *Id.* While EPA may have authority to act retroactively in certain cases, those circumstances are not present here, and uncertainty in projections is not grounds to revise the standards. The statute and EPA regulations did anticipate unforeseen events that might impact the ability to comply with the volume requirements and provided means for addressing them, which do not include the reset authority.

- a. Reduced gasoline and diesel fuel use in 2020 is not grounds for further reducing the required volumes.

EPA contends that it anticipates “a significant and unprecedented shortfall in renewable fuel use in 2020 relative to the volumes that [EPA] required in the 2020 final rule.” 86 Fed. Reg. at 72,448. This shortfall is attributed to the COVID-19 pandemic, which “caused an unforeseen and drastic fall in transportation fuel demand and in biofuel demand more specifically.” *Id.* While perhaps unprecedented, shortfalls in renewable fuel use were certainly not unanticipated, and both Congress and EPA provided different avenues for handling such events. Revising previously set standards under the “reset” authority, however, is not one such avenue.

First, as EPA acknowledges, “a shortfall in gasoline and diesel fuel consumption relative to the projected volumes results in a corresponding decrease in the volume of renewable fuel required.” 86 Fed. Reg. at 72,448. This means that the actual volumes that would be required will already be less than the volumes EPA set. For example, instead of the 20.09 billion gallons of total renewable fuel that EPA required, only 18.38 billion gallons would be required based on EPA’s revised transportation fuel use estimate of 158.96 billion gallons times the current standard of 11.56%.

Second, EPA’s regulations allow some “rollover” of prior year RINs to address potential supply disruptions. While EPA contends that the shortfall in 2020 is “significantly larger than in any previous year and disproportionately affected gasoline more than diesel fuel,” the difference is less than the 20% cap on rollover.¹² 86 Fed. Reg. at 72,448. While EPA argues that the RIN generation in 2020 fell short even of the volumes and would require a drawdown of the RIN bank, the entire purpose of the RIN bank was to address supply disruptions. EPA is seeking to revise the 2020 standards and to set the 2021 standards as close to actual RIN generation, which would allow the current RIN bank to be maintained into 2022. This is a clear circumvention of the 12 month limit on the life of a credit provided in the statute. 42 U.S.C. §7545(o)(5)(C).

Moreover, EPA’s concerns with respect to the RIN bank are overblown. The 20% cap was based on one instance of a drop in production based on a historical drought, which EPA found was a reasonable way to limit rollover, and, as such, there is no evidence that any RIN bank below this amount must be preserved. 72 Fed. Reg. at 23,935. Even under the current standards, the RIN bank would not be eliminated. There would remain hundreds of thousands of RINs in the RIN bank. And, if there is inadequate domestic supply of renewable fuels, EPA retains its general waiver authority.

Finally, EPA is essentially raising concerns with the lack of supply of RINs for 2020 compliance. The statute, however, provides for general waivers in the event of inadequate domestic supply. But EPA has expressly declined to utilize that authority. EPA then attempts to turn to its “reset” authority presumably to avoid its own prior policy. Indeed, the true concern of EPA appears to be RIN prices, but Congress also provided for waivers based on severe economic harm. EPA’s proposal to reduce the

¹² Biomass-based diesel has more energy than ethanol which allows those fuels to receive more “credit” under the RFS program by generating 1.5-1.7 RINs per gallon. As such, fewer physical gallons are required to meet the total renewable fuel volume requirements which are based on ethanol-equivalent gallons.

volumes because of concerns over RIN prices circumvents this high bar Congress requires to be overcome for EPA's waiver authority to be used. This is arbitrary.

B. 2021 Standards: EPA Must Set the Final 2021 Standards Based on All Available RINs.

For compliance year 2021, EPA proposes volumes that are equal to its projections of the volume of cellulosic biofuel, advanced biofuel, and total renewable fuel that will be used in that year, similar to its approach for compliance year 2015. 86 Fed. Reg. at 72,438. EPA again proposes to use its reset authority but eschews a true analysis of the statutory factors based on its finding that "this retroactive rulemaking has limited ability to incentivize increased production and use of renewable fuel in 2021." *Id.* at 72,439. While NDFU believes the biofuels industry, and thereby farmers, are being penalized for EPA's own delays in setting the 2021 volume requirements, we also appreciate the practical circumstances EPA faces as a result of the delay in setting the standards after the 2021 year is over.

While NDFU questions EPA's ability to use the reset authority retroactively now that 2021 is over, EPA should make clear that, had it been timely, a proper analysis of the reset criteria likely would have resulted in higher volumes. The year is now over, and EPA proposes to set the volumes based on the number of RINs available for compliance in 2021. EPA's estimates for renewable fuel in the proposal are too low.

C. 2022 Standards: EPA's Proposed Volumes for 2022 Are a Positive Step Toward Getting the RFS Program Back on Track.

EPA's proposed standards for 2022, which would be based on an overall minimum volume requirement of 20.77 million gallons, are a step in the right direction. This would include an implied requirement of 5 billion gallons for non-cellulosic advanced biofuels and 15 billion gallons for conventional biofuels. EPA contends that the proposed volume requirements for 2022 are appropriate under both the cellulosic waiver authority and the reset authority, noting that the proposed volumes represent the maximum permitted reduction under the cellulosic waiver authority. 86 Fed. Reg. at 72,445. Although we understand some representing the refining industry contend that constraints on ethanol use requires lower volumes, EPA must reject these calls and finalize at least the proposed 15-billion-gallon implied conventional biofuel requirement for 2022. NDFU also encourages EPA to finalize standards based on robust advanced biofuel volume requirements.

Because EPA is projecting cellulosic biofuel volumes to be below the statutory level, NDFU does not dispute the use of cellulosic waiver authority. NDFU is concerned, however, with EPA's proposed use of the "reset" authority, as it does not believe EPA has done a proper analysis of the statutory criteria. At a minimum, EPA should make clear that a proper review of those factors could result in higher volumes, even above the implied 15 billion gallons for conventional biofuels and five billion gallons for non-cellulosic advanced biofuels, but that EPA is using its cellulosic waiver authority as essentially a cap on the advanced biofuel and total renewable fuel volume for 2022.¹³

1. EPA must ensure at least the 15-billion-gallon implied conventional biofuel requirement for 2022.

Although EPA projects cellulosic biofuel volumes to be less than the statutory volume for 2022, the statute implicitly provides for 15 billion gallons of conventional biofuel, which is generally comprised of corn ethanol. EPA has properly declined to further reduce this implied requirement through its reset authority, as it is proposing to do for 2020 and 2021. This is because proper review of the reset factors

¹³ Although "reset" is triggered by waivers notwithstanding the statute requires that the modification to the statutory volumes only be reductions. The "reset" provision could also be used to make up for the lost volumes for the years in which the waivers were given if a review of the statutory factors including the commercial rate of production supported such volumes.

would support volumes higher than those proposed by EPA for 2022. Indeed, the RFS program is to be market-forcing, and while delayed, EPA can still incentivize additional volumes in 2022. EPA acknowledges that “some of the statutory factors assessed for conventional renewable fuel favor the implied statutory volume (15 billion gallons) or higher volumes...” 86 Fed. Reg. at 72,447 (emphasis added). Based on the list of statutory factors, these considerations include:

- significant GHG emissions reductions associated with renewable fuel production and use;
- many ethanol production facilities are using more efficient process technologies and have worked to reduce their GHG emissions;¹⁴
- reductions in emissions of other air pollutants compared to petroleum-based fuel, such as air toxics like benzene;
- production capacity and ability to produce and distribute over 16 billion gallons of domestic ethanol;
- 99% of D6 ethanol RIN generation from 2019-2021 is from domestic production;¹⁵
- high domestic production also creates domestic jobs and contributes to the rural economy;
- contributions to the rural economy help farmers and rural communities take further actions to mitigate climate change and use more sustainable agricultural practices;
- reduction in consumer costs at the pump due to cost-effectiveness of ethanol; and
- energy security benefits by diversifying feedstocks and fuels for energy use and reducing need for imported crude oil.

As the level of ethanol increases, these benefits also increase. EPA, however, does not consider mid-level ethanol blends such as E30 in its analysis, even though these fuels are in use by flexible fuel vehicles. Studies have shown that mid-level ethanol blends are also compatible with non-FFVs, and NDFU has urged EPA to facilitate the use of mid-level ethanol blends in all vehicles.

While EPA notes that some of the factors favor lower volumes, NDFU believes EPA’s analysis of the reset factors is incomplete and provides the following observations, which it believes show the volumes could be higher than those proposed by EPA for 2022, making any attempts to further reduce the 15-billion-gallon requirement based on EPA’s reset authority arbitrary.

First, EPA states that increased corn production in the United States “could” result in impacts to wetlands, ecosystems, wildlife habitat, water quality and supply, and increased prices for agricultural commodities and supply. But EPA itself recognizes that the U.S. ethanol industry produced over 16 billion gallons in 2018, and EPA is proposing simply to maintain the implied 15 billion gallon requirement. EPA cites no impacts traced to ethanol production in 2018 and, even if there were, this illustrates existing cropland and the market can handle this level of production. In other words, EPA is not proposing greater volumes that “could” result in increased impacts and these “potential” impacts cannot support lower volumes.

Second, EPA raises the long-standing concerns regarding “constraints on ethanol use.” 86 Fed. Reg. at 72,447. EPA states that the market has not achieved 15 billion gallons of actual use under the RFS. *Id.* Where other fuels can be used toward the 15 billion gallons, this is an overstatement. It also ignores the role of regulatory uncertainty since the 15 billion-gallon-requirement came in 2015. When EPA has issued more timely standards, over 15 billion RINs were, in fact, generated to meet the 15 billion gallon obligation in 2016, 2017 and 2018.¹⁶ While some of these RINs are due to higher equivalence values for biodiesel and renewable diesel, RINs generated is EPA’s proxy for use. Where EPA is

¹⁴ Where EPA references grandfathered plants as not having to meet the 20% GHG reductions for renewable fuel in the statute ethanol facilities have taken action to reduce their GHG emissions and, as noted above, have pledged to become net-zero by 2050

¹⁵ This is based on EMTS data for 2019-2021 (as of January 10 2022)

¹⁶ A most 15 billion RINs were generated in 2019

supposed to consider implementation of the program, this is evidence that the industry can meet the 15 billion requirement and, as such, does not support reduction of the volumes.

Finally, EPA raises concerns that, if there is reduced gasoline demand and, thereby, reduced ethanol use, the conventional biofuel program may be filled with foreign production or grandfathered biodiesel or renewable diesel. While some “D6” renewable diesel continues to be imported, 99% of D6 RINs generated from 2019-2021 is from domestic ethanol production. And, virtually all biodiesel and renewable diesel production in the United States today qualifies as advanced biofuel. Moreover, EPA has recognized that even imported renewable fuels contribute to the energy security of the United States.

If EPA is, in fact, concerned with so-called “constraints” on ethanol use, then, as NDFU has urged, EPA can take action to facilitate use of mid-level ethanol blends, such as E30. Instead, EPA appears to be making it more difficult to use higher blends of ethanol, even in flexible fuel vehicles.¹⁷ Mid-level ethanol blends, however, are a popular fuel for use in these vehicles, and EPA should facilitate their use. Studies have also shown that RVP concerns are reduced with mid-level ethanol blends, compared to E15, and emissions reductions are greater with increased displacement of fossil fuels. NDFU has provided EPA with numerous ways to remove regulatory hurdles to providing these cost-effective, low-carbon, high octane fuels.

2. EPA should ensure robust advanced biofuel volume requirements for 2022.

U.S. farmers do not just support corn ethanol, which makes up the bulk of the implied conventional biofuel requirement. They also support other biofuels, such as advanced ethanol, cellulosic ethanol, and biomass-based diesel. The “fundamental objective” of the Renewable Fuel Program “is clear”: To increase the use of renewable fuels in the U.S. transportation system. *Ams. for Clean Energy v. EPA (ACEI)*, 864 F.3d 691, 700 (D.C. Cir. 2017) (quoting 80 Fed. Reg. 77,420, 77,421 (Dec. 14, 2015)). NDFU is encouraged by the proposed volume requirements for advanced biofuels for 2022 and urges EPA to finalize, at least, the volumes as proposed for 2022.

For 2022, EPA’s proposal would provide for 770 million gallons for cellulosic biofuel, 2.76 billion gallons for biomass-based diesel, and 5.77 billion gallons for total advanced biofuels. Although EPA claims also to be using its “reset” authority, EPA has declined, yet again, to backfill any part of the shortfall in cellulosic biofuel production with other advanced biofuels. However, a proper review of the reset factors would support volumes of advanced biofuels that are higher than those proposed by EPA for 2022. Indeed, the RFS program is to be market-forcing, and while delayed, EPA can still incentivize additional volumes. NDFU believes EPA’s analysis of the reset factors is incomplete and believes the volumes should be higher than those proposed by EPA for 2022.

3. EPA should approve the registrations for corn kernel fiber ethanol and include projections for its production in setting the 2022 standards.

EPA requests comment on whether it should include estimates for corn kernel fiber ethanol in its cellulosic biofuel projections. 86 Fed. Reg. at 72,452. NDFU believes EPA should resolve the outstanding technical and regulatory issues to allow corn kernel fiber ethanol to generate RINs. EPA estimates as much as 210 million additional gallons of cellulosic biofuel could be produced from corn kernel fiber in 2022. *Id.* These are volumes that are being produced or ready to be produced and, as such, these volumes should be included in EPA’s projections.

¹⁷ See Petition for Reconsideration or Revoking Submitted On Behalf of Urban Air Initiative, Inc. et al., Aug. 9, 2019, available at https://www.epa.gov/sites/default/files/2019-08/documents/ua_19-1161_ppfr_08092019.pdf



D. EPA Must Finalize Its Proposal to Finally Address the Improperly Waived 500 Million Gallons of Renewable Fuel Requirement From 2016.

In November 2015, EPA finalized a 2016 RFS requirement that included an implied requirement of 14.5 billion gallons of conventional biofuels.¹⁸ This included a 500-million-gallon reduction of the (implied) statutory requirement of 15 billion gallons for conventional biofuels, which EPA attempted to base on its general waiver authority, arguing “inadequate domestic supply.” In July 2017, the D.C. Circuit held, in *ACEI v. EPA*, that EPA erred in reducing the 2016 requirement from its statutory level, rejecting EPA’s assertion of general waiver authority. The 2016 RFS was remanded back to EPA, who must enforce the volume requirements for 2016. Although EPA previously proposed to essentially ignore the D.C. Circuit’s remand order, the RFS Proposal includes a 250-million-gallon supplemental volume requirement for 2022, indicating it will address the remaining 250 million gallons in 2023. NDFU is pleased that EPA is finally correcting its unlawful action and restoring these volumes. NDFU agrees with EPA that imposing a supplemental standard in 2022 and 2023 is a better option than reopening 2016 compliance.

E. EPA Must Account for Small Refinery Exemptions and Must Require Small Refineries to Come into Compliance.

NDFU appreciates EPA’s proposal to deny all pending small refinery exemptions. NDFU believes EPA appropriately considered the remaining holdings in *RFA v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *rev’d in part by, HollyFrontier Cheyenne Ref. LLC v. RFA*, 141 S. Ct. 2172 (2021). As the Tenth Circuit found with respect to the three challenged exemption requests in that case, EPA had improperly expanded its grant of small refinery exemptions for reasons not related to RFS compliance. NDFU further agrees that the substantial evidence shows that refiners can pass costs of RINs through their fuel sales. Notwithstanding the findings of the majority of the U.S. Supreme Court, Congress did intend these exemptions to be the exception, not the rule.¹⁹

However, EPA notes that it remains uncertain if EPA will grant or deny any small refinery exemptions for 2020, 2021 or 2022. 86 Fed. Reg. at 72,449. EPA is continuing to accept information from small refineries in support of their exemption requests,²⁰ and, even since EPA issued its proposed denial, two additional exemption requests were submitted to EPA for compliance year 2020.²¹ EPA should make clear that the time for seeking such exemptions has also passed. As obligated parties, they should have been collecting RINs and planning for compliance. Where RFS compliance must be the cause of the disproportionate economic hardship, there is no rationale for small refineries to wait to request an exemption from the program.

F. EPA Must Finalize the 2021 and 2022 Volume Requirements, Including the Supplemental Volume, as Soon as Possible.

EPA’s proposal includes a number of additional proposed regulatory changes to the RFS regulations. NDFU addresses some of these proposals below. However, as EPA notes, the volume obligations are separate actions from these regulatory changes. 86 Fed. Reg. at 72,445. EPA has already unduly delayed issuing the standards for 2021 and 2022 and responding to the D.C. Circuit’s remand. While these other regulatory proposed changes may be beneficial to the program, there may be

¹⁸ 80 Fed Reg at 77 422 77 439

¹⁹ The American Petroleum Institute (API) has acknowledged that “refiners have had ample time to adjust the businesses to operate” under the RFS. See API Aug 31 2017 Cover Letter to Comments on 2018 RFS Proposal at 2 (EPA-HQ-OAR-2017-0091-3647); see also *id.* (“It is no longer appropriate for EPA to grant RFS compliance exemptions to small refiners or small refiners.”)

²⁰ See, e.g., EPA Proposed RFS Small Refinery Exemption Decision at 7 15 (2021) available at <https://nepis.epa.gov/Exec/zyPDF.cgi?Dockey=P1013KMM.pdf>.

²¹ As of December 10 2021 EPA stated 28 pending exemption requests for compliance year 2020. On January 20 2022 EPA updated this to 30 pending exemption requests. EPA RFS Small Refinery Exemptions <https://www.epa.gov/fuels-reg-strat-on-reporting-and-compliance-helpers/rfs-small-refinery-exemptions> (last updated Jan 20 2022)

additional issues raised that EPA must consider and weigh through. These other provisions must not delay finalizing the volume requirements, and EPA must finalize these standards as soon as possible, even if it must do so separately from the rest of the RFS Proposal.

III. EPA'S RFS REGULATIONS MUST ENSURE THE RENEWABLE FUEL VOLUMES AND SHOULD WORK TOWARD FACILITATING RENEWABLE FUEL PRODUCTION AND SUPPORTING INNOVATION.

The RFS Proposal includes several proposed regulatory changes to the RFS regulations. NDFU addresses some of these below. In particular, NDFU has long requested increased transparency in EPA's implementation of the program and, thus, fully supports EPA's (third) proposal to provide basic information on small refinery exemption requests and decisions. In addition, NDFU generally believes EPA must ensure its regulations help promote and facilitate renewable fuel production and innovation by promoting new fuels and processes. In doing so, EPA must be careful, nonetheless, that it does not place undue burdens on feedstock producers.

A. Treatment of Confidential Business Information (RFS Proposal, §VIII.D.2.): EPA Must Provide More Transparency on Small Refinery Exemptions.

NDFU has urged EPA to provide more transparency regarding the small refinery exemptions, including finalizing EPA's 2016 proposal in the Renewables Enhancement and Growth Support (REGS) Rule to codify a determination that basic information regarding small refinery exemption requests and decisions be made publicly available. EPA is again proposing to provide basic information on small refinery exemption requests and determinations. NDFU supports this action, but also believes EPA should provide information on the volume obligations being waived. Also, EPA should provide for public notice and comment for any policy changes on its handling of these exemptions requests, as it did with the proposed denial. At a minimum, EPA should make clear that it may provide copies of decisions explaining its rationale so that all stakeholders understand EPA's implementation of the provision.²² Providing copies of the decisions, not just the names of the refineries, would help the market understand the basis for EPA's decisions and better ensure compliance with the program. Moreover, EPA cannot hide behind claims of confidential business information to avoid procedural requirements to undergo notice and comment rulemaking when creating new policies or amending its rules and regulations.

In recent years, EPA's lack of transparency in how it processes small refinery exemptions and the extent of those exemptions caused substantial market uncertainty and volatility. EPA has improperly withheld this information for too long. Indeed, had EPA finalized its proposal in 2016, much of the harms caused by EPA's improper expansion of the exemptions could have been mitigated or avoided altogether. On the other hand, any potential harms to the refiners would seem to be minimal. Several small refineries have already revealed that they have sought or obtained exemptions, and thereby waived, any confidential business information claims related to the fact that they sought and received such exemption. They have also revealed their receipt or request for exemptions in other public filings, such as SEC filings, litigation, and other submissions to EPA that have been made public, such as comments and notices of intent to sue. Refiners should not be entitled to claim confidential business information if they are willing to publicly provide that information in situations when it may benefit them.

²² Such decisions could be redacted to protect confidential business information. But there is no rationale for EPA keeping the entire decision secret simply because it may contain some confidential business information.

B. Biointermediates (RFS Proposal, §VII): NDFU Generally Supports EPA Providing For Innovation in Feedstock Production.

EPA has interpreted the pathways in 40 C.F.R. §80.1426(f) to apply to one facility that accepts the feedstock listed and processes into renewable fuel. EPA has proposed regulatory provisions that would allow a facility to process renewable biomass into a “proto-renewable fuel (or ‘biointermediate’) and then have a second, separate facility process that biointermediate into renewable fuel.” 86 Fed. Reg. at 72,440. EPA first proposed regulations to address biointermediates in 2016 but has revised the proposal and is seeking comment on the entire proposed biointermediate scheme.

Although NDFU does not agree that the plain language of EPA’s regulations is so limiting with respect to pre-processing renewable biomass into “feedstock material” before it reaches the renewable fuel producer, it is supportive of efforts by EPA to facilitate innovation in feedstock production and, therefore, is generally supportive of the biointermediates proposal. NDFU appreciates EPA’s attempt to clarify what is a biointermediate, which should not include agricultural commodities, even if they undergo some pre-processing (e.g., corn oil or soybean oil that is refined). More generally, NDFU urges EPA to facilitate approval of new pathways for additional feedstocks for biofuel production.

C. Congress Expressly Authorizes Crop-Based Biofuels as Part of the RFS Program.

EPA indicates that it is evaluating whether any federally listed threatened or endangered species or their critical habitat are likely to be adversely affected by the proposed RFS volumes. As a result of this review, EPA further notes that it intends to initiate consultation, as appropriate, regarding this proposal.

As an initial matter, Congress defined the feedstocks and fuels that are eligible under the program, which include crop-based feedstocks. As such, EPA has no authority to exclude any crop-based feedstock from being eligible to participate in the program. While the D.C. Circuit found that EPA has discretion to consider impacts to wildlife as part of the statutory criteria, requiring it to make an effects determination and seek consultation, this would only apply to the “set” authority as EPA is purporting to use the “reset” authority to *reduce* the statutory volumes. EPA would not have authority to ignore Congress’s directives based on the Endangered Species Act. EPA is already proposing to use the full extent of its cellulosic waiver authority. Any claimed use of its “reset” authority is to further reduce these volumes. Where Congress gave EPA authority to reduce the volumes based on environmental harms, it is clear that it did not intend EPA to further reduce the volumes based solely on impacts to wildlife. Further, any effects determination requires more than mere speculation. There must be some causal connection between the EPA action and the alleged impacts to endangered species or their habitat.

Conclusion

The RFS is an important policy with far-reaching direct and indirect benefits, particularly for farmers but also for consumers. Recent wavering on the RFS has caused enormous setbacks in advanced biofuels, including cellulosic biofuel development, and, consequently, delayed important GHG emission reductions. But EPA can still regain some lost ground by:

- (1) withdrawing its proposal to revise the 2020 standards and enforce the current requirements;
- (2) finalizing the 2021 and 2022 standards that protect *all* production in 2021 and enforces the implied 15-billion-gallon conventional biofuel requirement for 2022, as soon as possible;



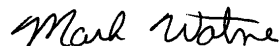
- (3) enforcing the 500 million gallons of improperly waived 2016 volumes;
- (4) stopping retroactive small refinery exemptions or providing some accounting for them in setting the standards;
- (5) increasing transparency with respect to small refinery exemptions; and
- (6) facilitating new feedstocks and fuel pathways.

If some of the proposed regulatory changes may take EPA time to consider, EPA must not wait in finalizing the 2021 and 2022 standards.

NDFU believes EPA must increase its efforts at addressing climate change and supporting actions that strengthen the climate resilience of agriculture and the food system. We stand ready to offer any support and assistance EPA may find helpful regarding these matters. Thank you for your consideration of these comments.

Sincerely,

NORTH DAKOTA FARMERS UNION



Mark Watne
President

