



October 19, 2017

Administrator Scott Pruitt  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: Docket ID No. EPA-HQ-OAR-2017-0091**

Dear Administrator Pruitt:

On behalf of more than 40,000 dues-paying corn farmers nationwide and more than 300,000 corn growers who contribute to corn checkoff programs in their states, the National Corn Growers Association (NCGA) opposes the further reductions in Renewable Fuel Standard (RFS) volumes the Environmental Protection Agency (EPA) contemplates in the October 4, 2017 Notice of Data Availability (NODA).

EPA proposed no direct changes to the implied 15 billion gallon volume requirement for conventional ethanol, which is the primary renewable fuel market for corn. However, EPA is exploring 2018 and 2019 volume reductions that NCGA believes are inconsistent with the RFS statute, as well as inconsistent with the United States Court of Appeals for the District of Columbia Circuit's July 28, 2017 decision in *Americans for Clean Energy v. EPA*.

As one of the petitioners comprising Americans for Clean Energy, NCGA is concerned with EPA's attempt to incorrectly apply the Agency's waiver authority in order to justify a further reduction in volumes. The Circuit Court held that EPA erred in its interpretation of the inadequate domestic supply waiver authority in the 2014-2016 rule. In the NODA, EPA is once again at risk of erring in its interpretation of domestic supply, despite the Court's thorough analysis of EPA's waiver authority.

As addressed in our August 31, 2017 comments, NCGA has significant concerns with EPA's proposed annual standards rule that reduces cellulosic, advanced and total volumes below 2017 levels and relies on new methodology to expand EPA's cellulosic waiver authority. The further volume reductions summarized in the NODA are not justified through the proper application of the general waiver authority or the biomass-based diesel (BBD) waiver authority and would harm Congress' energy and economic security objectives that motivated enactment of the RFS.

Although not specifically addressed in the NODA, NCGA further urges EPA not to change the treatment of RINs on biofuel exports, a proposal raised in comments to the volume rule. Such a change would result in new barriers to our growing ethanol exports and damaging trade retaliation, significantly harming our growing ethanol exports, an area in which the United States already leads the world.

NCGA appreciates your commitment to EPA's on-time administration of the annual RFS volumes. However, NCGA also strongly urges EPA to follow the law and reverse course on the proposals considered in the NODA; our detailed comments follow.

Sincerely,

A handwritten signature in black ink that reads "Kevin Skunes".

Kevin Skunes, President  
National Corn Growers Association

## General Waiver Authority: Inadequate Domestic Supply

EPA's renewed effort to redefine "inadequate domestic supply" in the October 4, 2017 Notice of Data Availability (NODA) does not comply with the United States Court of Appeals for the District of Columbia Circuit's opinion in *Americans for Clean Energy v. EPA*. In that opinion, the Court held that, "...the 'inadequate domestic supply' waiver provision refers to the supply of renewable fuel available to refiners, blenders and importers to meet the statutory volume requirements."<sup>1</sup>

EPA's goal appears to be to reduce renewable fuel standard (RFS) volume requirements for the benefit of obligated parties, regardless of the intent of the RFS law and regardless of the Agency's legal waiver authority. NCGA believes the Court's decision requires that EPA must account for all biofuel available to obligated parties. It is not consistent with the law, or the Court's interpretation of the law, to account only for domestic biofuel production in evaluating inadequate domestic supply, as EPA considers in the NODA.

If a supply of renewable fuel is available to obligated parties for use in meeting the statutory volume requirement, then it stands to reason that EPA is also required to account for that fuel in determining domestic supply when setting annual volume requirements. In the NODA, EPA states that obligated parties would continue to be allowed to use imported biofuels to comply with annual percentage standards.<sup>2</sup> If EPA is proposing that qualifying imported biofuel may continue to be used to meet statutory volume requirements, then the Court's definition of the waiver provision requires that EPA also continue to consider qualifying imported biofuels in determining adequacy of supply.

NCGA believes EPA is once again trying to force an interpretation of the general waiver authority based on inadequate domestic supply that is simply inconsistent with the statute, the very issue that prompted the *Americans for Clean Energy* lawsuit. The D.C. Circuit's decision laid out the factors EPA is permitted to consider in determining supply to refiners, blenders and importers and factors EPA is not permitted to consider. The Court includes the amount of fuel available for import as a factor affecting the availability of renewable fuel.<sup>3</sup>

When setting annual volume requirements since Congress expanded the RFS, EPA has consistently evaluated potential imports as part of the process of assessing domestic biofuel supply, most recently in the proposed rule for 2018 volumes.

EPA's latest attempt to contort the supply waiver also relies on an interpretation of "supply" the Court has already stated is incorrect. The Court held that "supply" does not only include production capacity, and that the correct interpretation of supply also affords consideration to non-production factors.<sup>4</sup> As the Court concluded its analysis, "The correct reading of supply, therefore, does not conflate 'supply' with 'production'."<sup>5</sup>

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<sup>1</sup> *Americans for Clean Energy v. EPA*. No. 16-1005 (D.C. Cir., 2017)

<sup>2</sup> 82 Federal Register 46178

<sup>3</sup> *Americans for Clean Energy v. EPA*. No. 16-1005 (D.C. Cir., 2017)

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

In the NODA, EPA incorrectly conflates supply with production by proposing to only consider domestic biofuel production in determining supply. In order to determine domestic supply, EPA is required to consider more than only domestic biofuel production, and the Court's decision affirms that requirement.

NCGA disagrees with EPA's proposal to substitute "domestic production" for "domestic supply" in order to justify use of waiver authority to further reduce volumes, while at the same time allowing all supply - domestic and imports - to qualify for compliance. EPA's inconsistent application of domestic supply results in a net larger pool of gallons than can be used for compliance while also resulting in a net smaller pool of gallons required to be used. While that outcome may be the desired goal of commenters cited in the NODA, the proposed path to reach that outcome is simply not available under the law.

As the Court stated, "The RFS requires increasing volumes of renewable fuel to be introduced into the nation's transportation fuel market."<sup>6</sup> NCGA believes the renewable fuel volume requirements must be based on the amount of renewable fuel to be introduced into the nation's transportation fuel market during the compliance year, regardless of the source. EPA must consider all renewable fuel supply, not only domestic fuel production, in setting the volume standards and evaluating use of waiver authority.

EPA cannot justify allowing gallons to count toward RFS compliance if those gallons are not also counted in determining available supply, and the Agency cannot propose further reductions from current volumes under a law that requires volumes to rise. As the Court reminded the Agency in *Americans for Clean Energy*, "But the fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute."<sup>7</sup>

### **General Waiver Authority: Severe Economic Harm**

As described in the NODA, EPA is considering options to reduce renewable fuel volumes due to cost considerations and the possible impact of potential higher costs, particularly for biodiesel. If cost is the driving factor behind EPA's NODA, EPA's appropriate general waiver consideration, then, is an evaluation of severe economic harm, not an evaluation of inadequate domestic supply. As the Court stated, "To the extent that application of the statutory volume requirements may lead to negative economic effects, we note that such effects could be addressed through other provisions of the statute," specifically referencing the severe economic harm waiver.<sup>8</sup>

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<sup>6</sup> *Americans for Clean Energy v. EPA*. No. 16-1005 (D.C. Cir., 2017)

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

Like the Court, NCGA is, “not convinced that EPA’s strained interpretation of ‘inadequate domestic supply’ is necessary to avoid the parade of horrors that EPA identifies.”<sup>9</sup> Or more specifically, the “parade of horrors” that API, AFPM and Valero identify in their comments, since EPA frames the NODA as a response to comments received only from those three parties.

NCGA believes EPA’s interpretation of severe economic harm waiver authority made through denials of waiver petitions in 2008 and 2012 is entirely appropriate and consistent with the statute; EPA should continue to rely on this thorough and well-documented interpretation.

As NCGA concluded in our August 31, 2017 comments on the proposed volume requirement, we found no indication that the volume requirements for 2018 would cause severe economic or environmental harm, using EPA’s interpretation for such harm. NCGA believes the severe economic harm threshold is a high standard to meet, and rightly so.

EPA has consistently held that use of the waiver is authorized only when implementation of the RFS itself would severely harm the economy. When evaluating use of the waiver, it is not enough for EPA to determine that implementation of the RFS would *contribute* to economic harm. EPA’s interpretation of the statute has been that implementation of the RFS must be the *cause* of the economic harm.<sup>10</sup> As EPA stated in the 2012 petition denial, “Had Congress intended to authorize EPA to grant a waiver where RFS implementation is merely a contributing factor to severe economic harm, it could clearly have done so by using statutory language (similar to that in other laws).”<sup>11</sup> The statute requires causation; contribution is insufficient.

Further EPA has held that, “there must be a generally high degree of confidence that severe harm would occur from implementation of the RFS.”<sup>12</sup> Finding that economic harm is *likely* is not sufficient; EPA must find that RFS implementation *would* cause harm.

When EPA declined petitions to waive volume requirements in 2008 and 2012 based on economic harm, the agency noted that the question of severe harm is a high statutory threshold for granting a waiver. Comparing the continuum of degrees of harm in other areas of the Clean Air Act, EPA concluded that “severe” should be interpreted as a point that is “quite far along a continuum of harm, though short of extreme.”<sup>13</sup>

Important for consideration is that EPA has held that severe harm must affect more than one sector of the economy. In 2008 EPA stated that, “it would be unreasonable to base a waiver determination solely on consideration of impacts of the RFS program to one sector of an economy, without also considering the impacts of the RFS program on other sectors of the economy, or on other kinds of impact.”<sup>14</sup> EPA must also evaluate both the negative and positive impacts of the RFS when assessing total economic harm to a state, region or the nation.

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<sup>9</sup> *Americans for Clean Energy v. EPA*. No. 16-1005 (D.C. Cir., 2017)

<sup>10</sup> 77 Federal Register 70773

<sup>11</sup> 77 Federal Register 70773

<sup>12</sup> 73 Federal Register 47171

<sup>13</sup> 73 Federal Register 47172

<sup>14</sup> 77 Federal Register 70774

EPA undertook significant analysis in evaluating the 2008 and 2012 waiver petitions to determine whether the RFS would cause severe harm to the economy of a state, region or the nation. For example, EPA evaluated several options for economic models and selected a model used to compare the circumstances with and without a waiver in order to determine the impact of a waiver. The Agency presented the results of the economic modeling for various scenarios, demonstrating the data EPA considered. EPA asked two questions to make a final determination on severe economic harm. First, EPA asked whether there was a high degree of confidence that severe harm would occur from implementation of the RFS. Second, EPA considered the nature and degree of any harm to determine severity.

EPA has not provided any analysis that shows severe economic harm to a state, region or the nation in the NODA, nor has the Agency answered the questions used to make a final determination. In contrast, EPA is now merely asking for input on whether information exists to indicate that severe economic harm is occurring or would occur under future volume requirements. While one sector of the economy is claiming economic harm, EPA provides no evaluation considering impacts, negative or positive, of the RFS on other sectors of the economy or the economy as a whole. EPA presents no modeling to compare circumstances with and without a waiver. EPA offers no evaluation of the degree of confidence that implementation of the RFS would cause severe harm.

In evaluating the severe economic harm waiver with respect to biomass-based diesel (BBD), analysts with the University of Illinois Department of Agriculture and Consumer Economics found that the BBD volume requirement, under current conditions, would not likely rise to the level severe harm to the economy, adding about four percent to the cost of biodiesel.<sup>15</sup>

NCGA finds no information indicating that severe economic harm is occurring or would occur for any volumes established in the current rulemaking. If EPA implements this waiver authority consistent with the law and consistent with EPA's prior interpretation of the severe economic harm waiver, we believe EPA would find that implementation of the RFS would not cause severe economic harm.

## **Biomass-Based Diesel Waiver Authority**

With regard to use of the BBD waiver authority, NCGA believes it is inappropriate for EPA to implement the waiver by reducing the annual standard. EPA has provided no analysis of significant price increase currently resulting from renewable feedstock disruption or other market circumstances that warrants use of the waiver. Rather, EPA is seeking to pre-emptively

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<sup>15</sup> Coppess, J., and S. Irwin. "The Other General Waiver: RFS and Severe Economic Harm." *farmdoc daily* (7):187, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, October 12, 2017.

address possible outcomes of a pending international trade dispute and possible Congressional action regarding the tax credit that supports biodiesel blending.

Once again, EPA's goal with the NODA appears to be to reduce RFS volume requirements as much as possible, by any means possible, regardless of intent of Congress in passing the RFS law and regardless of the Agency's legal waiver authority.

While EPA states the price of biodiesel "may be expected" to be impacted by a pending trade enforcement decision, EPA cannot yet determine a significant price impact from the unknown outcome of a pending trade enforcement case.<sup>16</sup> The U.S. Department of Commerce and the U.S. International Trade Commission will not issue a final decision in this trade enforcement matter until December 29, 2017.

EPA is permitted to use the BBD waiver authority at any point during the compliance year; EPA does not need to use the waiver authority in the final volume rule. Rather than EPA projecting the outcomes of an unsettled tax policy question and a pending trade enforcement case, EPA should wait for these outcomes before evaluating the impacts. Should the resolution of these open tax and trade policy items result in a disruptive market circumstance, EPA retains the authority to revisit use of the BBD waiver authority at the appropriate time.

Further, the BBD waiver authority requires EPA to consult with both the U.S. Department of Agriculture and the U.S. Department of Energy. EPA presents no information in the NODA to demonstrate that this consultation has occurred or, if it has, no information on the outcome of this consultation.

NCGA believes it is inappropriate for EPA to waive a national standard based on possible outcomes of open and undecided policy items. EPA has not thoroughly evaluated whether a significant price increase would occur, nor can EPA do so until the tax policy and trade enforcement case are settled matters. Therefore, EPA has no justification to reduce the final 2018 BBD volume, much less further reduce the 2018 proposed advanced and total renewable fuel volumes by the same amount of such a reduction.

## **2019 Biomass-Based Diesel Volume**

NCGA is concerned that EPA, through this NODA, appears to give full deference to comments from API, AFPM and Valero on the appropriate volumes for advanced biofuels, BBD and total renewable fuel. EPA does not afford the same level of consideration to comments regarding appropriate volumes submitted by biofuel producers themselves, reducing the comments from the National Biodiesel Board to a single footnote. NCGA urges EPA to give full consideration to biofuel producers' comments on domestic production, feedstock availability and capacity.

EPA has proposed a BBD volume of 2.1 billion gallons for 2019, the same level as for 2018, despite the fact EPA projects BBD production and supply will be greater than the proposed

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<sup>16</sup> 82 Federal Register 46179

volume requirement. Because EPA believes the market will supply more fuel than the standard would require, NCGA believes EPA should propose to increase, rather than lower, the standard. Such an action follows the Court's interpretation of the RFS as requiring increasing volumes of renewable fuels be introduced into the nation's transportation fuel supply.

As outlined in NCGA's comments on the proposed rule, NCGA believes the low volumes proposed would adversely impact biodiesel at a time when ample feedstocks are available to support expanding the domestic biodiesel industry. For example, over the last several years, the majority of dry mill ethanol plants have made investments to allow for the extraction of a portion of corn oil from the distiller's dried grains (DDGs) that are a co-product of ethanol production. Any concerns about displacing what some consider food into the biodiesel market are misplaced, and these investments increase feedstock availability for biodiesel.

In the case of corn oil from DDGs, this product was never destined for the food market, and, in all but the rarest cases, is not considered "food grade" oil. Instead, extracting a portion of the corn oil in the ethanol production process increases the energy balance of corn. Removing some of the fat content of DDGs by extracting corn oil only changes the nutritional profile of this co-product, and, depending upon the livestock species fed, actually increases the digestibility and feed value of the DDGs.

EPA expresses concern that a higher BBD volume requirement may cause BBD to displace or compete with other advanced biofuels within the advanced standard. To alleviate this concern, the legal and better choice for EPA is to increase the advanced biofuel volume to allow sufficient space within the volume for both a higher BBD standard as well as for other advanced fuels.

Rather than increase the advanced biofuel volume to account for the greater BBD supply, EPA has proposed to reduce the 2018 advanced biofuel volume and is now considering further reductions in both BBD and advanced biofuel volumes in the NODA. Once again, EPA is proposing to implement the RFS in a manner that contradicts Congress' intent - and the Court's interpretation of the law - that the RFS requires increasing amounts of renewable fuels to be introduced into the nation's transportation fuel supply.

## **Treatment of Renewable Identification Numbers on Ethanol Exports**

Although not specifically addressed in the NODA, NCGA further recommends EPA pursue no change to the treatment of renewable identification numbers (RINs) on biofuel exports, a proposal raised in comments on the proposed volume rule and that EPA is reportedly considering. EPA's consistent RIN policy has been that RINs associated with export gallons are separated from the fuel and cannot be used to demonstrate compliance with the domestic RFS.

The 2005 law establishing the RFS and the 2007 law expanding it direct EPA to ensure “that transportation fuel sold or introduced into commerce in the United States...on an annual basis, contains at least the applicable volume of renewable fuel...determined in accordance with (statutory volumes).” RINs are used to demonstrate compliance with the applicable volumes.

Issuing the regulations implementing the 2005 law, EPA addressed export gallons, stating, “...the RIN associated with that gallon is not valid for RFS compliance purposes since the RFS program is intended to require a specific volume of renewable fuel to be consumed in the U.S. ...To ensure that renewable fuels exported from the U.S. cannot be used by an obligated party for RFS compliance purposes, the RINs associated with that exported renewable fuel must be removed from circulation.”<sup>17</sup>

EPA set up a system for separating and retiring those RINs in the regulation. In the regulation implementing the 2007 RFS2, EPA continued the same system for exports, making adjustments to account for the additional categories of renewable fuel in the law.

NCGA believes EPA’s current RIN policy is equitable for both U.S.-produced and imported renewable fuel. Ethanol exports are already growing and succeeding under the current system, reaching more than a billion gallons in 2016. The United States leads the world in ethanol exports due to price, rising global demand for ethanol and our reliable production.

Current barriers to U.S. ethanol exports – such as in Brazil, China and the EU – are due to tariffs and related barriers other countries have erected. The current RIN treatment of U.S. exports is not impeding exports. This proposed change in RIN policy would create an effective export subsidy on exported ethanol. The only outcomes from this policy change will be higher trade barriers from the countries that have already put them in place, new trade barriers from our other ethanol export customers, harmful retaliation and World Trade Organization challenges that will affect other U.S. exports.

NCGA understands obligated parties have concerns about stability in the RIN market. However, those concerns do not allow EPA to change current RIN policy in a way that violates the RFS statute and purpose, as this proposal would do. NCGA urges EPA and obligated parties to consider means of addressing RIN price stability that are legal, including expanding domestic blending and use of renewable fuels. As more renewable fuel is blended into the fuel supply, more liquidity is added to the RIN market. NCGA is open to further dialog with EPA and obligated parties on legal improvements to the RIN system, but EPA must not proceed with a proposal that would upend the expanding, successful and vital ethanol export market.

## **Concluding Recommendations for EPA**

- In order to follow the law and to comply with the D.C. Circuit Court’s recent interpretation of the law, NCGA urges EPA to not exercise any of the waiver authorities proposed in the NODA.

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<sup>17</sup> 72 Federal Register 23936

- While NCGA strongly believes EPA's proposed use of the inadequate domestic supply general waiver authority outlined in the NODA is incorrect and not justified, NCGA cannot overlook EPA's statement regarding the implied volume for conventional biofuels.<sup>18</sup> NCGA disagrees that the statute implies a cap on conventional biofuel. EPA is not required to make a commensurate reduction in total renewable fuel volumes upon reducing advanced biofuel volumes on the basis of inadequate domestic supply.
- Although not specifically addressed in the NODA, NCGA further recommends EPA pursue no change to the treatment of RINs on biofuel exports, a proposal raised in comments on the proposed volume rule and that EPA is reportedly considering. NCGA believes EPA's current RIN policy is equitable for both U.S.-produced and imported renewable fuel.

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<sup>18</sup> 82 Federal Register 46178