



Administrator Andrew Wheeler  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

November 26, 2019

**RE: Docket ID EPA-HQ-OAR-2019-0136**

Dear Administrator Wheeler:

The Iowa Corn Growers Association (ICGA) represents nearly 7,500 members in Iowa that work to create opportunities for long-term corn grower profitability. Collectively, we appreciate this opportunity to comment on the supplemental proposed rule for the 2020 volume standards under the Renewable Fuel Standard (RFS) program.

As the Environmental Protection Agency (EPA) significantly expanded small refinery exemptions (SREs) under the RFS program, it destroyed more than 4 billion gallons of ethanol demand over the past three years, resulting in the loss of nearly 1.5 billion bushels of corn demand and weaker corn markets. Today, we ask the EPA to use its available tools to fulfill the agency's obligation to ensure RFS volume requirements are met.

We agree with EPA's acknowledgement of a responsibility under the law to keep the RFS whole when granting waivers in this proposed rule, taking a necessary step to stop the loss of biofuel gallons caused by retroactive waivers that go unaccounted for. EPA also points out, redistributing exempted gallons through the RFS volume formula only works to account for waivers if the projections for waived gallons are accurate. EPA's current proposal does not sufficiently ensure accurate projections for waived gallons and, therefore, will continue to shortchange the RFS when waivers are granted.

We believe EPA can formulate the proposed definitions for terms in the volume standards formula to ensure a more accurate projection of expected waived gallons is used in the final 2020 RVO, and future RVO rulemakings, by basing these terms on the most recent three-year average of waivers granted. Changing the proposed definitions, as detailed in our following full comments, enables EPA to meet the agency's obligation under the law to ensure required volumes are met.

Corn farmers across the country have been hit with a perfect storm of events and the farm economy throughout the Midwest is struggling. Iowa is number one in corn production and number one in ethanol production, yet Iowa currently carries the highest farm debt rate in the country according to a recent Iowa State University study.

That is why I am asking on behalf of our nearly 7,500 members and all corn farmers in Iowa that you honor the deal the President agreed to with Senators Ernst and Grassley and uphold the integrity of the RFS by basing any reallocation efforts on actual waived gallons, and not Department of Energy recommendations that EPA itself chose to ignore when granting said waivers.

Thank you for considering our comments. We look forward to working with you on a final rule that sufficiently addresses small refinery exemptions to the benefit of consumers, farmers and the environment.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Greif".

Jim Greif, President  
Iowa Corn Growers Association

## Fulfilling Statutory Requirements

As ICGA has discussed in our comments on all previous RVO rulemakings, the RFS statute requires EPA to determine and publish annual renewable fuel obligations that ensure transportation fuel sold or introduced into commerce in the United States, on an annual average basis, contains at least the applicable volume of renewable fuel determined in accordance with the volume tables.<sup>1</sup> For EPA to follow through on its charge to set renewable fuel volumes that ensure the obligations of the RFS are met, EPA must account for the impact of agency actions that affect renewable fuel volume in U.S. transportation fuel.

The most significant recent agency actions impacting the annual volume obligations have been EPA's approval of large volumes of small refinery exemption extensions, eliminating these refineries' obligation to blend renewable fuel. The EPA has failed to redistribute these exempted obligations to other obligated parties, effectively reducing RFS requirements. Since early 2017, EPA has granted 85 RFS exemptions to refineries for the 2016, 2017 and 2018 RFS compliance years, totaling 4.04 billion ethanol-equivalent gallons of renewable fuel. Under the previous Administration's last three RFS compliance years, refinery exemptions totaled just 690 million gallons.

In comments to EPA on the 2019 and 2020 proposed volume rules, ICGA repeatedly urged EPA to use available tools to stop retroactive refinery exemptions from reducing annual volume obligations set through the rulemakings. Interagency comments on the draft rules urged EPA to do so as well. To uphold the statute's directive that the final 2020 volume obligations ensure the requirements of the RFS are met, EPA must project an exempted small refinery volume in the final rule, even if EPA has not yet received or decided petitions for exemptions. Since the law allows refineries to petition for waivers at any time and requires EPA to set annual volume standards for the following year by November 30, EPA must include an exemption projection in the volume rule to carry out responsibilities under the law.

As EPA noted in the supplemental proposed rule, when only considering petitions that have been granted before the final volume rule, "any SREs granted after we issue the annual rule containing percentage standards for that year effectively reduces the required volume of renewable fuel for that year."<sup>2</sup> Rather than a 19.29 billion gallon total renewable fuel volume requirement for 2018, for example, the effective volume requirement after the 2018 waivers became 17.86 billion gallons. The 2018 waivers represent 9 percent of the total volume requirement for the year, following retroactive exemptions that waived nearly 10 percent of the 2017 RFS volume requirement.

The equation for calculating the annual renewable fuel percentage standards includes entries for the amount of gasoline and amount of diesel projected to be produced by exempt refineries any year they are exempt.<sup>3</sup> The values in the standards formula in the original 2020 proposed rule for these entries projected zero gallons of gasoline and zero gallons of diesel will be exempted for small refineries. When EPA has exempted 7.8, 17 and 13.4 billion gallons of gasoline and diesel from renewable fuel blending for the 2016, 2017 and 2018 compliance years, respectively, it is not credible for EPA to project zero gallons will be exempted from biofuels blending for 2020.

ICGA agrees with EPA that administering the RFS requires EPA to make many projections, and EPA does not need to project which refineries might apply for an exemption or receive one to estimate exempted gallons. EPA can reasonably estimate waivers based on the agency's years of experience implementing the RFS. Since EPA began granting refinery exemption extensions, exemptions have never

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<sup>1</sup> Clean Air Act § 211 (o)(3)(B)(i)

<sup>2</sup> 84 Federal Register 57679 (October 28, 2019)

<sup>3</sup> 40 CFR 80.1405(c) (GE<sup>i</sup> and DE<sup>i</sup>)

been zero. As refineries continue to petition for exemptions, which they have done in increasing numbers in recent years, it is reasonable and necessary for EPA to project exemptions greater than zero.

In this supplemental rulemaking, EPA proposes to project exempted volumes and use those projections in the volume formula to keep the RFS whole. We agree with EPA that accounting for waivers is a “reasonable interpretation” of the agency’s authority pursuant to the statute, “especially in light of our authority to ‘ensure’ that the renewable fuel volumes are met.”<sup>4</sup> Just as we have in prior rulemakings, ICGA strongly encourages EPA to use the volume formula to project exempted volumes to offset future refinery exemptions. Doing so allows EPA to meet its statutory authority to both grant refinery waivers and ensure RFS volumes are met, instead of prioritizing the authority to grant waivers over the obligation to fulfill renewable fuel volume requirements.

### **Proposed Standards Formula Definitions**

To reflect the required use of the percentage standards formula to account for waivers, EPA proposes to update and clarify the definitions of two terms in the formula at 40 CFR 80.1505 (c).

The terms for formula entries  $GE_i$  and  $DE_i$ , are currently defined as, “*The amount of gasoline projected to be produced by exempt small refineries and small refiners, in year i, in gallons in any year they are exempt per §§80.1441 and 80.1442,*” and, “*The amount of diesel projected to be produced by exempt small refineries and small refiners, in year i, in gallons in any year they are exempt per §§80.1441 and 80.1442,*” respectively.<sup>5</sup>

EPA proposes to define  $GE_i$  and  $DE_i$  as, “*the total amount of gasoline projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442,*” and, “*the total amount of diesel projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442,*” respectively.<sup>6</sup>

EPA states that the intent of the updated definitions for  $GE_i$  and  $DE_i$  in 40 CFR 80.1405 (c) is to, “represent a projection of the exempt gallons of gasoline and diesel, regardless of whether we have adjudicated exemptions for that year by the time of the final rule establishing the percentage standards for the four renewable fuel volume types.” ICGA agrees with EPA’s intent to account for all exemption, whether those have been granted or not by the time the annual volume rule is finalized. To ensure EPA’s intent is met in the 2020 volume rule, and in subsequent volume rules, ICGA believes EPA should also specify in the definitions that the projection for exempted gallons of gasoline and diesel be included regardless of whether the exemptions have been granted or are projected to be granted for that year. Adding this stipulation to the final definitions will bind EPA’s intentions to this 2020 volume rule and subsequent volume rules, bringing needed certainty to RFS volumes going forward.

As Administrator Wheeler testified to Congress this year, refiners typically do not petition for exemptions until after the following year’s final volume rule is issued. For the 2018 compliance year, most refineries did not petition for exemptions until late in the year, after the 2019 volume rule was final. EPA did not issue decisions on those 2018 exemption petitions until August 9, 2019, months after the 2018 compliance year had closed. With exempted gallons at or approaching 10 percent of volumes in the 2017 and 2018 compliance years, these large amounts of retroactive exemptions rendered the volume requirements meaningless.

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<sup>4</sup> 84 Federal Register 57680 (October 28, 2019)

<sup>5</sup> 40 CFR 80.1405(c) ( $GE_i$  and  $DE_i$ )

<sup>6</sup> 84 Federal Register 57680 (October 28, 2019)

Because of the time between completion of the volume rule, submission of petitions for exemptions, the close of the compliance year and adjudication of the petitions, EPA should amend its proposed definitions to specify that the projected exempted gallons of gasoline and diesel be accounted for whether those exemptions have been decided by the time of the final rule or are projected to be granted. Strengthening the proposed definitions in the final rule adds more certainty for consistent RFS administration following the significant uncertainty EPA has created through its handling of the recent expansion of refinery exemptions that have removed 4 billion gallons of blending requirements from the RFS.

Specifically, ICGA asks EPA to add the underlined text to the proposed definitions for GE<sub>i</sub> and DE<sub>i</sub> as, “*the total amount of gasoline projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442, whether the exemptions have already been or are projected to be granted in the future,*” and, “*the total amount of diesel projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442, whether the exemptions have already been or are projected to be granted in the future,*” respectively. These additions to EPA’s proposed definitions directly carry out EPA’s stated intent and use the RFS volume formula to properly account for waivers and keep the RFS whole.

### **Accurate Projection of Exempted Volumes**

Using the volume formula with the additional clarifying language from ICGA, the increased percentage standards would have the effect of offsetting future refinery exemptions for the applicable compliance year. However, as EPA notes, this change of accounting for RFS exemptions will only ensure the RFS is upheld, “provided EPA’s projection of the amount of gasoline and diesel production by exempt small refineries in 2020 is accurate.”<sup>7</sup> EPA correctly points out the significance of an accurate projection for making this waiver accounting through the volume standards work. While making this key point, however, EPA subsequently proposes a methodology that will not result in accurate projections, leaves the RFS volumes exposed to continued reductions from refinery waivers and fails to restore confidence and certainty in EPA’s RFS administration.

For accurate accounting for RFS waivers for 2020 and following years, EPA must base this projection on a rolling average of the three most recent years of actual volumes waived. A projection of future actions based on actual actions taken is a “reasonable projection of the future.”<sup>8</sup> A projection based on recommendations EPA did not follow, that is nearly half of the decisions EPA made, is not reasonable.

EPA makes the final decisions on refinery waivers after reviewing recommendations from the Department of Energy (DOE) based on DOE’s evaluation of the petitions. As EPA confirms in the proposed rule, the agency has discretion to provide relief that is different than DOE’s recommendations. In the past three RFS compliance years, EPA has provided relief different than DOE’s recommendations by exempting nearly twice as many gallons as DOE recommended. This difference between recommendations and actual waivers is largely due to EPA providing full exemptions when DOE recommended partial relief or no relief.

As EPA reveals in the proposed rule, exemptions recommended by DOE for 2016-2018 totaled 440, 1020 and 840 million RINs, or ethanol-equivalent gallons, respectively. EPA, however, waived 790, 1820 and 1430 RINs, or ethanol-equivalent gallons, for those three compliance years. The three-year average of DOE’s recommendations is 770 million RINs; the three-year average of EPA’s decisions is 1340 million RINs. Because of the lack of transparency in RFS exemptions, we did not previously have knowledge of

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<sup>7</sup> 84 Federal Register 57680 (October 28, 2019)

<sup>8</sup> 84 Federal Register 57682 (October 28, 2019)

DOE's recommendations and how those differed from EPA's final decisions, but EPA has consistently exempted nearly twice as many gallons as DOE recommended.

Although the supplemental proposed rule states EPA now "anticipates" granting partial exemptions where appropriate for 2020 and has an "intended approach" for 2020 refinery exemption petitions, the proposed rule does not bind EPA to this approach, and the statute gives EPA independent authority to grant or deny refinery exemption petitions. Without a binding methodology that will keep the RFS whole when future waivers are granted, these good intentions do not provide certainty that EPA will follow the agency's anticipated approach. Under the proposed rule, EPA has free rein to change its approach at any time. As the proposed rule states, "...we cannot predict with certainty the approach that we will in fact take once we have received and reviewed petitions."<sup>9</sup> Without certainty on EPA's approach, an estimate based on DOE recommendations will not ensure RFS volumes are met.

While EPA could have taken the approach of providing 50 percent relief when recommended by DOE, EPA instead chose to maximize exemptions. As recently as August 9, 2019, in a memo deciding 2018 refinery exemption petitions, EPA stated that granting full relief rather than the partial relief recommended by DOE is the "best interpretation" of the law.<sup>10</sup> EPA stated that because the original blanket exemption Congress granted to small refineries through 2011 was a full exemption from the RFS, EPA's interpretation was that any extension of that exemption in the future should be a full exemption.

Just two months after issuing this determination, EPA now proposes a different interpretation, that EPA may grant partial relief rather than either grant or deny a petition in full. Just like EPA's view may have changed between August and early October, the proposed rule does not preclude EPA's interpretation from changing again between the final 2020 RVO and the time when EPA determines 2020 refinery exemptions. Because EPA's interpretation continues to shift and because EPA has discretion to make final exemptions determinations, including whether to grant full or partial exemptions, EPA should project exemptions based on the most recent waiver decisions EPA has made rather than based on decisions the agency could have made.

EPA proposes to use an average of the three most recent years of DOE's recommendations for waivers, which EPA did not follow, as an estimate for future waivers. Because those recommendations do not reflect agency actions on waivers and actual decisions EPA made in the most recent years, projecting future waivers based on recommendations that were never followed is not a reasonable projection of the future and will continue to shortchange the RFS. The 15 billion gallon conventional ethanol volume requirement will not mean 15 billion gallons.

Through the interagency review of the supplemental proposed rule, commenters stated there is, "no rationale for using older data," and recommended an alternative based on actual refinery exemptions EPA issued from 2016 through 2018. As commenters stated, "This alternative is consistent with the decision to ensure more than 15 billion gallons of conventional ethanol. It is also grounded with actual historic data and gives greater consideration and weight to past practices."<sup>11</sup> ICGA strongly agrees.

ICGA believes EPA can bring more certainty to the projections used in the volume formula through further additions to the proposed definitions for the terms for values  $GE_i$  and  $DE_i$  in the volume standards formula. By setting the methodology for the projections in the definitions, EPA ensures consistent and meaningful accounting for RFS waivers in the volume formula for 2020 and subsequent years.

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<sup>9</sup> 84 Federal Register 57682 (October 28, 2019)

<sup>10</sup> Idsal, Anne, USEPA Memorandum, *Decision on 2018 Small Refinery Exemption Petitions*, August 9, 2019

<sup>11</sup> USEPA Documentation of OMB Review Under Executive Order 12866 posted to this docket, Email from Jessica Mroz to Danielle Jones, RFS Annual Rule SNPRM, October 11, 2019

Specifically, in addition to our proposed underlined text, ICGA asks EPA to add the double-underlined text to our amended proposed definitions for  $GE_i$  and  $DE_i$  as, “*the total amount of gasoline projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442, whether the exemptions have already been or are projected to be granted in the future, where the projection shall equal the mean of the total amount of gasoline exempt in years i-2, i-3 and i-4,*” and, “*the total amount of diesel projected to be exempt, in year i, in gallons, per §§80.1441 and 80.1442, whether the exemptions have already been or are projected to be granted in the future, where the projection shall equal the mean of the total amount of gasoline exempt in years i-2, i-3 and i-4,*” respectively.

Incorporating the projection methodology in the formula’s definition for gasoline and diesel projected to be exempt ensures a consistent methodology is used in the 2020 RVO and in following years. Obligated parties and biofuels and feedstock producers will have greater confidence in the integrity of RFS volume requirements when the process is included in the definition. This proposed addition fully retains EPA’s authority to make the final decisions on exemption petitions, including granting relief that is different than DOE’s recommendation, while ensuring EPA’s decisions are fully accounted for in the RFS volumes. ICGA believes these updated definitions are the best approach to account for exemptions in the RFS volume formula and accurately project exempted gallons going forward, upholding the integrity of an RFS that allows for exemptions but still requires that volume obligations be met.

Finally, EPA also requested comment on an alternative approach of using the average volume of gasoline and diesel that DOE recommended be exempt from 2015-2017. ICGA strongly disagrees with this alternative approach. EPA should use the average of the three most recent years of RFS exemptions granted. Looking further to the past and leaving out the most recent year of EPA’s administration of the RFS relies on old data with no justification. As previously discussed, waiver determinations are already made well after the RFS compliance year has closed. For the 2020 RVO, decisions on 2020 exemption petitions may not be made until well into 2021. A projection for those exemptions should not be based on exemptions granted more than five years previously when data on the three most recent years of EPA decisions is available.

## **Conclusion**

EPA has an obligation under the law to keep the RFS volumes whole when granting waivers. EPA has not met that obligation by waiving more than 4 billion gallons of renewable fuels blending in the past three compliance years. EPA also has the tools in the annual volume standards formula to account for waivers and offset waived gallons. Farmers have been asking EPA to uphold the law and give equal weight to the obligation to ensure volumes are met with EPA’s authority to grant waivers. EPA must use the 2020 and subsequent RFS volume rules to project waivers and accurately account for those volumes, regardless of whether the waivers have already been granted or are projected to be granted.

Restoring meaning to the RFS volume requirements depends on the accuracy of the waiver projections used in the formula. EPA’s proposal does not ensure an accurate projection and will very likely continue to shortchange the RFS when waivers are granted based on EPA’s record on waivers. EPA must project future waivers based on an average of the three most recent years of actual waivers granted. ICGA believes the updated definitions detailed in our comments are the best approach to account for exemptions and accurately project exempted volumes going forward. Our recommendations uphold and respect EPA’s discretion to make final exemption decisions, project exemptions based on EPA’s actions and protect the 15 billion gallon conventional biofuel volume.