Growth Energy Comments on EPA's Section 610 Review of Regulations of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program

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I. INTRODUCTION

Growth Energy appreciates the opportunity to provide comments for the Environmental Protection Agency's ("EPA's") consideration in its review of the Renewable Fuel Standard ("RFS") Program pursuant to section 610 of the Regulatory Flexibility Act ("RFA").[1] Growth Energy is the world's largest association of biofuel producers, representing 100 U.S. plants that each year produce more than eight billion gallons of cleaner-burning, renewable fuel. Growth Energy's producer plant membership consists of many small businesses that directly benefit from the RFS, when properly implemented, as do a range of Growth Energy's associate members, from retailers to biofuels technology companies. Member plants are located in small towns across the country and support local jobs and communities in places like Merrill, Iowa; Union City, Indiana; Boyceville, Wisconsin; Clearfield, Pennsylvania; Lake Odessa, Michigan; and Windsor, Colorado. Together, our members are working to bring better and more affordable fuel choices at the fuel pump to consumers and protect the environment for future generations. We remain committed to helping our country diversify its energy portfolio to support more green energy small businesses and jobs, sustain family farms, and reduce the costs of transportation fuels for consumers.

At the outset, we note that the courts have held that the RFA only applies to those small entities "which will be subject to the proposed regulation," *i.e.*, to those "small entities to which the proposed rule will apply." *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 176 (D.C. Cir. 2007) (internal citation and quotes omitted); *see also Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("[T]his court has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities."); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). EPA should therefore limit its RFA analysis to entities regulated under the RFS. However, to the extent the Agency more broadly considers the impacts alleged by non-regulated parties, it should also consider the potential *benefits* of the program to non-regulated small entities.

In general, as detailed below, EPA should acknowledge that the RFS program, when properly implemented, is vitally important to the economic well-being of a variety of small businesses in the ethanol production, distribution, and retail ecosystem. Unfortunately, as also detailed below, the manner in which the Agency is actually administering the RFS has undermined its integrity through misapplication of the Small Refinery Exemption; undermining the program in this manner harms small businesses.

We appreciate EPA's consideration of these perspectives.

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[1] Section 610 of the RFA directs EPA to review any rules "which have or will have a significant economic impact upon a substantial number of small entities." 5 U.S.C. § 610(a). The purpose of this review is to "determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities." *Id.*

II. A ROBUST, PROPERLY IMPLEMENTED RENEWABLE FUEL STANDARD IS BENEFICIAL TO SMALL BUSINESSES.

The RFS, when properly implemented, is vital for small businesses across rural America, including ethanol and other biofuels producers, biotechnology companies, consulting firms and other businesses that support the biofuels industry, and small retailers of higher biofuel blends, as well as independent farmers. In fact, half of Growth Energy's 100 ethanol plant members qualify as "small businesses" under the Small Business Act's ("SBA's") industry-specific definition, as incorporated in the RFA.[2] In addition, approximately 80 of Growth's 92 associate members (members who do not produce ethanol but offer support services or are otherwise associated with the ethanol industry, such as biotechnology and consulting businesses and other agriculture associations) qualify as small businesses. The economic well-being of each of these small businesses, from Growth's membership alone, is tied to a robust RFS program. The RFS, when properly implemented, increases market demand for ethanol and thus increases the use of renewable fuel. This economic stability allows small business owners to have the necessary confidence to grow their small businesses through capital and research investments.

By way of example, Growth Energy producer member, Carbon Green Bioenergy in Lake Odessa, Michigan, employs just 40 full-time employees.[3] The biorefinery, which produces approximately 55 million gallons of ethanol and 136,800 tons of dried distillers grains each year, purchases all of its corn locally from 500 farms within 50 miles of the plant. Additionally, Quad County Corn Processors employs 43 people in Galva, Iowa.[4] The plant produces 35 million gallons of starch ethanol per year as well as 2 million gallons of cellulosic biofuel and 87,500 tons of dried distiller grains. Demand for biofuels facilitated by a robust RFS directly benefits Carbon Green Bioenergy, Quad County, and the many other similarly-situated ethanol producers.

Similarly, Sukup Manufacturing Company, based in Sheffield, Iowa, employs around 600 people, including at several regional distribution centers in Illinois, Nebraska, South Dakota, Ohio, and Arkansas, and at a satellite office in Pennsylvania. Sukup manufactures grain bins, grain dryers, and other material handling equipment and pre-made steel buildings. A properly implemented RFS program increases demand for Sukup's products, in conjunction with consistent and increasing demand for grain.

In addition, small business retailers of higher-level ethanol-blended fuels such as E85 directly benefit from demand for biofuels spurred by a properly implemented RFS. For example, Minnoco, a fuel brand operated by 41 independently owned service stations in Minnesota, sells a number of higher biofuel blends such as E15, E30, and E85.[5] In some locations, higher biofuel blends account for nearly 55% of total sales. And hundreds of small business retailers have taken advantage of the U.S. Department of Agriculture's ("USDA's") Biofuels Infrastructure Partnership ("BIP") funding to upgrade pump infrastructure in order to offer higher-level ethanol

[2] 5 U.S.C. § 601. For ethyl alcohol producers, a small business is defined as a business that has less than or equal to 1,000 employees across all affiliates. 13 C.F.R. § 121.201.

[3] *See generally* Carbon Green Bioenergy, http://www.cgbioenergy.com/ (last visited Sept. 20, 2019).

[4] *See generally* Quad County Corn Processors, https://www.quad-county.com/ (last visited Sept. 20, 2019).

[5] *See generally* Minnoco, https://minnoco.com/ (last visited Sept. 20, 2019).

blends such as E85 and E15.[6] Today, there are more than 4,000 locations selling higher biofuel blends such as E15 or E85.

Although it is difficult for a small corn farm technically to qualify as a "small business" under the SBA's criteria,[7] many locally-based, independent family farmers benefit from a properly implemented RFS as well, and those farmers have substantial impacts on rural economies. For example, an average ethanol plant creates a market for 20 million bushels of corn from hundreds of local farmers often within 50 to 60 miles of the plant.[8] As USDA has extensively researched and documented, family farms are on precarious financial footing due to razor thin profit margins.[9] This precarious situation continues to worsen as net farm income has declined almost 40% between 2013 and 2017, primarily due to low commodity prices.[10] Moreover, 20% of non-metro-area counties in the United States, and 14% of all U.S. counties, have farming-dependent economies.[11] Small businesses in the farm machinery, transportation, construction, and many rural service industries are all put at risk when growing economic pressures threaten the continued existence of independent family farmers in these counties.[12]

In sum, the RFS program, when properly implemented, provides important benefits to small businesses across biofuels production, distribution, retail, and related industries. Thus, to the extent EPA broadly considers detrimental impacts to regulated and non-regulated parties alike, it should broadly consider the direct and indirect benefits the RFS program can provide for a wide array of small entities, as noted above; at the same time, EPA should take into account the potential adverse impacts to these small entities associated with changes to the program, or with implementation issues that undermine the integrity of the program.

III. EPA's Misapplication of the Small Refinery Exemption Harms Small Businesses.

As an initial matter, Growth Energy agrees with EPA's assessments in the annual Renewable Volume Obligation ("RVO") rulemakings that the RFS program does not have a "significant adverse economic impact on small entities" regulated by the RFS, e.g., small

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[6] Our understanding is that USDA and/or state agencies that administer BIP grants maintain detailed information on each grantee that receives BIP funds, but that such information may not be publicly available due to its confidential nature.

[7] SBA regulations limit corn farms defined as "small businesses" to those with $1 million or less in annual receipts. *See* 13 C.F.R. § 121.201.

[8] *See, e.g.*, *Products*, Carbon Green Bioenergy, http://www.cgbioenergy.com/products/ (last visited Sept. 20, 2019).

[9] Over 70% of small farms have an operating profit margin in the 'high risk zone' of <10%, and 30-50% of medium and large farms also fall into that zone. *See* USDA, *America's Diverse Family Farms* (2018), https://www.ers.usda.gov/webdocs/publications/90985/eib-203.pdf?v=9520.4.

[10] *Id.*

[11] A county is "farming-dependent" if either 25% or more of average annual labor and proprietors' earnings are derived from farming or 16% or more of county jobs are in farming. USDA, *County Economic Types, 2015 Edition*, https://www.ers.usda.gov/data-products/county-typology-codes/descriptions-and-maps/ (last visited Sept. 20, 2019).

[12] Rural counties are experiencing historic population declines due to an outmigration of young adults, which threatens a variety of local industries. U.S. Global Change Research Program, *Chapter 10: Agricultural and Rural Communities, in* Fourth Nat'l Climate Assessment, Volume II (2018), https://nca2018.globalchange.gov/chapter/10/.

refiners.[13] However, as described below, EPA's mal-administration of the small refinery exemption program—in particular, its exemption of large numbers of obligated parties from compliance obligations without ever making up the billions of gallons of RVOs affected—undermines demand for biofuels, which, in turn, adversely impacts the small businesses that are an integral component of the biofuels economy and rely on the RFS for their economic well-being, including (as described above) small ethanol producers, small flex fuel retailers, and others.[14] Further, few of the small refinery exemptions ("SREs") that EPA has granted actually benefit small businesses as defined by the SBA. To the contrary, the majority of the SREs granted by EPA actually benefit large integrated entities that do not qualify as small businesses. EPA must reform its approach to granting SREs to curtail further harm to small businesses.

To illustrate these points, we provide a brief explanation of the RFS program's statutory and regulatory framework applicable to "small refineries" and "small refiners," and the overlay of those concepts with the SBA (and RFA) definition of "small business." In the Energy Policy Act of 2005 ("EPAct"), which established the first phase of the RFS program ("RFS1"), Congress initially exempted "small refineries," defined as refineries with an average aggregate daily crude oil throughput below 75,000 barrels, from compliance until 2011. This definition includes no limit on employees or revenue, and looks only to the size of an individual facility rather than to the size of the business or its affiliates. The Energy Independence and Security Act of 2007 ("EISA"), which modified, expanded, and extended the RFS1 program (creating "RFS2"), left intact the EPAct's provision of relief for small refineries through the 2010 calendar year.[15] EISA thereafter allowed for an automatic two-year extension (through 2012) of a particular small refinery's exemption from the RVOs if the Secretary of Energy determined that compliance with the statute would subject the small refinery to "disproportionate economic hardship."[16] The statute also allows a "small refinery at any time [to] petition [EPA] for an extension of the [temporary] exemption . . . for the reason of disproportionate economic hardship."[17]

The statutory "small refinery" exemption stands in contrast, in this respect, to the regulatory exemption for "small refiners" that EPA subsequently promulgated. In particular, EPA created as part of the 2010 RFS2 Rule a "small refiner" exemption in 40 C.F.R. § 80.1442 that does not exist in the statute. Unlike the "small refinery" exemption, this "small refiner" exemption borrows from the SBA definition of "small business," including the requirement of having no more than 1,500 employees across all affiliates.[18]

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[13] *See, e.g.*, Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, 84 Fed. Reg. 36,762, 36,806 (Jul. 29, 2019) (to be codified at 40 C.F.R. pt. 80) (hereinafter "Proposed 2020 RVO").

[14] For a full discussion of the flaws with EPA's current implementation of the RFS program, which fails to drive any growth in biofuels, please see Growth Energy's Comments on Proposed 2020 RVO rulemaking, Docket #EPA-HQ-OAR-2019-0136-0021 (incorporated by reference and attached here as Exhibit 1).

[15] 42 U.S.C. § 7545(o)(9)(A)(i).

[16] 42 U.S.C. § 7545(o)(9)(A)(ii); *see* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,735 (Mar. 26, 2010) (to be codified at 40 C.F.R. pt. 80) (hereinafter "2010 RFS2 Rule").

[17] 42 U.S.C. § 7545(o)(9)(B).

[18] For the petroleum refining industry, the SBA limits small businesses to those with no more than 1,500 employees across "a concern and its affiliates." 13 C.F.R. § 121.201; 40 C.F.R. § 80.1442.

EPA's promulgation of this additional exemption recognized the theoretical possibility that some entities may qualify as small businesses under the SBA definition, but may not qualify for an exemption under the statutory "small refinery" definition because they exceed the throughput cap.[19] Conversely, many facilities that meet the statutory definition of "small refinery," because they fall below the throughput cap, are not actually "small businesses" under the SBA definition—and indeed, may be owned by large, fully integrated corporate enterprises. This is especially so given that the statutory definition of "small refinery" is focused at the facility level and does not take into account corporate affiliates.

The bottom line is that there are many large-scale corporations that own "small refineries" as defined under the statute, but that are clearly not "small refiners" and are nowhere near to qualifying as "small businesses" under the SBA. Yet many of these large corporations are still benefiting from EPA's exemptions. For example, in the Proposed 2020 RVO, EPA indicated that it has identified only 9 entities in the United States that qualify as "small refiners" (which, as noted above, parallels the SBA definition of "small businesses"), and explained that these entities own a total of 11 refineries, all of which are "small refineries" under the statutory definition.[20] Yet, each year, EPA has granted exemptions to many more than 11 refineries. Specifically, as EPA noted in the Proposed 2020 RVO, "[t]o date, EPA has adjudicated petitions for exemption from 35 small refineries for the 2017 RFS standards ([only] 10 of which are owned by a small refiner)."[21] In fact, EPA granted all 35 of those petitions—and 25 of those petitions relate to refineries that are owned by *large* refiners that are *not* small businesses.[22]

EPA also noted in the Proposed 2020 RVO that only 10 of the 39 then-pending 2018 SRE petitions were owned by small refiners.[23] On August 9, 2019, EPA adjudicated 37 of the 2018 petitions by granting relief to 31 refineries, including *at least* 21 refineries that are owned by large refiners who, presumably, do not qualify as "small businesses."[24]

Some of the largest Fortune 500 multinational corporations own what EPA considers to be "small refineries," including ExxonMobil ($290 billion in revenue), Chevron ($166 billion), Phillips 66 ($114 billion), Valero ($111 billion), Marathon ($97 billion), and HollyFrontier ($17

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[19] 2010 RFS2 Rule, 75 Fed. Reg. at 14,737.
[20] Proposed 2020 RVO, 84 Fed. Reg. at 36,807.
[21] *Id.* On August 9, 2019, EPA denied one 2017 petition which had still been pending when the 2020 RVO proposal was published on July 29, 2019.
[22] EPA, *RFS Small Refinery Exemptions, Table 2: Summary of Small Refinery Exemption Decisions Each Compliance Year*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last visited Sept. 20, 2019).
[23] Proposed 2020 RVO, 84 Fed. Reg. at 36,807.
[24] EPA, *supra* note 22.

billion).[25] Indeed, these 7 Fortune 500 companies own 29% of "small refineries" in the U.S.[26] While EPA refuses to acknowledge which of these large corporations have been granted hardship exemptions, it is public record that the vast majority of corporations who own "small refineries" have petitioned for exemption, and the vast majority of petitions adjudicated by the EPA have been granted.[27] It is difficult to fathom, and EPA has failed to explain, how such large fully-integrated energy conglomerates could demonstrate economic hardship based on their ownership of a particular refinery facility with a throughput of 75,000 barrels or less. In any event, it is clear that such refineries do not qualify as "small businesses" under the SBA definition, which takes into account affiliates.[28]

EPA's continued use of SREs primarily for the benefit of "small refineries" owned by large multinational corporations harms many more small businesses than it aids for two primary reasons. As detailed above, hundreds of legitimate small businesses (including small ethanol plants, retail stations, biofuels technology companies, etc.) rely on the RFS program to spur demand for domestic biofuels. However, year after year, EPA has doled out SREs retroactively *without ever requiring the industry to make up exempt volumes*, thereby dramatically undermining demand for biofuels. For example, EPA's retroactive grant of SREs for 2016, 2017, and 2018 resulted in more than a 4 billion gallon reduction in total renewable volumes below the level set by the rule.[29] Because EPA failed to require that those exempt volumes be made up, the market experienced substantial reductions in demand for biofuels—so much so that D6 Renewable Identification Number ("RIN") prices are now below $0.10.[30] The benefits of this reduction in demand inured primarily to the large businesses that received the majority of SREs granted by EPA. Meanwhile, the resulting reduction in demand for biofuels adversely impacted the small businesses that benefit from the RFS and are an integral component of the biofuels economy.

Thus, EPA's practice of granting so many exemptions to large entities is doubly harmful to small businesses: not only do the few truly small refiners (who presumably do qualify as "small businesses") suffer competitive harm when EPA provides numerous exemptions to their

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[25] *See generally*, Fortune 500, https://fortune.com/fortune500/ (last visited Sept. 20, 2019). *See also* Geoff Cooper, *Small Refiner Exemptions: It's Time to Name Names*, Renewable Fuels Ass'n Blog (May 23, 2019), https://ethanolrfa.org/2019/05/small-refiner-exemptions-its-time-to-name-names/; Emily Skor, Growth Energy CEO, *Hardship or Handout? The Facts Are Clear*, Ethanol Producer Magazine (June 19, 2019), http://www.ethanolproducer.com/articles/16277/hardship-or-handout-the-facts-are-clear; Emily Skor, Growth Energy CEO, *More EPA Exemptions, Biofuel Plants Shuttered*," Ethanol Producer Magazine (Aug. 14, 2019), http://www.ethanolproducer.com/articles/16414/more-epa-exemptions-biofuel-plants-shuttered; Humeyra Pamuk & Jarrett Renshaw, *Trump's EPA grants 31 small refinery waivers from biofuel laws, angering corn lobby* Reuters (Aug. 9, 2019), https://www.reuters.com/article/us-usa-ethanol-epa/trumps-epa-grants-31-small-refinery-waivers-from-biofuel-laws-angering-corn-lobby-idUSKCN1UZ2AV.

[26] Cooper, *supra* note 25.

[27] In 2018, 83% of small refineries petitioned EPA in 2018, 84% of petitions were granted. In 2017, 77% of small refineries petitioned for hardship, and 97% of petitions were granted. *See* EPA, *supra* note 22, *see also* Cooper, *supra* note 25.

[28] *See* 13 C.F.R. 121.201, n.4 ("NAICS code 324110 - To qualify as small for purposes of Government procurement, the petroleum refiner, including its affiliates, must be a concern that has either no more than 1,500 employees or no more than 200,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity.") (emphasis added).

[29] *See* EPA, *supra* note 22.

[30] *Id.*

billion dollar competitors, the independent farmers, small biofuel producers, and other small businesses that rely on a robust RFS suffer economically when the efficacy of the program is undermined and its benefits are diluted. And unlike small refiners, the independent farmers, ethanol producers, and other associated small businesses do not have a specific statutory mechanism to protect them from Agency decisions that undermine the RFS.

IV. ADDITIONAL COMPLIANCE FLEXIBILITIES FOR SMALL REFINERS ARE NOT NECESSARY OR APPROPRIATE.

Prior to promulgation of the 2010 RFS2 Rule, EPA conducted a Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel that found that "all directly regulated small entities would have compliance costs that are less than one percent of their sales over the life of the program" and that any negative impact would decrease over time.[31] Because the actual proposed RVOs for 2020 are substantially less than the statutory volumes considered by the SBREFA panel when it reached this conclusion, the compliance costs for small businesses going forward is necessarily minimal. Existing compliance flexibilities provided by the current RFS rules provide more than adequate protection against any adverse economic impacts to small businesses, and they are not in need of revision or enhancement. For example, in addition to the SREs that may be provided to legitimate "small businesses" that make the necessary hardship demonstration, the RFS provides ample compliance flexibilities through a 20% rollover RIN allowance, the ability to carry forward RIN deficits into the following year, and RIN trading.[32] EPA's section 610 review should acknowledge these compliance flexibilities and determine, consistent with the Agency's previous findings, that small businesses subject to RFS compliance obligations do not face adverse economic impacts from the program, and therefore that no additional regulatory relief is necessary or appropriate.

V. CONCLUSION

In sum, EPA's section 610 review should acknowledge the continued need for the RFS program, implemented as Congress intended. Congress expanded the RFS program in 2007 "to increase the production of clean renewable fuels" and "[t]o move the United States toward greater energy independence and security."[33] Growth in conventional renewable fuel substantially reduces greenhouse gas ("GHG") emissions relative to fossil fuel. In fact, it does so far more than Congress originally expected and nearly as much as advanced biofuel.[34] Growth in conventional renewable fuel also increases the country's energy independence and security by reducing dependence on foreign oil and diversifying our energy sources, while

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[31] Proposed 2020 RVO, 84 Fed. Reg. at 36,807.

[32] Discussion of EPA's administration of the RIN bank—a mechanism by which EPA has historically managed RIN prices and therefore compliance burdens on obligated parties—is outside the scope of this comment letter. Please see Exhibit 1.

[33] Energy Independence and Security Act of 2007 pmbl., 121 Stat. 1492, 1492 (2007).

[34] When Congress revised the RFS program in 2007, it expected conventional renewable fuel to reduce GHG emissions by 20% relative to fossil fuel. According to the USDA, however, conventional renewable fuel currently reduces GHG emissions by more than 40%—approaching the 50% reduction needed to qualify as advanced biofuel. *See* ICF, *A Life-Cycle Analysis of the Greenhouse Gas Emissions from Corn-Based Ethanol* 152 (2018), https://www.usda.gov/oce/climate_change/mitigation_technologies/LCA_of_Corn_Ethanol_2018_Report.pdf; *see generally* Growth Energy's Comments on Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020 rulemaking, Docket #EPA-HQ-OAR-2018-0167.

creating American jobs, revitalizing rural economies, and introducing much needed competition into a monopolized vehicle-fuels market. EPA should acknowledge that the RFS program, when properly implemented, is critically important for numerous small businesses across America. At the same time, EPA should consider the harm caused to small businesses through misapplication of the SREs, which undermines the integrity of the program.