February 4, 2022

**VIA REGULATIONS.GOV**

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Re: Comments on the Environmental Protection Agency's Notice of Proposed Rulemaking, Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Docket No. EPA-HQ-OAR-2021-0324, 86 Fed. Reg. 72,436 (Dec. 21, 2021)**

To Whom It May Concern:

The following comments are being submitted on behalf of Coffeyville Resources Refining & Marketing, LLC ("CRRM") and Wynnewood Refining Company ("WRC") in response to the United States Environmental Protection Agency's (EPA or the Agency) proposed rule, Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Docket No. EPA-HQ-OAR-2021-0324, 86 Fed. Reg. 72,436 (Dec. 21, 2021) ("Proposed Rule"). CRRM owns a refinery in Kansas, WRC is a small refinery in Oklahoma, and both provide critical employment in rural areas. EPA's proposals to modify and establish the 2020-2022 volume requirements, disclose refineries' confidential information, and make other changes as described below will directly impact CRRM and WRC. CRRM and WRC offer the following comments on EPA's Proposed Rule.

## I. CRRM and WRC oppose the proposed volume requirements for 2020, 2021, and 2022.

EPA proposes to: (1) reduce the previously finalized 2020 volume requirements to equal the amount that was actually blended or consumed during that compliance year; (2) set the 2021 volume requirements to the amount that was actually blended or consumed during compliance year 2021; and (3) substantially increase the 2022 volume requirements compared to those for 2021. For the reasons described below, CRRM and WRC oppose these changes.

The final volume requirements for the 2020-2022 compliance years are particularly critical for WRC because EPA simultaneously has proposed to deny all pending petitions for small refinery hardship relief for the 2019-2021 compliance years. The Proposed Denial of all pending small refinery hardship petitions was published on December 14, 2021, just one week

prior to the Proposed Rule. Several weeks after the publication of the Proposed Denial, in response to requests from counsel, [redacted].[1]

Further, in the Proposed Denial, which was published on December 14, 2021, EPA based its decision, in part, on its determination that "RINs are widely available in an open and liquid market."[2] Yet one week later, EPA published the Proposed Rule in which it concluded the opposite—that it is necessary to lower the volume requirements for 2020 and 2021, that there is a shortfall in RIN generation in 2019, and that there is uneven holding of carryover RINs among obligated parties.[3]

Thus, although EPA was advised by DOE that small refineries were at risk of shutdown and bankruptcy, EPA independently recognized that small refineries have not yet complied for 2019, and EPA knew that RINs are not "widely available in an open and liquid market," EPA arbitrarily failed to consider lowering the volume mandates for 2019 and did not lower the 2020 and 2021 volumes enough to create the "open and liquid" RIN market that is needed for the proper functioning of the RFS program as a whole. EPA has repeatedly affirmed that a properly functioning RIN market is fundamental to the success of the RFS program,[4] and the RIN market is not functioning properly.

### A. EPA's failure to adequately lower the 2020 and 2021 volume requirements or lower the 2019 volume requirements is arbitrary and capricious.

While EPA has proposed to lower the volume requirements for 2020 and 2021, the proposed volume reductions are inadequate because RINs are not available to all obligated parties. In the Proposed Rule, EPA acknowledged that there is a projected shortfall in RIN generation in 2019 and "uneven holding of carryover RINs among obligated parties," but it did not propose to lower the 2019 volumes or acknowledge how the expected 2019 shortfall could impact small refineries that have not yet complied for 2019.[5] Instead, EPA proposed to lower the 2020 and 2021 volumes. Small refineries may use 2019-vintage RINs for 2019 compliance, and all refineries may use 2019-vintage RINs for up to 20% of their RVOs for 2020.[6] When EPA

[1] *See* Tab A [redacted]
[2] Proposal to Deny Petitions for Small Refinery Exemptions at 26, Docket ID No. EPA–HQ–OAR–2021–0566 (Dec. 2021), https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions ("Proposed Denial").
[3] Proposed Rule at 72,455.
[4] 85 Fed. Reg. 7016, 7021-22 (Feb. 6, 2020); see also 80 Fed. Reg. at 77,482–87; 81 Fed. Reg. 89,746, 89,754–55 (Dec. 12, 2016); 82 Fed. Reg. 58,486, 58,493–95 (Dec. 12, 2017); 83 Fed. Reg. 63,704, 63,708–10 (Dec. 11, 2018).
[5] Proposed Rule at 72,455.
[6] 72 Fed. Reg. 23,900, 23,909 (May 1, 2007) (codified at 40 C.F.R. pt. 80). EPA extended the 2019 compliance deadline for small refineries but did not also extend the deadline for other obligated parties, which was March 31, 2020. 86 Fed. Reg. 17,073 (Apr. 1, 2021).

announced its plans to lower the 2020 and 2021 volume requirements to increase liquidity in the RIN market, RIN prices dipped but then quickly recovered to their prior levels, indicating that the volume reductions for 2020 and 2021 were insufficient to relieve pressure in the RIN market.

EPA's decision on the volume requirements has two consequences. First, some small refineries will not be able to achieve compliance in 2019 and will be forced to carryover a deficit into 2020.[7] Second, small refineries and CRRM will continue to struggle to locate RINs for 2020 compliance because large refineries are holding those as carryover RINs for 2020 compliance. For example, CRRM has been unable to acquire sufficient D4s RINs for 2020 compliance. Said differently, although EPA recognizes that 2019-vintage RINs are scarce and not in the hands of small refineries that need them for 2019 compliance, EPA has not proposed to lower the 2019 volumes to relieve the pressure on small refineries, and the 2020 and 2021 reductions were inadequate to change the status quo because they caused large refineries to hold on to their carryover RINs for 2020 compliance. The harm will be compounded by the fact that the compliance deadlines, which were published on February 2, 2022, are now stacked one on top of the next.[8]

EPA's failure to lower the 2019 volumes or adequately lower the 2020 and 2021 volumes is arbitrary and capricious. Agency action is arbitrary and capricious if the agency fails to consider an important aspect of the problem.[9] Here, EPA identified "significant deficit carryovers and potential non-compliance by some obligated parties" as a potential problem.[10] But EPA failed to consider an important aspect of that problem. Specifically, EPA's decision not to lower the 2019 volumes or adequately lower the 2020 and 2021 volumes leaves small refineries and some other parties stranded as captive buyers in an illiquid and expensive RIN market, making it difficult for some parties and impossible for some small refineries to comply, as discussed above. Thus, the problem remains.

To avoid harm to RIN-short obligated parties, ensure an open and liquid RIN market, and protect consumers from over-priced fuel, EPA must either grant hardship relief to small refineries consistent with DOE's scoring, lower the 2019 volumes, and/or further reduce the 2020 and 2021 volumes to ensure an adequate RIN bank. The extraordinary price of RINs, the inability of obligated parties to secure them, and the hoarding of RINs are all signs that the RIN bank is inadequate. In light of the current market conditions and the risk to small refineries, the conventional biofuel (D6) portion of the RIN bank should be 20% of the de facto conventional biofuel volume requirements, or 3 billion RINs; not the 1.85 billion expected after 2019

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[7] 72 Fed. Reg. 23,900, 23,904, 23,909, 23,935 (May 1, 2007).
[8] Renewable Fuel Standard (RFS) Program: Extension of Compliance and Attest Engagement Reporting Deadlines, 87 Fed. Reg. 5696 (Feb. 2, 2022).
[9] *Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983); *Gresham v. Azar*, 950 F.3d 93, 99 (D.C. Cir. 2020).
[10] Proposed Rule at 72,455.

compliance.[11] As EPA recognized, "the carryover RIN bank" is an "important compliance flexibility for obligated parties,"[12] and the bank must have sufficient RINs to be effective.[13] As EPA stated, "[b]ecause carryover RINs are individually and unequally held by market participants, a small RIN bank may negatively impact the RIN market even where the market overall could satisfy the standards. Consequently, were the market disruptions to occur with an insufficient carryover RIN bank, it could force the need for a new waiver of the standards, undermining the market certainty so critical to the RFS program."[14] Without an adequate RIN bank, obligated parties with the market power to do so hold on to carryover RINs, creating a perceived or real shortfall, higher prices, and unnecessary harm to RIN-short obligated parties.

### B. CRRM and WRC oppose the 2022 volume requirements for the same reasons as the American Fuel & Petrochemical Manufacturers.

EPA acknowledges the 2022 conventional biofuel requirement is unachievable with ethanol and that the RFS has failed to appropriately incentivize mid-level ethanol blends needed to move the nation past the blendwall. It is also likely to result in persistently high RIN prices. Under EPA's own RIN-bank calculations, the proposed 2022 conventional biofuel standard would essentially (1) eliminate the RIN bank by the end of next year and (2) require massive quantities of foreign biofuel imports and domestic bio and renewable diesel production to meet the highest projections for next year.[15] High RIN prices threaten refining jobs and raise consumer fuel costs when Americans are already struggling with inflation, without increasing the amount of ethanol in the fuel supply. This violates EPA's responsibility to consider cost to the consumer when using its "reset" authority, as the Agency did in the proposed RVO. As a result,

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[11] EPA expects the RIN bank to reach 1.85 billion after 2019 compliance. EPA uses actual blended or consumed amounts for its proposed 2020 and 2021 volume requirements, which does not add to the bank. EPA then uses 15 billion gallons as the 2022 volume requirement, which is 1.2 billion more than EPA says will be created (138 billion gallons gasoline demand equals 13.8 billion gallons ethanol at E10). The market will need to pull that 1.2 billion from the RIN bank, leaving only 650 million at the end of 2022. Since in a flat standard, RINs will run out in 2023, RIN-long parties could withhold those RINs out of fear none will exist.

To avoid this problem, EPA must create liquidity. Since the law allows for a 20% carryover, EPA should ensure that the RIN bank is at least 20% of the volume requirement. Because EPA chose 15 billion gallons, EPA must ensure that the RIN bank has 20% of 15 billion, or 3 billion, RINs. Otherwise, EPA encourages parties to withhold RIN supply out of fear they will run out.

EPA must also keep the 2022 volume requirement at or below the blendwall so that the 3 billion RINs do not get drawn down.

[12] Proposed Rule at 72,455.

[13] Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, EPA–HQ–OAR–2019–0136, 85 Fed. Reg. 7016, 7021 n.22 (Feb. 6, 2020) (codified at 40 C.F.R. parts 79 and 80).

[14] Proposed Rule at 72,454.

[15] EPA recognized that if only 630 million RINs, or less than 4% of the proposed total renewable fuels standards, were available for compliance, that "would be the lowest quantity of carryover RINs available since EPA began projecting the size of the carryover RIN bank in 2013" and would create the potential for significant market disruptions. *Id.* at 72,457.

EPA's 2022 proposal contradicts the agency's own evidence and procedures and is arbitrary and capricious.

## II. CRRM and WRC oppose removing the attest requirements for parties transacting 10,000 or fewer RINs.

Under the RFS regulations, parties that transact or hold RINs must submit an annual "attest engagement."[16] During this process, an auditor with certain professional qualifications must verify the accuracy of the party's RIN transaction and RIN activity reports and report any deviations to EPA.[17]

EPA proposes to exempt parties that transact 10,000 or fewer RINs from the annual attest engagement requirements because of the expense.[18] To qualify for the exemption, the party would have to register as a "RIN owner only" and not be engaged in any other role (e.g., obligated party, exporter of renewable fuel, renewable fuel producer, renewable fuel importer, etc.).[19]

CRRM and WRC oppose EPA's proposal to exempt "RIN owners only" from the annual attest engagement requirements. EPA failed to act on numerous recommendations in the proposed rule entitled "Renewable Fuel Standard Program: Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations," to protect obligated parties from hoarding, manipulation, speculation, and fraud in the RIN market.[20] Attest is a protection against RIN fraud and no regulatory purpose is served by lessening the protections for captive participants in the RIN market. There is no reason to save "RIN owners only," market speculators that are not even in the RFS program, from the expense of attest engagements. They should not be in the market in the first place but if they are going to be in the market, they should be subject to the same rules as other market participants.

## III. CRRM and WRC oppose EPA's proposal to disclose companies' confidential business information.

EPA proposes to disclose certain information in enforcement actions and invalid RIN determinations, including the company name and identification number, the total quantity of fuel and parameter, information relating to the generation, transfer, or use of credits or RINs, and the total quantity of RINs in question.[21] CRRM and WRC oppose EPA's proposal to disclose certain

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[16] 40 C.F.R. § 80.1464(c).
[17] *Id.*; *id.* § 1090.1800; *id.* § 80.1451(c).
[18] Proposed Rule at 72,476.
[19] *Id.*
[20] Docket ID No. EPA–HQ–OAR–2018–0775, 84 Fed. Reg. 10,584 (proposed Mar. 21, 2019).
[21] Proposed Rule at 72,477.

information in enforcement actions and invalid RIN determinations for the same reasons as the American Fuel & Petrochemical Manufacturers.

EPA also proposes to disclose information contained in small refinery petitions and exemptions, including the submitter's name, the name and location of the facility, the date the request was transmitted to EPA, any EPA-issued company or facility identification numbers associated with the request, the general nature or purpose of the request, the relevant time period for the request, the extent to which EPA either granted or denied the request, and any relevant terms and conditions.[22]

### A. WRC opposes EPA's proposal to disclose small refineries' confidential business information.

WRC opposes EPA's proposal to disclose the confidential business information ("CBI") of small refineries. The information EPA proposes to make public will abandon small refineries in their longstanding defense of sensitive commercial and financial information and, in turn, expose them as individual targets in a politically charged debate by those opposing small refinery hardship relief.

EPA acknowledges that it is "proposing regulations that would facilitate [the Agency's] processing of claims that requests for information submitted under 40 CFR part 80, subpart M, should be withheld from the public under Exemption (b)(4) of the FOIA, 5 U.S.C. 552(b)(4), as CBI."[23] With this admission, EPA appears to be citing "convenience" as justification for abandoning its long-standing process for assessing the CBI claims of small refinery hardship petitioners under the regulations. The likely subtext for EPA's proposal is its participation in protracted litigation with biofuels groups, opponents of hardship relief, that have sought the confidential information of small refinery hardship petitioners.[24] In order to process the expansive FOIA requests of biofuels groups, EPA has assessed the substantiations of scores of small refinery hardship petitioners in accordance with the regulations and *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). This was a time and resource intensive exercise for both the small refineries asked to defend their CBI claims and EPA.[25] Despite EPA's increased workload, it managed the CBI review process. The Agency ultimately (1) reached an agreement with the biofuels plaintiffs to narrow the scope of the document production and streamline the CBI review process; and (2) completed methodical assessments of small refinery

[22] *Id.* at 72,477-78.
[23] *Id.* at 72,477.
[24] *Renewable Fuels Ass'n v. U.S. Env't Prot. Agency*, No. 18-cv-02031 (D.D.C.) ["FOIA case"].
[25] *See* Joint Status Report at 2, FOIA case, No. 18-cv-02031 (D.D.C. Nov. 1, 2021) (describing the manhours and administrative resources necessary for EPA to process the CBI review of responsive records).

petitioners' CBI substantiations. More critically, EPA defended the very same CBI data points as worthy of FOIA Exemption 4 withholding that it now proposes to broadly disseminate.[26]

Administrative burden is not a sufficient justification for EPA's proposal. In fact, EPA's litigation experience with the biofuels groups shines a light on the politically charged nature of small refinery hardship and the motivation of hardship opponents to expose the CBI of small refinery petitioners, including the identity of companies who hold confidential the fact of its hardship application.

EPA claims its proposal is appropriate because it provides the public with information regarding entities seeking exemptions under part 80.[27] In EPA's own words, arguments for exposing small refinery hardship CBI in the name of transparency fall flat:

> EPA SRE decisions are not withheld from the public, nor is the methodology behind the decisions withheld. The only thing that is withheld from public release is certain commercial and financial information submitted to the government by a refinery who treats the information as confidential, which renders it exempt from disclosure under FOIA. In short, the law is public, but some refinery identities are not. Congress did not create exceptions to the application of Exemption 4, and EPA's regulations do not permit the unilateral dissemination of information that has otherwise properly been determined by the Agency to constitute CBI. When an affected business – in compliance with all statutory, regulatory, and jurisprudential requirements – asserts a confidentiality claim over commercial information that they submitted to the government, and where that affected business "actually" and "customarily" treats that information as private, the information meets the requirements of FOIA Exemption 4 and must be withheld.[28]

The Agency is applying the Department of Justice guidance implementing the *Argus Leader* opinion to achieve a preferred administrative result.[29] But just because EPA can provide notice that it no longer intends to hold information confidential, that does not mean EPA's justification for doing so is sound. The DOJ guidance advises agencies to employ "sound administrative practice" in their determination of whether they provided an express or implied

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[26] Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, *Renewable Fuels Ass'n*., No. 18-cv-02031 (Dec. 15, 2020), ECF No. 58.
[27] Proposed Rule at 72,478.
[28] Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, *Renewable Fuels Ass'n*., No. 18-cv-02031, at 37–38 (Dec. 15, 2020), ECF No. 58.
[29] Proposed Rule at 72,477.

assurance of confidentiality to submitters.[30] It does not suggest that agencies should mechanically remove entire categories of information from CBI protection, including categories historically treated as confidential by EPA. EPA's proposal will have dramatic consequences for those small refineries that hold confidential their status as a hardship petitioner and/or relief recipient. The mere fact of a company's petition for regulatory relief, if disclosed to the public, would have tremendously negative effects on the company's competitive position. Disclosure of a company's need for regulatory relief could cause its competitors, partners, customers, and others to question its viability and, as a result, cause the company to suffer competitive harm.

EPA should continue to assess small refinery CBI in accordance with the regulations and *Argus Leader*.

## IV. CRRM and WRC oppose EPA's Proposed Rule because EPA did not comply with Executive Order 12898.

Executive Order 12898,[31] which establishes executive policy on environmental justice, requires EPA to identify and address any "disproportionately high and adverse human health or environmental effects of [its]" policies "on minority populations and low-income populations in the United States."[32] EPA claims that it aims to answer whether "there [is] evidence of potential E[nvironmental] J[ustice] concerns for the regulatory option under consideration," such as how the "pollutant(s) and their effects [are] distributed for the regulatory options under consideration."[33]

As discussed *supra* Part I.A, EPA's 2019 volume requirements and proposed volume requirements for 2020 through 2022 will leave WRC and CRRM stranded as captive buyers in an illiquid and expensive RIN market and make it impossible for WRC to comply. [redacted][34] The icing on the cake is EPA's contemporaneous announcement that it plans to deny all pending small refinery hardship petitions, including WRC's.[35]

These market realities should have prompted EPA to consider the environmental impact of the potential shutdown of WRC and other small refineries as a result of the Proposed Rule and

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[30] *Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media*, Office of Information Policy, U.S. DOJ, (October 4, 2019), https://www.justice.gov/oip/ exemption-4-after-supreme-courts-ruling-foodmarketing-institute-v-argus-leader-media.
[31] 59 Fed. Reg. 7,629 (Feb.16, 1994).
[32] Proposed Rule at 72,440.
[33] *Id.*
[34] *See* Tab A.
[35] *See* Proposed Denial.

the likelihood that the reduced production would be made up through expansions at existing, large refineries.

Despite the requirements of Executive Order 12898,[36] EPA fails to "identify or address" the fact that small refinery closures (or even reductions in capacity) caused by the Proposed Rule could have an adverse environmental impact on environmental justice communities because small refineries have a smaller environmental footprint and less impact on their surrounding communities than large integrated refineries. For example, reports show that fenceline concentrations of benzene are higher at large refineries.[37] Over 92% of the refineries with fenceline benzene concentrations exceeding EPA's "action level" in 2020 were large refineries. "More than 530,000 people live within three miles of these ['action level'] refineries, with 57 percent being people of color and 43 percent living below the poverty line …."[38]

In sum, EPA did not comply with Executive Order 12898.

## V. EPA must delay the finalization of the Proposed Rule until it complies with the Endangered Species Act.

EPA must delay finalizing the Proposed Rule until it has made the required determinations and consultations under the Endangered Species Act.[39] Under the Endangered Species Act, EPA must first make an "effects determination," which means it "must assess whether a proposed action 'may affect' listed species or critical habitat."[40] If so, EPA must formally consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the "Services").[41] If the EPA makes a "no effect" determination by finding that its proposed action "will not affect any listed species or critical habitat," and the relevant Services concur in writing, then EPA need not consult formally with the Services.[42] The D.C. Circuit held that EPA must finish this process before issuing a final RFS volumes rule.[43]

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[36] *Id.* at 72,484 ("Due to time constraints and uncertainty about where impacts are likely to occur, EPA is able to evaluate only qualitatively the extent to which this action may result in disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples ….").
[37] *E.g.*, Environmental Justice and Refinery Pollution: Benzene Monitoring Around Oil Refineries Showed More Communities at Risk in 2020, at 4, Env't Integrity Proj. (Apr. 28, 2021), https://environmentalintegrity.org/wp-content/uploads/2021/04/Benzene-report-4.28.21.pdf.
[38] *Id.* at 3.
[39] *Am. Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019) ("*AFPM*"); *see Growth Energy v. EPA*, 5 F.4th 1, 32 (D.C. Cir. 2021).
[40] *AFPM*, 937 F.3d at 597 (quoting 50 C.F.R. § 402.14(a)).
[41] *Id.*
[42] *Id.*
[43] *Id.* at 597-98.

EPA acknowledged that it must consult with the Services and has not yet done so.[44] In fact, EPA has not even finished the initial step of the required process.[45] EPA cannot finalize the rule until it completes the consultation process.

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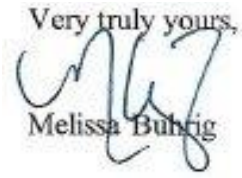
Thank you for the opportunity to provide these comments.




**Coffeyville Resources Refining & Marketing, LLC**
**Wynnewood Refining Company, LLC**

cc: LeAnn Johnson Koch, Perkins Coie LLP
Jonathan Hardin, Perkins Coie LLP
Alexandra Magill Bromer, Perkins Coie LLP

[44] Proposed Rule at 72,441-42 ("EPA intends to initiate consultation, as appropriate, with the Services regarding this proposed rule. At this time, EPA is evaluating whether any federally listed threatened or endangered species or their critical habitat are likely to be adversely affected by the finalization of this rulemaking.").
[45] *Id.*

# Tab A

# Confidential Business Information

**(provided to EPA—not for public disclosure)**