March 5, 2024

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

RE: Response to Coffeyville Resources Refining & Marketing, LLC and Wynnewood Refining Company, LLC's Petition to initiate Rulemaking Concerning the Renewable Fuel Standard's Credit Trading Program

Dear Administrator Regan,

The undersigned organizations, representing the nation's leading biofuel producers, fuel distribution and retail companies, and farmers, write in response to the petition submitted to the Environmental Protection Agency ("EPA") by Coffeyville Resources Refining & Marketing, LLC and Wynnewood Refining Company, LLC ("Petitioners") to initiate a new rulemaking to change the regulations in 40 C.F.R Part 80 Subpart M governing participants in the market for Renewable Identification Numbers ("RINs") under the Renewable Fuel Standard ("RFS").

EPA should promptly reject the Petitioners' request for several reasons. First, the Petitioners' request is untimely, as the rules targeted by the petition were issued more than a decade ago. No new circumstances have arisen that would give rise to EPA reviewing these regulations, and EPA has taken no actions to reopen the rulemaking process on its own. Second, the Petitioners' contorted reading of the RFS's enabling statutory provisions is devoid of context and ignores the broad discretion Congress granted EPA to create an efficient trading program for renewable fuel credits. Third, the Petitioners' desired structure of the RIN market (i.e., where only obligated parties who have over-complied with their volume obligations could generate RINs and only obligated parties could buy and sell RINs) is contrary to the RFS's policy objectives, untenable in practice, and legally unmoored from any objective reading of the enabling statute. Fourth, recent court rulings regarding eligibility for small refinery exemptions under the RFS have nothing to do with the structure of the RIN market, and therefore provide no basis for revisiting EPA's long-standing regulatory framework for generating and transferring RINs under the RFS. Finally, the Petitioners' desired outcome would raise fuel prices by eliminating fuel retailers' ability to use RINs to lower their costs of goods sold, as they do today.

The existing RIN market structure, which has been in place since EPA finalized "RFS2" regulations nearly 14 years ago, has worked effectively and efficiently to facilitate compliance with annual renewable volume obligations. The current system, which allows registered entities other than obligated parties to buy and sell RIN credits, enables RINs to function as efficient price signals to the market regarding the value of incorporating renewable fuels into the fuel supply.

Limiting the number of entities who can own RINs as Petitioners request would result in a wide gap between bids and offers for RINs; the market clearing (equilibrium) price will be much higher or lower than it would be in a more liquid, efficient marketplace. RIN markets would be far more volatile, with highly concentrated market power in the hands of just a few market participants. It would make it impossible to hedge, particularly for small hedgers and non-integrated hedgers. This would hurt every market participant, including consumers, in the form of higher prices at the pump.

Unlike other compliance credit programs that Petitioners cite, RINs are an integral part of the economics around all aspects of the gasoline and diesel value chains. Refiners and importers rely upon renewable fuel producers to generate RINs, and traders and marketers (terminal operators, wholesalers, distributors, retailers) all incorporate RINs into their commercial practices. This must continue to include the exchange of separated RINs by and between any of these parties.

In short, the Petitioners' requested RIN market structure would have the exact opposite effect of what they are purportedly seeking. To the extent the Petition needs to be addressed at all, it should be rejected.

1. The Petitioners' Request is Untimely.

The Clean Air Act provides that petitions for review must be filed "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise."[1] A petition for review of an EPA action under the Clean Air Act filed after the requisite sixty-day post-publishing period is timely only in one of three circumstances: (1) the petition is based "solely on grounds arising after" the 60 day period; (2) the petition establishes that post-rulemaking events have fatally undermined the original jurisdiction for the rule; or (3) the petition establishes that EPA has reopened the proceedings.[2]

The Petitioners' request comes long after the 60-day window lapsed following the publication of EPA's regulatory framework for RIN generation under the RFS in the Federal Register. Indeed, EPA's regulation establishing the RIN program was published more than 16 years ago—on May 1, 2007.[3] Further, the final regulation for the RFS2 program, which made certain changes to the RIN program, was published nearly 14 years ago—on March 26, 2010.[4] These foundational regulations squarely addressed all the ailments that the refineries now attempt to resurrect:

- "While recognizing that limiting trading to and between obligated parties might help obligated parties to maintain control of those RINs being traded, such an approach could have the unintended effect of limiting the number of RINs that non-obligated parties

[1] 42 U.S.C. § 7607.
[2] *See Pub. Emps. for Env't Resp. v. EPA*, 77 F.4th 899, 910–11 (D.C. Cir. 2023).
[3] *See* 72 Fed. Reg. 23,900 (May 1, 2007).
[4] *See* 75 Fed. Reg. 14,670 (March 26, 2010).

contribute to the RIN market. The RFS program must work efficiently not only for a limited number of obligated parties, but for a number of non-obligated parties as well."[5]

- "There was disagreement among commenters about whether an open RIN market was appropriate. … [S]ome commenters … argu[ed] … that an open market does not necessarily make the market any more fluid and freer. They pointed to past credit programs in which only refiners and importers have been allowed to transfer credits, and argued that the success of those programs should compel the Agency to use those past credit program structures as the model for the RFS program. We continue to believe that there is a need to provide for more open trading in the RFS program and that this need warrants a unique approach for this rule."[6]

- "Some commenters argued that limiting the RIN trading market to and among obligated parties would make the program more enforceable, since there would be fewer parties to track, and the sources of RINs would be more reliable. While this may be directionally true, we believe the RFS program will remain sufficiently enforceable under an open RIN market, and as discussed above, the greater need for market fluidity for this program warrants the change."[7]

- "Some commenters were concerned that an open RIN market could lead to price volatility and potentially higher prices as non-obligated speculators enter the market expressly to profit from the sale of RINs. ... However, by expanding the number of parties that can hold RINs, we minimize the potential for any one party to exercise market power, and thus we do not believe that such activity on the part of speculators is likely to substantively affect the availability of RINs or their price. Moreover, we do not believe that a given party will hold a RIN indefinitely simply to increase profit because RINs have a limited life and new RINs will be generated and will enter the market continuously."[8]

In addition, EPA carefully considered—and ultimately denied—multiple requests from oil refining companies in 2016 and 2017 to initiate a rulemaking to change the RFS "point of obligation."[9] Those requests, which were rejected by EPA after a robust process to solicit input from affected stakeholders, raised several of the same tenuous arguments as the present petition.

Further, Petitioners meet none of the requirements for any of the three possible grounds for seeking review after the 60-day limit. Although the Petitioners reference several recent events to suggest they should lead EPA to amend its 2007 and 2010 regulations, none of these events give rise to circumstances that would require EPA to amend its regulations.

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[5] *See* 72 Fed. Reg. at 23,944.
[6] *Id.* at 23,944.
[7] *Id.*
[8] *Id.*
[9] See 82 Fed. Reg. 56,779 (November 30, 2017).

1. First, the petition for review is not based "solely on grounds arising after the 60-day period." Those grounds all center around EPA's choice to allow non-obligated parties to generate RINs. But this issue was specifically raised and resolved in the 2007 regulations, as published in the Federal Register. Nor is it new grounds for the Petitioners to mention an audit performed by EPA's Office of Inspector General (OIG) regarding the sufficiency of RIN market controls in EPA's Moderated Transaction System (EMTS) and Quality Assurance Program (QAP); the manner in which EPA monitors RIN market activity has no bearing on who is eligible to participate in that market and under what circumstances.

   The Petitioners' desperate search for "new grounds" includes a recent decision in the U.S. Court of Appeals for the Fifth Circuit in *Calumet Shreveport Refining v. EPA,*[10] which addressed an entirely separate issue—whether EPA had appropriately determined that small refineries had not suffered disproportionate economic hardship and thus did not qualify for exemptions from compliance with their RFS obligations. The case did not concern—and the court did not opine on—which parties should be allowed to own RINs, or even the functioning of the RIN market more generally. Whether refiners completely pass through their RIN costs to customers—which the court did opine on—has no relevance whatsoever to the question of which parties should be allowed to buy and sell RINs. Moreover, when the Petitioners tried to raise similar programmatic arguments in *Alon Refining Krotz Springs v. EPA*, the D.C. Circuit rejected them.[11]

2. There are no post-rulemaking facts that have undermined the agency's authority to issue those foundational regulations in 2007 and 2010. Although the Petitioners allege that EPA's promulgation of the volumes for 2023-2025 ("Set Rule") somehow changed the agency's authority to issue regulations governing the RIN market, Congress's delegation to EPA to set volumes beginning in the year 2023 and beyond further reaffirms the deference Congress afforded EPA on the highly technical issues governing the structure and operability of the RIN market. Accordingly, the Petitioners have not established that post-rulemaking facts have undermined the original jurisdiction for the rule.[12] Second, while the Petitioners contest the adequacy of EPA's analysis of the RIN market in the Set Rule, EPA's Regulatory Impact Analysis accompanying the rule included an extensive section on "RIN System and Prices," and concluded: "We have monitored RIN prices as a proxy for RIN market functioning, and given current RIN prices, we continue to believe the RIN market is liquid and fungible."[13]

3. Third, EPA has not taken any action to reopen the regulations at issue. To determine whether an agency has reopened a proceeding, a court will examine the "entire context of

[10] *See Calumet Shreveport Ref., L.L.C. v. EPA*, 86 F.4th 1121, 1127 (5th Cir. Nov. 22, 2023).

[11] *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 649 (D.C. Cir. 2019) ("At the root of Petitioners' claim is a single premise: that the current point of obligation misaligns incentives by requiring those who refine fossil fuel, but not those who blend it, to meet the RFS program's annual standards…the problem with this argument, however, is that EPA reasonably explained why, in its view, there is no misalignment in the RFS program").

[12] It is worth noting that Petitioners failed to file a petition for review of the Set Rule within the requisite 60-day period. EPA published the final Set Rule in the Federal Register on August 3, 2023. 88 Fed. Reg. 51,239 (Aug. 3, 2023). Petitioners made their request to EPA on December 28, 2023, more than 100 days later.

[13] 88 Fed. Reg. 44,468, 44,495 (July 12, 2023).

the proceeding, including all relevant proposals and reactions of the agency, indicat[ing] that the agency has undertaken a serious substantive reconsideration of the existing rule."[14] EPA has done nothing of the sort, and in fact has been staying the course on the RFS's implementing regulations for more than 15 years. In a circular and contorted argument, the Petitioners suggest that EPA has implicitly reopened the regulations because EPA promised in the RFS2 final rule to reconsider its regulations "if the RIN market is not operating as intended," and, in the Petitioners' clouded judgment, the RIN market is not properly functioning.[15] In reality, the RIN market is functioning as intended for all of its participants. The RIN system has inarguably enabled market participants to achieve the purpose of the RFS. It has bolstered energy security by reducing demand for petroleum imports; reduced greenhouse gas emissions by replacing petroleum with low-carbon, renewable alternatives; lowered fuel prices for American consumers; and created jobs and spurred economic development across the country.

Petitioners' request is little more than an effort to use a petition for rulemaking under 5 U.S.C. § 553(e) as a means of circumventing the Clean Air Act's statutorily prescribed time frame for challenging RFS-related regulations.[16] The Petitioners had every opportunity to make these arguments within the statutorily prescribed time frame, but either failed to do so, or had the arguments rejected by EPA. In either case, their hindsight reevaluation years later does not justify a new regulatory framework for the RFS that would significantly destabilize the RIN market.

2. <u>The Petitioners' Reading of the RFS's Enabling Statutory Provisions is Devoid of Context.</u>

The Petitioners' central premise behind their request to reopen the RFS regulatory framework is that "[t]he Clean Air Act and the RFS adopted thereunder directed EPA to develop a credit program in which RINs could be generated only by obligated parties that over-complied and transferred only to other obligated parties for the purpose of compliance" (internal quotations omitted). To attempt to find support for their position, the Petitioners reference the Clean Air Act's provision stating that EPA's implementing RFS regulations should provide that "[a] person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2)."[17]

Petitioners argue that this provision provides support for their claim that is "unambiguous." In reality, there are multiple sections of the Clean Air Act that delegate broad authority to EPA to promulgate regulations governing the RIN market. Indeed, an earlier section of the Act reflect EPA's broad mandate to "promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual basis,

[14] *Pub. Emps. for Env't Resp.* at 911 (citing *Growth Energy v. EPA*, 5 F.4th 1, 21 (D.C. Cir. 2021) (internal quotations omitted).
[15] *See* 75 Fed. Reg. at 14,722.
[16] *Alon Ref. Krotz Springs* at 643 ("When the petition to amend attacks defects in the regulation as originally promulgated, and when the time limit for seeking review of the regulation has passed, questions can arise about whether the time limit is being improperly circumvented").
[17] 42 U.S.C. § 7545 (o)(5)(B).

contains the applicable volume of renewable fuel, determined in accordance with paragraph (B)." 42 U.S.C. § 7545(o)(2)(A)(i). Read together and in context, these two statutory provisions convey that, while Congress certainly intended for EPA to *include* obligated parties who have over-complied with the regulation to generate RINs, Congress did not intend to limit RIN generation to only those parties. (If it did, it would have explicitly said so.) Instead, Congress also granted EPA discretion to structure the RIN program in a manner that facilitates the increased blending of renewable fuel.

The Petitioners' strained reading of the statute also misunderstands the function of RINs within the RFS more broadly. RINs do not just function as a tool of measurement for parties who have over-complied, but also as a recordkeeping, compliance tracking, and fraud prevention mechanism throughout the renewable fuel market. EPA acknowledged as much in its initial 2007 rulemaking, saying:

> "In order to implement a program that is based on production of a certain volume of renewable fuels, we are finalizing a system of volume accounting and tracking of renewable fuels. We are requiring that this system be based on the assignment of unique numbers to each batch of renewable fuel. These numbers are called Renewable Identification Numbers or RINs, and are assigned to each batch by the renewable fuel producer or importer. The use of RINs allows the Agency to measure and track renewable fuel volumes starting at the point of their production rather than at the point when they are blended into conventional fuels."[18]

This is not the first time that Petitioners have pressed misguided economic theories to try to avoid their RFS obligations or shift those obligations to others. Congress enacted the RFS and EPA created the current RIN market to increase the amount of renewable fuel introduced into the U.S. transportation fuel supply—not to give Petitioners a competitive edge. Petitioners' request would undercut the RFS and distort our free-market economy.

3. <u>The Petitioners Advocate for a Wholly Untenable Structure of the RIN Market.</u>

The Petitioners argue that only obligated parties who have over-complied with their annual volume obligations should be able to generate RINs and their only buyers should be other obligated parties who need credits for compliance. Practically speaking, it would be virtually impossible to adopt the Petitioners' recommendations, and this structure would certainly fail to facilitate an efficient, liquid market for RINs.

EPA allows flexibility in the RIN market to facilitate a liquid, efficient, and competitive trading program. Reducing the number of parties eligible to generate RINs would cause a substantial disruption to the market and risk undermining the success of the RFS program. Additionally, renewable fuel producers, obligated parties, importers, and blenders alike have all made substantial business decisions related to infrastructure investment and product offerings in reliance on the RIN market's existing structure, which is now nearly two decades old. Revisiting the basic structure of

[18] 72 Fed. Reg. at 23,929 (May 1, 2007).

the RIN market in order to bail out Petitioners from their own business decisions to not invest in renewable fuel production and delivery capabilities would unnecessarily disrupt these settled expectations, inflict meaningful economic harm upon our member companies and others that have responded to EPA's policy signals, and raise fuel prices for consumers.

It is well established that the liquidity, fungibility, transparency, and flexibility of a market are improved as the number of participants in that market increases. In addition, EPA has implemented safeguards in the RIN market (e.g., all parties that own RINs must register with EPA and keep certain records, audits and attestations, RINs have a two-year life, etc.) to ensure no single party is able to exercise undue influence or market power. Removing participants – including discretionary blenders, marketers, retailers, and brokers – from the RIN trading marketplace would weaken the market signal function of RIN prices and undercut the RFS program by reducing biofuel blending incentives. In addition, a more open market is especially beneficial in markets as sensitive to policy announcements as the RIN market; higher participation reduces volatility and can help the market adjust to a policy shift more quickly and efficiently and with less pain for consumers than "curtailed participation."[19]

4. <u>The Petitioners Rely on Cases Concerning Eligibility for Small Refinery Exemptions, which Have No Bearing on Eligibility to Generate RINs.</u>

Finally, the Petitioners argue for a new agency rulemaking based on the U.S. Court of Appeals for the Fifth Circuit's recent decision in *Calumet Shreveport Refining v. EPA,* where the Fifth Circuit vacated and remanded EPA's April and June 2022 Denials of Small Refinery Exemptions.[20] Petitioners cite *Calumet* for the proposition that "a federal court rejected the economic foundation on which EPA has rested its conclusion that the RIN market is functioning properly."

The "economic foundation" to which Petitioners refer is EPA's conclusion that obligated parties pass through their RIN costs to their customers (i.e., buyers of refined petroleum fuels). In fact, the Fifth Circuit disagreed with EPA's position on RIN pass-through only as it relates to a finite number of so-called "inefficient" markets – a finding that EPA is rightfully disputing in ongoing litigation in the D.C. Circuit.[21] Even the Fifth Circuit clearly acknowledged, however, that in most markets – including those in which petitioners operate – the RIN costs are in fact passed-through at wholesale. All RIN market participants –including petitioners – engage in commercial behavior every day that demonstrates conclusively that RIN costs are passed through at wholesale. This fact has been confirmed by other courts as well.[22]

It is also well supported by empirical evidence from the marketplace. Irrespective of Petitioners' purported disagreement with EPA on RIN pass-through, EPA's position on whether the RIN market is functioning properly does *not* rest on its views of RIN pass-through. Rather, the factors leading EPA to conclude that the RIN market is functioning as intended are described in great

[19] *See* 84 Fed. Reg. at 10,619.
[20] See *Calumet Shreveport Ref., L.L.C. v. EPA*, 86 F.4th 1121, 1127 (5th Cir. Nov. 22, 2023).
[21] See *Sinclair Wyo. Refin. Co. v. EPA*, No 22-1073 (D.C. Cir filed May 3, 2022).
[22] See *Renewable Fuels Assn. v. EPA*, No. 18-9533 (10th Cir. 2020).

detail throughout the RFS rulemaking record dating back to 2007. In addition, restricting RIN generation to only those obligated parties who over-complied with their obligations, as requested by the Petitioners, would not change the fact that obligated parties – including Petitioners – who purchase RINs pass their costs on to their customers in the price of their refined products.

In any event, conclusions regarding small refinery exemption court cases should not be construed to bear on the RFS more broadly, particularly which types of entities are eligible to participate in the RIN market. Moreover, economic findings concerning small refineries' ability to recover their RFS compliance costs provide absolutely no basis for dramatically shifting which entities are eligible to participate in the RIN market.

In light of these facts, we respectfully request that EPA promptly deny the petition from Coffeyville Resources Refining & Marketing, LLC and Wynnewood Refining Company, LLC for a new rulemaking that would severely restrict what parties may participate in the RFS program's RIN market. As described above, fundamentally altering the structure of the RIN system would have disastrous impacts on renewable fuel producers, fuel marketers and retailers, farmers, obligated parties, and consumers in the form of higher prices at the pump. It would also significantly undermine the statutory purpose of the RFS.

Sincerely,

NATSO, Representing America's Travel Centers and Truckstops
National Association of Convenience Stores
National Farmers Union
Renewable Fuels Association
SIGMA: America's Leading Fuel Marketers