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Via Electronic Filing ([www.regulations.gov](http://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:

The South Dakota Farmers Union (SDFU) represents nearly 20,000 family-scale farmers, ranchers, and rural community members. It is a long-held belief of SDFU that good and fair opportunities in agriculture are the foundation and future of strong farm and ranch families, and strong farm and ranch families are the fuel for thriving rural communities. These rural communities, in turn, are vital to the health, security, and economic well-being of our state and the entire national economy. The Renewable Fuel Standard (RFS) program is the most vital of those important opportunities, 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, SDFU's policy calls for strong support of the RFS and expanding the mandate for renewable fuels to make up a third of the U.S. fuel supply.<sup>1</sup> Because of the significant interest of SDFU and its members in EPA's implementation of the RFS program's volume requirements, SDFU appreciates the opportunity to submit these comments on EPA's proposal entitled "Renewable Fuel Standard (RFS) Program: RFS Annual Rules," published at 86 Fed. Reg. 72,436 (Dec. 21, 2021) ("RFS Proposal"). The RFS Proposal would address the volume requirements for compliance years 2020, 2021 and 2022 and includes EPA's proposed approach for addressing the remanded 2016 standard-setting rulemaking, as well as other regulatory changes to the RFS regulations.

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<sup>1</sup> Policy of the South Dakota Farmers Union, 2022 , <https://sdfu.org/legislation/state/>.

EPA stated that the RFS Proposal was intended to get the RFS program “back on track,”<sup>2</sup> and SDFU appreciates EPA’s efforts in that regard. Along those lines, SDFU 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 EPA’s approach to restore the improperly waived 500 million gallons of renewable fuel volume requirements from 2016.<sup>3</sup> 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. SDFU is calling for standards for that protect investments and move the program forward for 2021 and 2022 and urges EPA to withdraw the retroactive cut on 2020 volumes and enforce the current standards.

You have recognized the need to work with agricultural stakeholders and rural communities to tackle the climate crisis, advance environmental justice, and build a sustainable future. The RFS program and biofuels generally are key components to meeting this Administration’s goals in each of these areas. 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 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.**

SDFU and its members are longstanding proponents of the RFS and its proper implementation, because the RFS provides numerous benefits. These benefits include, but are not limited to, the following:

- 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;

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<sup>2</sup> Todd Neeley, *EPA Sends RFS Volumes Proposal to OMB*, The Progressive Farmer, Aug. 26, 2021, <https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2021/08/26/epa-says-volumes-proposal-designed>.

<sup>3</sup> SDFU also supports EPA’s proposed denial of all pending small 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.

- 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. SDFU is especially concerned with farmers; the RFS is an important opportunity to establish trust regarding climate resilience among a population that is prone to regard federal policy with skepticism and may be vulnerable to a variety of coSDFUUsing climate messages. Farmers, the first step in biofuel production, require the certainty that is supposed to come with the RFS program to make the necessary decisions to do their part to contribute to expanded use of renewable fuel, as does the rest of the industry. 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. SDFU Takes Seriously the Interaction Between Climate Change and Agriculture.

Climate change impacts, brought on by GHG emissions to the earth's atmosphere resulting from human activity, are detrimental to both human health and the economy. As a family farm organization, SDFU 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 SDFU is extremely 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."<sup>4</sup> Anticipated disruptions to agricultural production caused by climate include:

- rising temperatures;
- changes in precipitation;
- increasing frequency of extreme weather events;

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<sup>4</sup> 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/climate\\_change/FoodSecurity2015Assessment/FullAssessment.pdf](http://www.usda.gov/oce/climate_change/FoodSecurity2015Assessment/FullAssessment.pdf).

- new pest, disease and weed pressures; and
- increases in heat stress on livestock.

The Fourth National Climate Assessment, which was prepared by several U.S. government agencies, reiterated these risks, noting “[r]ural communities, where economies are more tightly interconnected with agriculture than with other sectors, are particularly vulnerable to the agricultural volatility related to climate.”<sup>5</sup> 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. “[E]ffective adaptation can reduce food-system vulnerability to climate change and reduce detrimental climate change effects on food security...”<sup>6</sup> A recent report by the United Nations Intergovernmental Panel on Climate Change also identified the need for action at local levels and adaptation as needed to address climate change impacts.<sup>7</sup> “[R]ural residents and the lands they manage have the potential to make important economic and conservation contributions to climate change mitigation and adaptation,” but their capacity to adapt is impacted by a host of demographic and economic concerns.<sup>8</sup> We want to achieve this goal, and enactment of the RFS volume targets put forth by Congress will help.

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 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,

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<sup>5</sup> U.S. Global Change Research Program, Fourth National Climate Assessment, Volume II Impacts, Risks, and Adaptation in the United States, Chapter 10: Agriculture and Rural Communities (2018), <https://nca2018.globalchange.gov/chapter/10/>.

<sup>6</sup> Brown, *supra* n.4, at 112.

<sup>7</sup> Intergovernmental Panel on Climate Change, Special Report: Global Warming of 1.5°C (2018), <http://ipcc.ch/report/sr15/>.

<sup>8</sup> U.S. Global Change Research Program, Fourth National Climate Assessment, Volume II Impacts, Risks, and Adaptation in the United States, Chapter 10: Agriculture and Rural Communities (2018), <https://nca2018.globalchange.gov/chapter/10/>.

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 have been 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. And, unlike fossil fuel production, farmers have done this in a sustainable way. The expansion of the RFS has only supported these efforts, allowing farmers to continue to innovate and find new ways to bring added value to their farmland and production.<sup>9</sup> EPA has long recognized the contributions *increasing* biofuel production makes to this country's energy independence.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The industry continues to reduce its GHG emissions, with the ethanol industry pledging to reach net zero emissions by 2050.<sup>13</sup>

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<sup>9</sup> See Keith L. Kline, *et al.*, *Reconciling food security and bioenergy: priorities for action*, Global Change Biology Bioenergy (2016), available at <http://onlinelibrary.wiley.com/doi/10.1111/gcbb.12366/epdf>.

<sup>10</sup> 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.

<sup>11</sup> RFA, *Ethanol Promotes Energy Independence*, <https://ethanolrfa.org/ethanol-101/energy-independence> (last visited Jan. 20, 2022).

<sup>12</sup> Life Cycle Associates, *GHG Emissions Reductions due to the RFS2-A 2020 update*, at iii (2021), available at [https://ethanolrfa.org/file/748/LCA\\_-\\_RFS2-GHG-Update\\_2020.pdf](https://ethanolrfa.org/file/748/LCA_-_RFS2-GHG-Update_2020.pdf).

<sup>13</sup> 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>.

While the potential GHG emission reductions resulting directly from the RFS are significant, the policy has much more potential to contribute to climate resiliency than the directly attributable lowered emissions. The RFS is popular among farmers and rural communities. These are important demographics to encourage farmers to engage in climate resilience because of the importance of land use.

Land use in the United States has long served as a sink for GHG emissions, which can be lost as farmland becomes developed.<sup>14</sup> Improving economics allows farmers to retain their lands. It also gives them the ability to take additional actions to improve their land management. Land ownership in the U.S. is highly dispersed. Reaching landowners to encourage climate-smart land management practices, in the numbers needed to meet important emissions reduction goals, will be a challenge. Offering farmers a way to achieve value for participating in climate change, as a properly implemented RFS would, supports these goals.

Consumers, like farmers, also are likely to be called upon to contribute to climate resilience. Like farmers, consumers receive value while engaging in climate change mitigation through the RFS. The RFS has saved consumers money at the pump. Implementing volume requirements that match those in the statute would save consumers more money and opening the transportation fuels market to competition would save consumers even more. In addition, building further renewable fuel infrastructure would deter the price volatility that oil is particularly subject to.

Setting a strong RFS also would require obligated parties to make additional infrastructure investments, as envisioned by Congress. Lower volume requirements than those set in the statute allows obligated parties to continue to ignore Congress's directives, thereby impeding future climate resilient actions.

EPA, however, continues to fail to adequately assess the benefits that increasing the volume requirements provides. While substantial efforts have been made to increase ethanol use, EPA's limited view of the RFS program, particularly with respect to the potential for mid-level ethanol blends, has caused EPA to fall behind in achieving the goals Congress set in establishing the RFS program. This limited view has focused on purported constraints that may increase compliance costs rather than the benefits and potential of biofuels. The failure to examine the full extent of these benefits provides an incomplete picture with respect to the asserted costs of the program. EPA must implement Congress's "market forcing policy" to achieve those benefits, not implement the program solely in a way to reduce obligated party compliance costs.

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<sup>14</sup> EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019, at ES-23 (2019), available at <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2019>.

## 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.<sup>15</sup> 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.

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. EPA then revised its formula for setting the standards to account for projected exempted volumes and projected exemptions that may be granted for 2020 based on the U.S. Department of Energy’s recommendations for those granted for three prior years (2016-2018). EPA’s accounting for these exemptions was required to “ensure” the volume requirements, and its projections were reasonable based on the information that was available. At the time, EPA was aware of the concerns raised that the expansion of exemptions was unlawful, as EPA was in the midst of litigation with respect to its expansion of the small refinery exemptions. The public had the opportunity to suggest alternative projections, and the biofuels industry argued that the projections were too low. 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.”<sup>16</sup>

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

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<sup>15</sup> EPA extended the 2020 compliance deadline until January 31, 2022 and has proposed to extend the deadline based on when the 2021 standards are finalized.

<sup>16</sup> 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).

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.<sup>17</sup> 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 is outlined in 42 U.S.C. §7545(o)(7)(F), which provides:

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(Emphasis added). The statute 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 appears to argue that the statute says EPA "shall" modify the volumes for "all years following the final year to which the waiver applies" and that EPA "retains authority to promulgate annual standards for the years in question, so long as EPA exercises this authority reasonably." 86 Fed. Reg. at 72,444. But EPA acknowledges that the reset authority was triggered for cellulosic biofuel and advanced biofuel years earlier. Instead, EPA chooses to rely on the trigger date for the total renewable fuel volume, which EPA finds occurred for compliance year 2019 on December 11, 2018. The problem for EPA is that using the reset authority for 2020 based on the 2019 waivers was an impossibility, and thus, not what Congress could have intended. The statute requires EPA to promulgate a rule to modify the volumes one year after the

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<sup>17</sup> For cellulosic biofuel, EPA is proposing to use both its cellulosic waiver authority and its reset authority. Neither are available to retroactively revise already reduced statutory volumes.



waiver was issued, which was due by December 2019. But EPA also is required to “comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii),” which requires that the rule be issued “no later than 14 months before the first year for which such applicable volume will apply.” 42 U.S.C. §§7545(o)(2)(B)(ii), (o)(7)(F). This was impossible for 2020 since EPA would have been required to issue the rule by November 1, 2018, before EPA even issued the waivers for 2019. Since the modified volumes could only start in 2016, this indicates that Congress anticipated waivers early in the program or separate from the annual standard-setting process, not that EPA could retroactively use its reset authority. Even if not an impossibility, 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.

EPA’s failure to issue a timely reset rule presents a significant difference from the situation in the cases on which EPA seeks to rely where EPA was found to have reasonably issued retroactive rules with respect to the RFS standards. 86 Fed. Reg. at 72,444 n.45. In those cases, EPA had missed the statutory deadline for setting the percentage standards that were required to “ensure” the volume requirements, and the obligated parties argued that EPA had lost all authority to enforce any volume requirements at all. Importantly, in *National Petrochemical & Refiners Association v. EPA*, 630 F.3d 145, 164 (D.C. Cir. 2010), the D.C. Circuit acknowledged that EPA had told obligated parties that it would seek to enforce the volume requirements, despite its delay. Here, EPA indicated it would no longer seek to use its reset authority for 2020, issuing final standards only using its cellulosic waiver authority. As such, feedstock and biofuel producers took action to meet the volume requirements promulgated, even though some efforts were impacted by the pandemic in 2020. Retroactively reducing the volume requirement further ignores and undermines those investments. For a program that is intended to promote investments in production and use of biofuels, it makes little sense that EPA is not also required to consider the impacts on producers by its retroactive actions.<sup>18</sup>

2. The standard-setting process is based on projections with the obligation of EPA being 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

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<sup>18</sup> While some contend that retroactively reducing the volumes does not impact biofuel production in 2020, this is not the point. The investments made were to meet the 2020 volumes and beyond. Moreover, EPA’s actions are intended to increase or maintain the RIN bank, which impacts the volume production requirements in later years.

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.

It is now 2022, and 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. Indeed, EPA’s approach here would undermine the very meaning of final agency action, which is to provide certainty to the regulated community. 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. EPA’s decision to nonetheless seek to retroactively reduce the statutory volumes even further through its reset authority is arbitrary, particularly with respect to a program involving annual requirements intended to be market-forcing.

- 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%.

	<b>EPA required 2020 volumes</b>	<b>Current 2020 Standard</b>	<b>EPA revised demand estimate</b>	<b>Actual 2020 volume obligations</b>	<b>Reduction in volume requirement</b>
Advanced Biofuel	5.09 billion gallons	2.93%	158.96 billion gallons	4.66 billion gallons	430 million gallons
Renewable Fuel	20.09 billion gallons	11.56%	158.96 billion gallons	18.38 billion gallons	1.71 billion gallons

The total renewable fuel volume would be further reduced to 17.43 billion gallons if EPA exempted the 8.19 billion gallons of volume from small refineries it uses as its high end projection. Although it could be argued that EPA must ensure the shortfall in the required volumes are met, since EPA does not “true up” those volumes, the regulations, by operation, already address the drop in demand. There is no reason for EPA to revise these standards again. This is how the RFS program has operated for over ten years.

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 percent cap on rollover, and, even if it is relevant that gasoline demand was impacted more, other biofuels can be used to make up any potential shortfall in ethanol use that were not impacted by the gasoline demand.<sup>19</sup> 86 Fed. Reg. at 72,448. While EPA argues that the RIN generation in 2020 fell short even of these volumes and would require a drawdown of the RIN bank, the entire purpose of the RIN bank was to address supply disruptions. Moreover, EPA acknowledges that, in revising the 2020 standards, it is seeking to maintain current levels of the RIN bank, which basically means it is intentionally rolling 2019 (and even 2018) RINs for compliance into 2022. 86 Fed. Reg. at 72,457. As EPA previously found, “excess RINs generated in one year could be used to show compliance in the next year, leading to the generation of new excess RINs in the next year, causing the total number of excess RINs in the market to accumulate over multiple years despite the limit on RIN life. ... The rollover issue would in some circumstances essentially make the applicable valid life for RINs virtually meaningless in practice.” 72 Fed. Reg. 23,900, 23,934 (May 1, 2007). 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).

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<sup>19</sup> 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.

Moreover, EPA's concerns with respect to the RIN bank are overblown, as there is no magical amount of carryover RINs that need to be in the RIN bank. 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 the historical drought we have not seen since 1996 does occur and there is inadequate domestic supply of renewable fuels, EPA retains its general waiver authority.

While EPA acknowledges that the RIN bank would not be depleted, it estimated that only about 635 million RINs would remain. EPA-HQ-OAR-2021-0324-0328 at 9. This, however, is due to EPA's estimates of 2019 deficits, not due to the 2020 volume requirements.<sup>20</sup> In other words, those RINs should have been retired to show compliance with 2019 obligations. Thus, it is not the 2020 standards that EPA set that implicates EPA's concerns about meeting deficits and non-compliance, it is the statutory requirement that all deficits be met the next year. That is a policy disagreement EPA may have with Congress, but it is not grounds to revise the 2020 standards.

While some of these RINs may be used by small refineries that have yet to comply with the 2019 volume obligations, it is important to note that much of the "RIN bank" is due to the impermissible expansion of small refinery exemptions that artificially inflated the RIN bank in the first instance.<sup>21</sup> As such, EPA is working to preserve a bank that should not have been there in the first place and has created uncertainty and price volatility that has undermined investments to support additional production since at least 2018 when EPA began the expansion of the small refinery exemption program. This has undermined the carefully crafted incentives created by Congress and, as such, EPA's proposal to revise the 2020 standards on those grounds is arbitrary and contrary to the statute.

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. This makes sense because EPA has counted carryover RINs in determining whether there is inadequate domestic supply for purposes of issuing a retroactive waiver. 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

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<sup>20</sup> The 2019 deficits EPA notes in EPA-HQ-OAR-2021-0324-0328 are much higher than the claimed 2019 deficits listed on its EMTS website (<https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>, Table 5). As such, it is unclear whether the impact would be as high as EPA estimates, even if you include deficits.

<sup>21</sup> EPA recognizes the impact small refinery exemptions had on the RIN bank. EPA, Draft Regulatory Impact Analysis: RFS Annual Rules, at 13-14 (2021); *see also id.* at 44 (showing increase in carryover RINs as percentage of volumes starting in 2017, when EPA expanded small refinery exemptions).

RIN prices, but Congress also provided for waivers based on severe economic harm. EPA's proposal to reduce the 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. EPA's change in policy regarding small refinery exemptions is not grounds to change the standards set two years ago.

When EPA set the 2020 standards in 2019, it accounted for projected 2020 small refinery exemptions, recognizing that EPA's failure to account for the retroactive exemptions did not ensure the volume requirements. EPA contends that, while "there continues to be substantial uncertainty whether we will grant or deny the many SRE petitions for 2020" due to intervening case law, a change in its prior policy would impact its earlier projections. 86 Fed. Reg. at 72,449. But the U.S. Court of Appeals for the D.C. Circuit has upheld projections used by EPA in setting the standards under the RFS program, so long as EPA has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

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 SDFU 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 SDFU 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, as shown below.

	EPA 2021 Proposed Volumes	2021 RINs Generated <sup>a</sup>	2021 RINs Retired for other reasons <sup>c</sup>	Available 2021 RINs
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D6 RINs	13,320,000,000	14,251,613,571	423,591,601 (142,716,234 without exports)	13,828,021,970 (14,108,897,337)
Total Renewable Fuel (D3, D4, D5, D6, D7)	18,520,000,000	19,910,491,291 <sup>b</sup>	972,902,561 (190,144,684 without exports)	18,937,588,730 (19,720,346,607)

a EMTS Data, as of January 10, 2022

b EPA typically adjusts the December compressed natural gas and liquified natural gas D3 RIN generation with the February update to its EMTS data. This adjustment for 2019 and 2020 basically doubled the amount shown in the January update, and so this includes an additional 51.9 million D3 RINs than shown in EMTS.

c Because EPA typically considers RINs available for compliance, we show the RINs that have been retired for other reasons, such as export, using EPA's EMTS data on RIN use. However, had EPA issued the standards on time, the exports may have been used domestically instead.

Where EPA notes that it will use updated data when finalizing the standards, this means that EPA should ensure all RINs generated in 2021 be counted. This represents the investments and actions made by biofuel producers and stakeholders along the entire supply chain, including feedstock suppliers, with the expectation that EPA will set and enforce volume requirements for 2021 and those investments should be protected.

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 requirements 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. SDFU 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, SDFU does not dispute the use of cellulosic waiver authority. SDFU 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.<sup>22</sup>

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 properly has 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 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;<sup>23</sup>
- 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;<sup>24</sup>
- high domestic production also creates domestic jobs and contributes to the rural economy;

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<sup>22</sup> Although “reset” is triggered by waivers, nothing in the statute requires that the modifications 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.

<sup>23</sup> While 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.

<sup>24</sup> This is based on EMTS data for 2019-2021 (as of January 10, 2022)

- 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 SDFU has urged EPA to facilitate the use of mid-level ethanol blends in all vehicles.

While EPA also notes that some of the factors favor lower volumes, SDFU 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.<sup>25</sup> 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 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.

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<sup>25</sup> Almost 15 billion RINs were generated in 2019.



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 SDFU 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.<sup>26</sup> Mid-level ethanol blends, however, are a popular fuel for use in these vehicles, and EPA should facilitate their use. Studies also 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. SDFU 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)). SDFU 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. SDFU believes EPA’s analysis of the reset factors is incomplete and provides the following observations, which it believes show the volumes should be higher than those proposed by EPA for 2022.

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<sup>26</sup> See Petition for Reconsideration or Rulemaking Submitted On Behalf of Urban Air Initiative, Inc., et al., Aug. 9, 2019, available at [https://www.epa.gov/sites/production/files/2019-08/documents/uai\\_19-1161\\_ppfr\\_08092019.pdf](https://www.epa.gov/sites/production/files/2019-08/documents/uai_19-1161_ppfr_08092019.pdf).

EPA acknowledges that “some of the statutory factors ... suggest that the targets for non-cellulosic advanced biofuel established by Congress, *or even higher volumes*, are still appropriate.” 86 Fed. Reg. at 72,446 (emphasis added). These factors include:

- significant GHG emissions reductions associated with advanced biofuels, which must show at least a 50% reduction in lifecycle emissions;
- high domestic production capacity, which, coupled with the higher RIN values for biomass-based diesel, presents significant opportunities to grow the advanced biofuel program;
- high domestic production also creates domestic jobs and contributes to the rural economy; and
- energy security benefits by diversifying feedstocks and fuels for energy use and reducing the need for foreign imports of crude oil.

While EPA references the higher cost of advanced biofuel production and potential increased costs for agricultural commodities, these costs are offset by federal and state incentive programs or have minimal impacts compared to other causes of increased costs, such as fluctuating oil prices. In any case, these benefits far outweigh any potential costs.<sup>27</sup>

EPA also refers to the potential for diversion of feedstocks, such as vegetable oils, from other markets, which “could result” in impacts to wetlands, ecosystems, and wildlife habitat. But farmers continue to innovate to increase yield and production to meet all the demands of the market and to do so in a sustainable way.<sup>28</sup> Despite the growth of the RFS program, cropland in the U.S. remains well below the 402 million acres of existing agricultural land in 2007. Preserving or bringing these lands back into production is in the public interest, and conversion of agricultural land to urban development has slowed in recent years but remains a significant concern. Moreover, as explained above, improved economics at the farm will help promote action toward sustainability. While EPA refers to potential issues “abroad,” there is no indication that Congress sought EPA to consider such attenuated and speculative impacts when assessing the statutory factors. In any event, recent analysis shows that biofuel production in the United States has had significantly less impacts than has been estimated in the past. As such, EPA’s reference to the mere “potential” for such impacts is not sufficient analysis to claim lower

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<sup>27</sup> SDFU does not suggest that EPA is required or should do a cost-benefit analysis. It is worth noting that EPA has not sought to quantify many of the benefits provided by advanced biofuels.

<sup>28</sup> See, e.g., M. Wu, *Energy and Water Sustainability in the U.S. Biofuel Industry*, at 1-2 (2019), available at [https://ethanolrfa.org/file/2002/Energy-Water-Sustainability-in-the-US-Biofuel-Industry\\_Argonne\\_2019-06.pdf](https://ethanolrfa.org/file/2002/Energy-Water-Sustainability-in-the-US-Biofuel-Industry_Argonne_2019-06.pdf) (“The biofuel industry has made a concerted effort to conserve resources, diversify energy sources, and recycle and reuse water.”).

volumes are appropriate, as it is based on questionable or outdated analysis and ignores these other dynamics.<sup>29</sup>

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. SDFU 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.

- 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.<sup>30</sup> 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. SDFU is pleased that EPA is finally correcting its unlawful action and restoring these volumes. SDFU agrees with EPA that imposing a supplemental standard in 2022 and 2023 is a better option than reopening 2016 compliance.

Unlike the retroactive reduction of the 2020 standards, EPA here is responding to a Court mandate, which EPA has no authority to ignore.<sup>31</sup> The 500 million gallons remain a volume

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<sup>29</sup> See, e.g., Farzad Taheripour and Wallace E. Tyner, *US biofuel production and policy: implications for land use changes in Malaysia and Indonesia*, Biotechnology for Biofuels (2020), <https://biotechnologyforbiofuels.biomedcentral.com/articles/10.1186/s13068-020-1650-1>; cf. Joshua Pritsolas and Randall Pearson, *Critical Review of Supporting Literature on Land Use Change in the EPA's Second Triennial Report to Congress* (2019), available at <https://ethanolrfa.org/file/1834/SIUE-Review-of-Land-Use-Change-Literature-07-2019.pdf> (discussing data concerns with studies purporting to show land conversion from biofuel production).

<sup>30</sup> 80 Fed. Reg. at 77,422, 77,439.

<sup>31</sup> SDFU, along with other biofuel petitioners, requested the D.C. Circuit to enforce its mandate, and such request is in abeyance pending EPA's rulemaking here.

requirement that Congress directed EPA to ensure that EPA has failed to implement. By adding these volumes onto future volume requirements, EPA finally would be meeting its obligation to ensure the statutory volumes, *and*, where EPA is proposing to spread the requirement over two years, obligated parties would have ample time to prepare for their obligations. EPA previously had raised concerns about potential impacts on the RIN bank if it finally enforced the 500 million gallons. As SDFU noted in its prior comments to EPA,<sup>32</sup> EPA's job is not to maintain the RIN bank as high as it can, and EPA failed to consider alternative options such as spreading the requirement over two years, as EPA now proposes.

Even so, the 2022 supplemental standard would only be partly retroactive and the 2023 supplemental standard, if EPA is timely, should be prospective in nature, as the supplemental standards apply to 2022 and 2023 produced gasoline and diesel fuel. Even if appropriate to consider the impacts to the RIN bank, spreading the supplemental obligation over two years reduces those impacts, and EPA properly finds that those impacts would not be unduly burdensome. And obligated parties have been on notice regarding the Court's remand order and that supplemental obligations could be a viable alternative remedy that EPA must consider.<sup>33</sup> Even if there is a drawdown in the RIN bank that may affect an obligated party's flexibility for compliance, EPA has consistently found that obligated parties pass through the costs of RINs. EPA's claims as to the benefits of the RIN bank notwithstanding, the market-forcing scheme Congress established would be restored. Contrary to EPA's concerns, this would actually put the RFS program back on track, not preserving the RIN bank.

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

SDFU appreciates EPA's proposal to deny all pending small refinery exemptions.<sup>34</sup> SDFU believes EPA appropriately considered the remaining holdings in *RFA v. EPA*, 948 F.3d 1206 (10<sup>th</sup> 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 RFS compliance. SDFU 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

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<sup>32</sup> EPA-HQ-OAR-2019-0136-0197 at 14-16.

<sup>33</sup> See, e.g., Jordan Godwin, *EPA to Propose Splitting 500-Million-Gal RFS Remand in 2021, 2022: Sources*, OPIS, June 17, 2020, <https://www.governorsbiofuelscoalition.org/epa-to-propose-splitting-500-million-gal-rfs-remand-in-2021-2022-sources/>.

<sup>34</sup> SDFU was also part of the D.C. Circuit litigation challenging EPA's grant of 31 small refinery exemptions for compliance year 2018. EPA informed the D.C. Circuit that it was reconsidering these exemptions to review the exemption requests based on the same considerations that led EPA to propose to deny all pending small refinery exemption requests. For the same reasons expressed therein, EPA must deny the 31 exemptions granted and, in so doing, must consider how it will enforce those lost volumes.

the U.S. Supreme Court, Congress did intend these exemptions to be the exception, not the rule.<sup>35</sup>

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,<sup>36</sup> and, even since EPA issued its proposed denial, two additional exemption requests were submitted to EPA for compliance year 2020.<sup>37</sup> 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.

Even if EPA does not impose deadlines for seeking exemptions, EPA is required to “ensure” transportation fuel sold in the United States includes the minimum applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel.<sup>38</sup> It is important to note that these are, in fact, *minimum* volumes that are meant to be achieved. As long as EPA continues to allow for retroactive exemptions, it must account for them in setting the standards. EPA proposes a range of exempted volumes of gasoline and diesel as a result of small refinery exemptions in the calculation of the applicable percentage standards, ranging from zero to 8.19 billion gallons. Unless EPA makes clear that late-filed petitions will no longer be granted, any standards with a “zero” projection would be arbitrary.

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. SDFU 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.

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<sup>35</sup> The American Petroleum Institute (API) has acknowledged that “refiners have had ample time to adjust their 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 refineries or small refiners.”).

<sup>36</sup> *See, e.g.,* EPA, *Proposed RFS Small Refinery Exemption Decision*, at 7, 15 (2021), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013KMM.pdf>.

<sup>37</sup> As of December 10, 2021, EPA listed 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-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Jan. 20, 2022).

<sup>38</sup> 42 U.S.C. §7545(o)(2)(A)(i); *see also id.* §7545(o)(3)(B)(i).

Circuit's remand. While these other regulatory proposed changes may be beneficial to the program, there may be 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. SDFU addresses some of these below. In particular, SDFU 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, SDFU 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.**

SDFU 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. SDFU 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.<sup>39</sup> 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

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<sup>39</sup> 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.

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.

**B. Biointermediates (RFS Proposal, §VII): SDFU 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 made revisions to the proposal and is seeking comment on the entire proposed biointermediate scheme.

Although SDFU 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. SDFU 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, SDFU 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. While some have argued that crop-production impacts wildlife and their habitat as a result of land use changes and agricultural runoff, whether, where, and how these feedstocks are grown is based on other factors unrelated to the RFS program. Moreover, ensuring a market helps farmers preserve their land and take action to conserve the environment. It is not causing new lands to be destroyed. As such endangered species should not be impacted by the volumes EPA has proposed.

### 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.

SDFU maintains that the EPA must increase its efforts to address climate change and support actions that strengthen the climate resilience of agriculture and rural communities. We would be pleased to offer support and assistance as the EPA deems helpful regarding these matters. If you would like to discuss SDFU's position further, don't hesitate to contact Doug Sombke, SDFU President, via e-mail at [dsombke@sdfu.org](mailto:dsombke@sdfu.org) or by phone at (605)350-4211.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Sombke". The signature is fluid and cursive, with the first name "Doug" and last name "Sombke" clearly distinguishable.

Doug Sombke  
President, South Dakota Farmers Union