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VIA ELECTRONIC FILING  
September 23, 2019

U.S. Environmental Protection Agency  
EPA Docket Center  
Office of Transportation and Air Quality  
Mail Code 28221T  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

**Re: Section 610 Review of Renewable Fuel Standard Program, EPA-HQ-OAR-2019-0168**

Dear Director Dunham,

The National Biodiesel Board (NBB) appreciates the opportunity to comment on EPA's review of its 2010 regulation "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program" pursuant to section 610 of the Regulatory Flexibility Act.

The Regulatory Flexibility Act requires EPA to periodically review rules "to minimize any significant impact of the rule on a substantial number of small entities." 5 U.S.C. § 610. Almost ten years after the promulgation of EPA's initial regulations implementing the Renewable Fuel Standard (RFS) program, the RFS program continues to be essential for increasing production and use of clean, renewable fuels in the United States. EPA's RFS regulations have helped enhance our nation's energy security, reduce greenhouse gas emissions, and support U.S. farmers. And they have provided significant benefits for small entities, including both small biofuel producers and small farmers.

The biomass-based diesel ("BBD") industry in particular has been a success story of the RFS program. BBD production has repeatedly surpassed required volumes and currently comprises the vast majority of advanced biofuel production. Assisted in its development by the market incentive from both the biomass-based diesel volume and the advanced biofuel volume, the biomass-based diesel industry has grown to support more than 65,600 jobs throughout its supply chain.

The majority of BBD producers are small, independently owned businesses. These small biodiesel producers can be a giant driver of economic opportunity in rural communities. Specifically, BBD producers can provide significant benefits to small farming operations by creating demand for the surplus oils from commodity crops.

Unfortunately, a roadblock to this success has recently emerged. EPA's dramatic expansion in small-refinery exemptions from seven in 2015 to thirty-five in 2017 has taken a significant chunk out of the RFS and minimized its benefits. In 2017 alone, those exemptions reduced required volumes by 1.8 billion gallons. The impact has been especially acute for BBD producers. NBB estimates that the impacts of small-refinery exemptions on the advanced biofuel and BBD volumes alone have reduced BBD demand by about 240 million gallons in 2017 and 185 million gallons in 2018. And a recent analysis by Dr. Scott Irwin, which includes the potential lost demand for BBD as a result of a lower total



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renewable fuel volume, estimates even greater impacts. Dr. Irwin estimates that the collective impacts of small-refinery exemptions on the BBD, advanced biofuel, and total renewable fuel volumes have resulted in lowered demand for BBD by over *900 million gallons* in 2018 alone. See Scott Irwin, *Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction*, *Farmdoc Daily* (9): 45 (March 14, 2019).

As a result, EPA's small-refinery exemptions have harmed many small entities, including small BBD producers and small feedstock suppliers. Within a week of the decision to grant 31 waivers from the Renewable Fuel Standard (RFS) program, one U.S. biodiesel producer announced plans to close three plants – in Pennsylvania, Georgia, and Mississippi. Other producers have announced closings and laid off workers. More than 200 million gallons of domestic biodiesel production has been idled this year, due to instability in federal policy. We anticipate that additional facilities will close over the next several months if actions are not taken to restore RFS volumes for biodiesel and renewable diesel. This harm to small businesses is inconsistent with Congress's desire in the RFS statute to avoid harming small entities.

In contrast, the refiners EPA is ostensibly protecting through small refinery exemptions are not actually harmed by the RFS program because they can pass on the cost of RINs in the fuels they sell. EPA itself has repeatedly asserted as much in litigation. In *Alon Refining Krotz Springs v. EPA*, No. 16-1052 (D.C. Cir. 2019), the D.C. Circuit agreed with EPA that "refiners 'recover the cost of the RINs they purchase' by passing that cost along in the form of 'higher prices for the petroleum based fuels they produce.'" *Id.* at 33. In support of its assertions in that case, EPA presented multiple studies and data demonstrating that refiners "were recouping the costs associated with RIN prices." *Id.* at 34. Similarly, the D.C. Circuit agreed with EPA's argument in *AFPM v. EPA*, No. 17-1258 (D.C. Cir. 2019) that refiners were not experiencing "severe economic harm" because there was no "concrete evidence that their financial difficulties are caused primarily or even significantly by the RFS program." *Id.* at 28. EPA again explained that there was no reason "why [refiners] cannot recoup the cost of RINs through higher prices of their products." *Id.*

As part of its Section 610 review, EPA should consider its recent treatment of small-refinery exemptions as an "other factor" that has changed the impacts of its 2010 regulations. 5 U.S.C. § 610(b)(5). There are several ways EPA could fix the impacts caused by its expanded small-refinery exemptions. These options are discussed in further detail in NBB's comments on EPA's 2020 proposed rule. See NBB Comments on Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, Dkt No. EPA-HQ-OAR-2018-0167-0711. In short, EPA could take one or more of four types of actions:

1. **Change the Procedures for Granting Small-Refinery Exemptions.** To begin with, EPA can and must grant fewer small-refinery exemptions. Because EPA may only "extend" existing exemptions, 42 U.S.C. § 7545(o)(9)(A)(ii), EPA must deny all exemption applications for refiners who have not been exempt continuously since 2010. EPA should also ensure that all refineries granted exemptions actually experience "disproportionate economic hardship." Doing so requires engaging in a fair assessment of whether any hardship alleged by a refiner is truly disproportionate. In making that assessment, EPA must appropriately consider the analysis and



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recommendations of DOE. And EPA must consider its own findings, recently validated by the D.C. Circuit, that refiners “recover the cost of the RINs they purchase by passing that cost along in the form of higher prices.” *Alon Refining Krotz Springs v. EPA*, No. 16-1052 (D.C. Cir. 2019).

2. **Change the Timing of Small-Refinery Exemptions.** Another simple way to account for small refinery exemptions would be for EPA to ensure that it grants or denies all small-refinery exemptions for a calendar year before it issues the final RVO rule for that year. Doing so would allow all exemptions to be accounted for in EPA’s percentage standards under its existing formula in 40 C.F.R. § 80.1405. EPA could easily require refiners to apply for an exemption with sufficient time to allow EPA to reach a decision by November 30 each year.
3. **Include a Prediction of Retroactive Small-Refinery Exemptions.** If EPA continues to grant retroactive exemptions, it should include a good faith estimate of such exemptions in the percentage standards for the coming year. For example, EPA could set estimated values for GE (the amount of gasoline projected to be produced by exempt small refineries) and DE (the amount of diesel fuel projected to be produced by exempt small refineries) in EPA’s formula for the calculation of the annual percentage standards in 40 C.F.R. § 80.1405. EPA has plenty of information with which to make such a prediction, including small refiners’ statements of whether they will need an exemption in upcoming years. See 40 C.F.R. § 80.1441(e)(2)(i). At the very least, such a prediction would be significantly more accurate than EPA’s current approach that assumes zero exemptions will be granted despite all evidence to the contrary.
4. **Account for Retroactive Small-Refinery Exemptions in Future Years.** Finally, EPA can account for any unexpected retroactive exemptions by making them up in a future year’s RVO rule. The D.C. Circuit has repeatedly recognized that EPA must follow the requirements of the RFS statute even if it is late in doing so. See, e.g., *NPRA v. EPA*, 630 F.3d 145, 152 (D.C. Cir. 2010) (recognizing that EPA could establish 2009 standards as part of a 2010 rulemaking). Moreover, EPA has plenty of space with which to increase volumes for 2020. EPA has proposed to use its cellulosic waiver authority to lower the total and advanced volumes by over 10 billion gallons, though it is not required to do so. 42 U.S.C. § 7545 (o)(7)(D) (when EPA lowers the cellulosic volume, it “may also reduce the applicable volume of renewable fuel and advanced biofuels requirement ... by the same or a lesser volume.”) (emphasis added). If EPA does not address small-refinery exemptions through any other means, it must at a minimum use that authority to increase the required total and advanced biofuel volumes. Similarly, EPA must increase the BBD volume through its analysis under 42 U.S.C. § 7545(o)(2)(B)(ii).

EPA could address small-refinery exemptions through any of these options, or it could use a combination of them. And while some of these changes could be accomplished without any revisions to



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EPA's regulations, EPA should consider amending the small-refinery exemption provisions of its regulations at 40 C.F.R. § 80.1441 and its percentage standard formula in 40 C.F.R. § 80.1405.

EPA should maintain the current broad structure of the RFS program and set annual volumes that "increase the production of clean renewable fuels." Energy Independence and Security Act of 2007, Pub. L. 110-1140, 121 Stat. 1492 (Dec. 19, 2007). But it can and must fix the demand destruction caused by its small-refinery exemptions.

Again, the National Biodiesel Board appreciates the opportunity to comment on EPA's review of its 2010 regulation "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program" pursuant to section 610 of the Regulatory Flexibility Act.

Sincerely,

A handwritten signature in black ink that reads "Kurt A. Kovarik". The signature is written in a cursive, flowing style.

Kurt Kovarik  
Vice President, Federal Affairs  
National Biodiesel Board (NBB)