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ORAL ARGUMENT NOT YET SCHEDULED No. 19-1220

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

On Petition for Review of Final Agency Actions of the United States Environmental Protection Agency

PETITIONERS' OPENING BRIEF

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December 7, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioners Renewable Fuels Association, American Coalition for Ethanol, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union, through undersigned counsel, hereby certify the following as to parties, rulings, and related proceedings in this case.

Parties, Intervenors, and Amici

A. Petitioners

American Coalition for Ethanol, Growth Energy, the National Biodiesel Board, the National Corn Growers Association, the National Farmers Union, and the Renewable Fuels Association.

B. Respondent

United States Environmental Protection Agency ("EPA").

C. Intervenors for Respondent

- HollyFrontier Refining & Marketing, LLC; HollyFrontier Cheyenne Refining, LLC; and HollyFrontier Woods Cross Refining, LLC.
- Alon Refining Krotz Springs, Inc.; Alon USA, LP; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Delek Refining, Ltd.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt

Refining Company; Lion Oil Company; Par Hawaii Refining, LLC; Sinclair Casper Refining Co.; Sinclair Wyoming Refining Co.; U.S. Oil & Refining Co.; and Wyoming Refining Co. (collectively, the "Small Refiners Coalition").

3) American Fuel & Petrochemical Manufacturers.

4) Kern Oil & Refining Co.

D. Amici

None.

Rulings Under Review

The ruling under review is EPA's final action granting small refinery exemption petitions for 2018, as embodied in EPA's unpublished "Decision on 2018 Small Refinery Exemption Petitions," signed August 9, 2019.

Related Cases

Sinclair Wyoming Refining Co. v. EPA, No. 19-1196 (D.C. Cir. filed Sept. 20, 2019), involves Sinclair Wyoming Refining Company's ("Sinclair's") petition for review of EPA's denial of Sinclair's petition for a small refinery exemption from the Renewable Fuel Standard for 2018. Sinclair also filed a petition for review of this same action in the Tenth Circuit, *Sinclair Wyoming Refining Co. v. EPA*, No. 19-9562 (10th Cir. filed Aug. 22, 2019).

Big West Oil v. EPA, No. 19-1197 (D.C. Cir. filed Sept. 23, 2019), involves Big West Oil's petition for review of EPA's denial of Big West Oil's petition for a small refinery exemption from the Renewable Fuel Standard for 2018. Big West Oil also filed a petition for review of this same action in the Tenth Circuit, *Big West Oil v. EPA*, No. 19-9576 (10th Cir. filed Sept. 23, 2019).

Wynnewood Refining Co. v. EPA, No. 20-1099 (D.C. Cir. filed Oct. 22, 2019), involves Wynnewood Refining Company's ("Wynnewood's") petition for review of EPA's grant of Wynnewood's petition for a small refinery exemption from the Renewable Fuel Standard for 2018. This case was transferred to this court from the U.S. Court of Appeals for the Tenth Circuit on March 26, 2020.

Kern Oil v. EPA, No. 19-1216 (D.C. Cir. filed Sept. 21, 2019) involves a Kern Oil's petition for review of EPA's grant of Kern Oil's petition for a small refinery exemption from the Renewable Fuel Standard for 2018. Kern Oil also filed a petition for review in the Ninth Circuit.

In an order dated March 3, 2020, this Court denied EPA's motion to consolidate this case with Case Nos. 19-1196, et al. and 19-1216. Case Nos. 19-1196 and 19-1197 are consolidated pursuant to an order dated October 24, 2019.

Date: December 7, 2020

Respectfully submitted,

<u>/s/ Matthew W. Morrison</u> Matthew W. Morrison

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners provide the following corporate disclosure statement:

The **Renewable Fuels Association** ("RFA") is a non-profit trade association. Its members are ethanol producers and supporters of the ethanol industry. RFA promotes the general commercial, legislative, and other common interests of its members. RFA does not have a parent company, and no publicly held company has a 10% or greater ownership in it.

The American Coalition for Ethanol ("ACE") is a non-profit trade association. Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. ACE promotes the general commercial, legislative, and other common interests of its members. ACE does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Growth Energy is a non-profit trade association. Its members are ethanol producers and supporters of the ethanol industry. It operates to promote the general commercial, legislative, and other common interests of its members. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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The **National Biodiesel Board** ("NBB") is a non-profit trade association. It is the national trade association for the biodiesel and renewable diesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth. NBB does not have a parent company, and no publicly held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

The National Corn Growers Association ("NCGA") is a non-profit trade association. Its members are corn farmers and supporters of the agriculture and ethanol industries. NCGA promotes the general commercial, legislative, and other common interests of its members. NCGA does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The **National Farmers Union** ("NFU"), is a non-profit trade association. Its members include farmers who produce biofuel feedstocks and consume large quantities of fuel. The NFU promotes the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Date: December 7, 2020

Respectfully submitted,

<u>/s/ Matthew W. Morrison</u> Matthew W. Morrison

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

- DOE United States Department of Energy
- EPA United States Environmental Protection Agency
- RFA Renewable Fuels Association
- RFS Renewable Fuel Standard
- RIN Renewable Identification Number

USCA Case #19-1220

INTRODUCTION

Congress created the Renewable Fuel Standard ("RFS") "to move the United States toward greater energy independence and security" and "to increase the production of clean renewable fuels." Pub. L. No. 110-140, 121 Stat. 1492 (2007). To this end, the RFS requires that obligated parties—refiners and importers of gasoline and diesel—introduce increasing volumes of renewable fuel into the gasoline and diesel they produce. Although most obligated parties were required to begin fulfilling their RFS volume obligations in 2006, Congress provided a blanket "[t]emporary exemption" from these RFS obligations through 2010 to all small refineries, to allow them additional time to come into compliance. 42 U.S.C. 7545(o)(9)(A). Congress also allowed individual small refineries to petition the United States Environmental Protection Agency ("EPA") for an "[e]xtension of the exemption," which EPA may grant only if it finds that continued compliance would cause the refinery a "disproportionate economic hardship." 42 U.S.C. down" over time. Renewable Fuels Ass 'n v. EPA, 948 F.3d 1206, 1246 (10th Cir. 2020).

Consistent with this framework, the number of exempt refineries declined for the first several years of the RFS, from fifty-nine under the initial, blanket exemption to seven exempt refineries in 2015. Starting with the 2016 compliance

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year, however, EPA reversed course and dramatically increased the number of exemptions to nineteen for 2016, thirty-five for 2017, and—at issue in this case thirty-one for 2018. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/ fuels-registrationreporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Nov. 19, 2020).

The basic limitations on EPA's authority to continue to exempt small refineries from compliance with the RFS are well established. First, EPA's authority is limited to "extensions" of the initial, "temporary exemption" that Congress provided at the start of the RFS. 42 U.S.C. § 7545(*o*)(9)(A), (B)(ii). Thus, a refinery cannot be eligible for an extension of the exemption for a given compliance year if it was not exempt in the prior year (and all prior years, in fact). Second, EPA can extend the exemption only upon a finding that compliance with the RFS would cause a "disproportionate economic hardship." *Id.* Third, to make that finding EPA must "consider … economic factors" "in consultation with" the Department of Energy ("DOE"). *Id.*

EPA exceeded its authority and acted in an arbitrary and capricious manner by ignoring these requirements and by failing to provide a rational basis for its decisions that accounts for the evidence and important aspects of the problem before it. EPA granted exemptions to refineries that had not been exempt in all prior years, in effect granting new exemptions rather than extending exemptions still in effect. EPA also failed to provide a sufficient analysis of the extent to which each refinery suffered a disproportionate economic hardship from compliance with the RFS, relying blindly on DOE's incomplete recommendations—perhaps an unsurprising omission given the agency's long-held view that RFS compliance costs are actually recoverable by all refineries, big and small. Further, in certain instances, EPA increased the exemptions recommended by DOE without any finding of additional hardship and based solely on a mistaken view of its own authority. Finally, EPA granted some petitions that were filed after the 2018 compliance year was over—something EPA has no authority to do. These fatal flaws in EPA's actions require that all thirty-one small refinery exemption petitions granted for 2018 be vacated.

JURISDICTION

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1). Petitioners challenge EPA's final agency action granting small refinery exemption petitions for 2018, as embodied in EPA's "Decision on 2018 Small Refinery Exemption Petitions" ("2018 SRE Decision"), signed August 9, 2019. The 2018 SRE Decision is, according to EPA, the "only concrete, identifiable and reviewable EPA 'final action" concerning approval or denial of small refinery exemption petitions for 2018. EPA Mot. to Dismiss 7, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 010110231146. Venue is appropriate in this Court because the 2018 SRE Decision is nationally applicable. *See* 42 U.S.C. § 7607(b)(1); EPA

Reply in Support of Mot. to Dismiss 7, *Sinclair*, No. 19-9562 (10th Cir. Oct. 15, 2019), ECF No. 010110245406 ("An agency action that determines the rights of facilities all over the country, across multiple circuits, using a coordinated and consistent rationale is 'nationally applicable[.]").

The petition was timely. The challenged agency action was not published in the Federal Register and Petitioners were unaware of its existence until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit. *See* EPA Mot. to Dismiss, *Sinclair*, No. 19-9562, Bunker Decl., Ex. A.

STATEMENT OF ISSUES

1. Whether EPA exceeded its statutory authority by granting petitions to extend small refinery temporary exemptions under 42 U.S.C. § 7545(o)(9)(B) where the refinery was not exempt for all prior compliance years.

2. Whether EPA acted arbitrarily, capriciously, or otherwise contrary to law by failing to provide a reasonable basis for granting the petitions to extend small refinery exemptions.

3. Whether EPA exceeded its statutory authority or acted arbitrarily, capriciously, or otherwise contrary to law by fully exempting small refineries for which DOE only recommended 50% relief without finding that the additional 50% hardship was caused by the RFS.

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4. Whether EPA exceeded its authority by granting petitions for small refinery exemptions to refineries that petitioned after the compliance year ended.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

A. The Renewable Fuel Standard Program

The RFS program was established to move the United States toward greater energy independence and security by increasing the production of clean renewable fuels.¹ *See American Fuel & Petrochemical Mfrs. v. EPA* ("*AFPM*"), 937 F.3d 559, 568 (D.C. Cir. 2019). To accomplish these goals, "the program requires an 'applicable volume' of total renewable fuel to be sold or introduced into U.S. commerce each year." *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 912 (D.C. Cir. 2014); 42 U.S.C. § 7545(*o*)(2)(A)(i).

The statute "specifies annual fuel-volume requirements for four overlapping categories of fuel," ² and EPA is "task[ed]" with "ensuring that those annual targets are met." *AFPM*, 937 F.3d at 568. EPA fulfills this mandate by "translat[ing]" the

¹ Renewable fuels are "produced from renewable biomass" such as crops, trees, and animal byproducts, and are "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. § 7545(*o*)(1)(J).

² "[C]ellulosic biofuel and biomass-based diesel are kinds of advanced biofuel, and advanced biofuel in turn is a kind of renewable fuel that may be credited toward the total renewable fuel obligation." *Americans for Clean Energy v. EPA* ("ACE"), 864 F.3d 691, 697-98 (D.C. Cir. 2017).

statutory volumes "into 'renewable volume obligations' for each category of renewable fuel for the upcoming compliance year." *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 637 (D.C. Cir. 2019); 42 U.S.C. § 7545(*o*)(3)(B)(i). "The volume obligation for each category of renewable fuel is expressed as ... a 'percentage standard," *Alon*, 936 F.3d at 637, which "inform[s] each obligated party"—refiners and importers of gasoline and diesel—"of how much renewable fuel it must introduce into U.S. commerce based on the volumes of fossil-based gasoline or diesel it imports or produces." *AFPM*, 937 F.3d at 571 (quoting *ACE*, 864 F.3d at 699); 40 C.F.R. § 80.1406.

To demonstrate compliance, "obligated parties can acquire and trade credits," called "Renewable Identification Numbers" or "RINs." *ACE*, 864 F.3d at 699. RINs are "unique number[s] generated to represent a volume of renewable fuel." 40 C.F.R. § 80.1401. When renewable fuel is blended into transportation fuel, "the RINs become 'separated' from the associated volumes of renewable fuel ... [and] may be retained by the party who possesses them or sold or traded on the open RIN market." *ACE*, 864 F.3d at 699. Obligated parties "satisfy" their renewable fuel obligation by "retiring' RINs at an annual compliance demonstration." *AFPM*, 937 F.3d at 572; 40 C.F.R. § 80.1427. "[A]n obligated party [that] does not have enough RINs to meet its renewable fuel obligation [] may: (i) attempt to purchase any RINs it needs on the open RIN market; (ii) use carryover RINs it has from the prior year to meet some

portion of its obligation; or (iii) carry a renewable fuel deficit forward into the next compliance year, provided that some conditions are met." *ACE*, 864 F.3d at 699-700.

B. Small Refinery Exemptions

Most obligated parties were required to begin fulfilling their RFS volume obligations in compliance year 2006. However, "aware that small refineries"-those whose "average aggregate daily crude oil throughput for a calendar year ... does not exceed 75,000 barrels," § 7545(o)(1)(k)—"would face greater difficulty complying with the renewable fuels requirements, [Congress] created a three-tiered system of exemptions to afford small refineries a bridge to compliance." Hermes Consol., LLC v. EPA, 787 F.3d 568, 573 (D.C. Cir. 2015); accord Renewable Fuels Ass 'n v. EPA ("RFA"), 948 F.3d 1206, 1246 (10th Cir. 2020); see 42 U.S.C. § 7545(o)(9)(A)-(B). First, the statute provided a "[t]emporary exemption" from RFS obligations to all small refineries until 2011. 42 U.S.C. § 7545(*o*)(9)(A)(i); see Hermes, 787 F.3d at 572-73. Second, "the statute directed DOE to conduct a study 'to determine whether compliance ... would impose a disproportionate economic hardship on small refineries," and "[i]f DOE determined that any small refinery 'would be subject to a disproportionate economic hardship if required to comply with' the renewable fuels program, EPA was required to extend the exemption for that refinery 'for a period of not less than 2 additional years." Hermes, 787 F.3d at 573 (quoting 42

U.S.C. § 7545(o)(9)(A)(ii)). Third, the statute permits individual small refineries "at any time [to] petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B)(i)); *see Hermes*, 787 F.3d at 573.

DOE conducted the mandated study in 2009 and found "no reason to believe small refineries will be disproportionately harmed by inclusion in the RFS program."GD-10³ at 13 (2009 DOE Study). DOE explained that the RFS provided sufficient "flexibility," in that "[s]ome [small refineries] will be able to generate RINs through blending renewable fuels into their products; others may choose to purchase RINs." Id. A few months later, a report from the Senate Committee on Appropriations directed DOE to "reopen and reassess" its study. S. Rep. No. 111-45, at 109 (2009). DOE issued a revised study in 2011. GD-11 (2011 DOE Study). In the 2011 DOE Study, DOE reversed itself and determined that small refineries can suffer disproportionate economic hardship from compliance with the RFS program, at least to the extent that compliance costs increase to the point that the refineries are not viable, either due to loss of market share or lack of working capital to cover the costs of purchasing RINs. Id.

³ Documents in the Administrative Record are referenced using the document numbers assigned by EPA. *See* Certified Index of Documents Comprising the Administrative Record, ECF No. 1856817.

To determine whether a refinery's petition demonstrates "disproportionate economic hardship," EPA is statutorily required, "in consultation" with DOE, to "consider the findings" of the 2011 DOE Study and "other economic factors." 42 U.S.C. 7545(o)(9)(B)(i)-(ii). In practice, DOE evaluates the petitions first and provides EPA with a recommendation. See GD-14 (2018 SRE Decision). DOE bases its recommendations on what it calls a "scoring matrix" containing two "indices": One index measures the "disproportionate impacts" to the refinery through structural and economic factors (e.g., access to capital, presence of other business lines, margins); the other index measures the impact on the refinery's "viability" (*i.e.*, its ability to remain competitive considering its cost of compliance) using factors such as whether costs impair efficiency gains or are likely to lead the refinery to need to shut down. See GD-11 (2011 DOE Study); see, e.g., A-7 (DOE Recommendation for Company A); B-16 (DOE Recommendation for Company B). DOE then computes a separate score for each index. See GD-11. These two scores form the basis of DOE's recommendation to EPA: if the score on both indices is greater than 1, DOE recommends a 100% exemption; if only one index scores above 1, DOE recommends a 50% exemption; and if both indices score below 1, DOE recommends no exemption. Id.

EPA has offered little public information regarding its adjudication of small refinery exemption petitions after it receives DOE's recommendations. An EPA memorandum issued in December of 2016 asserted that EPA considers "the findings of the DOE Small Refinery Study and a variety of economic factors," including "profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for small refinery improvement projects, corporate structure, debt and other financial obligations, RIN prices, and the cost of compliance through RIN purchases." *See* GD-13. It is not clear from public sources or the Administrative Record whether EPA continues to undertake the analysis identified in EPA's December 2016 memorandum. Based on the 2018 SRE Decision, however, it appears that EPA has abandoned this analysis.

C. EPA's Change in Approach for Granting Small Refinery Exemptions

Congress "contemplate[d] a '[*t*]*emporary* exemption' for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries." *Hermes*, 787 F.3d at 578. That is, over time, the "number [of exemptions] should ... taper[] down." *RFA*, 948 F.3d at 1246. And that is what happened for the first several years of the RFS. Fifty-nine small refineries were covered by the initial, blanket exemption prescribed by the statute through 2010. *See* GD-11. Between a two-year extension of exemption based on the DOE study (*i.e.*, for 2011 and 2012) and a few individual petitions, only twenty-four refineries were exempt for 2011 and twenty-three were exempt for 2012. *Id*.; 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012); EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registrationreporting-and-compliance-help/rfs-small-refinery-exemptions. Once the DOEbased extension expired, the number of exempt refineries declined again: EPA granted eight extension petitions for 2013, eight for 2014, and seven for 2015. *See RFS Small Refinery Exemptions*.

Starting with the 2016 compliance year, however, this downward trend reversed: EPA granted nineteen petitions for 2016, thirty-five petitions for 2017, and thirty-one petitions for 2018. *Id*. The corresponding exempted volume of renewable fuel jumped from 190 million gallons for compliance year 2013, to 790 million gallons for 2016, 1.8 billion gallons for 2017, and 1.4 billion gallons for 2018. *Id*.

Throughout this time, EPA granted exemption petitions in secret. The public began to learn about the increase in exemptions only through anonymously sourced media reports in the spring of 2018, ⁴ which were then confirmed by the Administrator during a congressional hearing. ⁵ EPA still refuses to disclose individual orders granting extension petitions, but it has created an online "dashboard" through which it periodically releases updates on the *aggregate* number

⁴ See e.g., Jarrett Renshaw & Chris Prentice, Chevron, Exxon Seek 'Small Refinery' Waivers from U.S. Biofuels Law, Reuters (Apr. 12, 2018), https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/ exclusive-chevron-exxon-seek-small-refinery-waivers-from-u-s-biofuels-lawidUSKBN1HJ32R.

⁵ Transcript of U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Environment hearing on Fiscal Year 2019 Environmental Protection Agency Budget at 11.1231-32, 4371-81 (April 26, 2018).

of exemptions and the corresponding aggregate amount of renewable fuel covered by the exemptions. *See RFS Small Refinery Exemptions*. As this Court observed recently, the story of EPA's administration of RFS exemptions "paint[s] a troubling picture of intentionally shrouded and hidden agency law" that generally left "those aggrieved by the agency's actions"—such as Petitioners—"without a viable avenue for judicial review." *Advanced Biofuels Ass 'n v. EPA*, 792 F. App'x 1, 5 (D.C. Cir. 2019).

Based on information pieced together from news articles and financial disclosures, the Renewable Fuels Association and other entities were able to identify three refineries that were granted exemptions for 2016 and 2017, and they challenged those decisions in the Tenth Circuit on various grounds. See RFA, 948 F.3d at 1214. The Tenth Circuit invalidated the three exemptions on several grounds. First, the court held that because the refineries had not "consistently received an exemption in the years preceding [their] petitions[,] EPA exceeded its statutory authority in granting those petitions because there was nothing for the agency to 'extend."" Id. Second, the court held that EPA exceeded its "statutory authority" in granting petitions "to address disproportionate economic hardship caused by something other than compliance with the renewable fuels mandate"; a petition may be granted only if RFS compliance would cause the hardship. Id. And third, the court held that EPA "abuse[d] its discretion ... by failing to address the extent to which the three refineries were able to recoup their compliance costs by charging higher prices for the fuels they sell"—so-called RIN pass-through. *Id.* at 1215.⁶

D. The 2018 Small Refinery Exemptions

On August 9, 2019, EPA granted thirty-one extension petitions for the 2018 compliance year, covering 1.43 billion gallons of renewable fuel, or about 7.4% of the total amount of renewable fuel required to be used nationally in 2018. GD-14 (2018 SRE Decision); *RFS Small Refinery Exemptions*. Unlike in past years, EPA issued a single memorandum expressing its decision for all of the petitions for 2018. *See* GD-14. Like in past years, though, EPA did not publicly disclose its decision document. The document came to light only when EPA attached it to a brief that it filed in another lawsuit in the Tenth Circuit. *See* EPA Mot. to Dismiss, Decl. of Byron Bunker, Ex. A, *Sinclair Wyo. Refining Co v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 010110231147.

The 2018 SRE Decision does not mention any refineries by name or provide analysis of any individual petition. *See* GD-14. In it, EPA announced categorically

⁶ In response to the Tenth Circuit's decision, small refineries submitted seventyone petitions asking EPA to either reconsider a prior exemption denial or grant an exemption for a prior year in which the refinery had not sought one—socalled gap-filling petitions. See EPA, Denial of Small Refinery Gap-Filling Petitions (Sept. 14, 2020), https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf. EPA denied fifty-four of those petitions on September 14, 2020. See id. These additional denials are now reflected in EPA's dashboard. See RFA Small Refinery Exemptions. EPA has not yet acted on the other seventeen gap-filling petitions.

that it was "granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because those refineries will face a [disproportionate economic hardship]" and that it was "denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a [disproportionate economic hardship]." *Id.* EPA also announced categorically that it was "granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief." *Id.* EPA explained that "the best interpretation of Section 211(a)(9)(B) is that EPA shall either grant or deny petitions for small refinery hardship in full, and not grant partial relief." *Id.* EPA then reasoned that because "DOE's recommendations recognize an economic impact on these small refineries" that received a recommendation of a 50% exemption, those petitions should be granted in full. *Id.*

This petition to review the 2018 SRE Decision followed.

SUMMARY OF ARGUMENT

On several grounds, EPA's decision to grant thirty-one small refinery exemptions for compliance year 2018 exceeded EPA's authority under the Clean Air Act, was contrary to the Act, and was arbitrary and capricious; it therefore must be vacated.

First, EPA exceeded its authority by granting *new* exemptions to refineries when the statute authorizes only "*[e]xtension* of exemption." As a unanimous Tenth

Circuit panel confirmed earlier this year, the only small refineries that are "eligible for extensions [are] ones that submitted meritorious hardship petitions each [prior] year." *RFA*, 948 F.3d at 1246. Because only seven small refineries still held exemptions as of 2015, at *least* twenty-four of the thirty-one small refinery exemptions EPA granted for 2018 had to be invalid.

Second, EPA acted in an arbitrary and capricious manner and contrary to law by issuing the 2018 SRE Decision without any reasoned analysis of the hardships alleged by the individual refineries and instead blindly adopting DOE's recommendations. EPA must form its own analysis based on the evidence before it and accounting for important aspects of the problem; it did not. Its perfunctory, twopage analysis of forty-two small refinery petitions is facially deficient, reflecting the agency's failure to evaluate relevant economic factors. EPA also acted irrationally by failing to reconcile its findings of disproportionate economic hardship with its longstanding position that refineries of all sizes are able to recoup the costs of RFS compliance in the sales prices of their products.

Third, EPA exceeded its authority and acted in an arbitrary and capricious manner in fully exempting refineries for which DOE had recommended only partial exemption. Contrary to EPA's assertion—which it subsequently abandoned—the Clean Air Act does not foreclose partial exemptions. Apart from that incorrect statutory interpretation, EPA provided no justification for the increased exemptions. Although EPA has discretion to depart from DOE's recommendations, it must still have a reasoned justification for doing so, and in particular for concluding that RFS compliance would cause a greater degree of hardship than DOE found. Because EPA conducted no such analysis, EPA exceeded its authority by converting partial exemptions into full exemptions without finding any additional hardship caused by RFS compliance, and its decision to simply round up to 100% any DOE recommendation for only a 50% exemption was arbitrary and capricious.

Fourth, EPA exceeded its authority by granting six exemption petitions that were submitted after the compliance year at issue. Under the Clean Air Act and EPA's own regulations, EPA had no power to grant those petitions. The small refinery program is expressly designed for refineries to petition prospectively. By allowing refineries to get relief from their RFS compliance obligations *after* they already had met those requirements, EPA's decision granting those petitions ran contrary to Congressional intent.

Petitioners therefore request that this Court vacate EPA's decision to grant thirty-one small refinery exemption petitions for compliance year 2018 and order EPA to restore the corresponding volumes of renewable fuel in the next compliance year.

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STANDARD OF REVIEW

The Administrative Procedure Act requires that a reviewing court "hold unlawful and set aside agency action, findings and conclusions" that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

With respect to EPA's interpretations of the Clean Air Act, if the Court, "employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984). If, however, "the statute is silent or ambiguous with respect to the specific issue," then sometimes "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id.; see also Michigan v. EPA, 576 U.S. 743, 751 (2015) ("Even under this deferential standard, ... agencies must operate within the bounds of reasonable interpretation." (quotation marks omitted)). But "[d]eference in accordance with *Chevron* ... is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Fox v.

Clinton, 684 F.3d 67, 76 (D.C. Cir. 2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

Here—as the Tenth Circuit held in *RFA*—any interpretation of an ambiguous provision of the Clean Air Act that EPA rendered through the "informal adjudications of petitions to extend the small refinery exemption [a]re not subject to *Chevron* deference." *RFA*, 948 F.3d 1244. Instead, they are "entitled to respect only to the extent it has the 'power to persuade.'" *Fox*, 684 F.3d at 76 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "In making its determination, the court must examine 'the thoroughness evident in [the Agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Brown v. United States*, 327 F.3d 1198, 1205 (D.C. Cir. 2003) (citing *Skidmore*, 323 U.S. at 140).

In rendering a decision, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass 'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A decision is arbitrary and capricious if the agency "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

Finally, EPA's interpretation of its own regulations may also be entitled to deference, but "only if [the] regulation is genuinely ambiguous" after the court "has resorted to all the standard tools of interpretation," and only if the interpretation is "reasonable." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-16 (2019).

STANDING

As the Tenth Circuit found in *RFA*, Petitioners have standing to challenge EPA's final decisions granting small refinery exemption petitions. *RFA*, 948 F.3d at 1231-39.⁷ This standing is based on the interests of their members, which include companies that manufacture and sell the most common renewable fuels—ethanol and biodiesel—to blenders and sellers of gasoline, as well as agricultural producers of corn and other feedstocks used to produce renewable fuel.⁸ *See Hunt v. Wash.*

⁷ Standing is clearer here because, whereas the three exemptions challenged in *RFA* covered "only a tiny fraction of the total RFS obligation" (according to the refineries), 948 F.3d at 1234, the thirty-one 2018 exemptions covered (as noted) 1.43 billion gallons, or about 7.4% of the total renewable-fuel volume requirement.

⁸ Declaration of Geoff Cooper (for RFA); Declaration of Scott Richman (for RFA); Declaration of Emily Skor (for Growth Energy); Declaration of Jon Doggett (for National Corn Growers Association); Declaration of Brian Jennings (for American Coalition for Ethanol); Declaration of Rob Larew (for National Farmers Union); Declaration of Donnell Rehagen (for National Biodiesel Board); Declaration of Jim Leiting (for member of RFA and Growth Energy); Declaration of Scott Mundt (for member of American Coalition for Ethanol);

State Apple Advert. Comm'n, 432 U.S. 333, 342-43 (1977) (outlining prerequisites to "associational standing"); *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (same).

The RFS standards define the national "demand" for renewable fuel, *i.e.*, Petitioners' members' products. *AFPM*, 937 F.3d at 568. Small-refinery exemptions "create[]" a "renewable-fuel shortfall," depressing the sale of Petitioners' members products. *Id.* at 571. The thirty-one small refinery exemptions EPA granted for compliance year 2018 covered 1.43 billion RINs. 85 Fed. Reg. 7,016, 7,050 (Feb. 6, 2020). Those RINs may be used by the exempt refineries to meet their own compliance obligations or sold to other obligated parties to meet *their* compliance obligations; either way, these RINs allow obligated parties collectively to buy and use less renewable fuel than they would without the exemptions. *See* Richman Decl. ¶10. The reduced demand for renewable fuel in turn drives down the price of renewable fuels such as ethanol and biodiesel, as well as the price of the feedstocks used to produce renewable fuels. *Id.* ¶¶ 20, 24, 27-28.

Additionally, by relieving refineries of their obligation to use renewable fuel, the exemption decisions also subject renewable-fuel producers to greater competition with fossil-fuel producers to supply transportation fuel. "[E]conomic

Declaration of Chris Edgington (for member of National Corn Growers Association).

actors suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016).

The 2018 exemptions reduced the ethanol industry's revenue by about \$109 million due to curbed ethanol consumption, and by another \$439 million due to lower ethanol prices. *See* Richman Decl. ¶17-18, 25. The decline in consumption and prices that resulted from the 2018 exemptions contributed to the idling of ethanol plants in the second half of 2019—at least five plans idled during August and September (immediately after the 2018 exemptions were granted), and one plant closed permanently. *Id.* ¶25; Jennings Decl. ¶19 & n.2. The 2018 exemptions also reduced the price of corn—the feedstock used to make ethanol—by about 10%. *Id.* ¶20; Edgington Decl. ¶9. The biomass-based diesel industry likewise suffered as a consequence of the 2018 exemptions; an estimated reduction in demand of almost one billion gallons forced ten biodiesel production facilities to shut down in 2019. Rehagen Decl. ¶13-14.

A favorable decision from this Court would redress these injuries. If the Court vacates the 2018 exemptions, EPA could require obligated parties to meet the formerly exempted obligations. Thus, relief would raise the demand for renewable fuel and feedstocks, and correspondingly raise their prices. *See* Skor Decl. ¶23; Cooper Decl. ¶21.

ARGUMENT

I. EPA HAS NO AUTHORITY TO "EXTEND" SMALL REFINERY EXEMPTIONS TO REFINERIES THAT WERE NOT EXEMPT FOR ALL PRIOR YEARS

At least twenty-four of the thirty-one small refinery exemptions EPA granted for 2018 are facially invalid because no more than seven refineries could have validly received an exemption for all prior years of the program. As the Tenth Circuit has held, "the only small refineries" that are "eligible for extensions [are] ones that submitted meritorious hardship petitions each [prior] year." RFA, 948 F.3d at 1246. The smallest number of refineries to hold an exemption in any year was seven, for the 2015 compliance year. Consequently, only those seven refineries could possibly be eligible for a 2018 extension of the exemption-and only if they also were granted an extension for all other years between 2009 and 2017.9 EPA, however, argues that it can grant—which it claims is equivalent to "extend"—a new exemption for any year regardless of whether the recipient was exempt in the prior year. That interpretation is nonsense. The statutory text, structure, and purpose permit only one interpretation: EPA may grant an "extension" of a refinery's exemption for any given year only if the refinery has been continuously exempt for all prior years.

⁹ Because EPA refuses to release the identify of refineries that have received small refinery exemptions, Petitioners are unable to determine precisely how many refineries were eligible to receive an exemption extension for 2018.

Congress began the program with a blanket "[t]emporary exemption" for all small refineries through 2010: the RFS program's annual volume "requirements ... shall not apply to small refineries until calendar year 2011." 42 U.S.C. 7545(o)(9)(A)(i). Congress then provided two mechanisms for an "extension of exemption." Id. $\S7545(o)(2)(A)(ii)$, (B)(i). First, the Act provided that if the Secretary of Energy "determine[d]" in a study due by December 31, 2008, that compliance with the RFS volume requirements "would impose a disproportionate economic hardship on small refineries," EPA could "extend the exemption under clause (i) for the small refinery"—that is, the initial "[t]emporary exemption" granted statutorily through 2010—"for a period of not less than 2 additional years." Id. $\S7545(o)(2)(A)(ii)$. Second, the Act provided that a "small refinery may at any time petition [EPA] for an extension of the exemption under subparagraph (A)" again, referring to the initial "[t]emporary exemption" granted statutorily through disproportionate economic hardship." 2010—"for the reason of Id. § 7545(*o*)(2)(B)(i).

To recite this framework is to resolve the interpretive question. The statute expressly contemplates a two-year initial exemption that would be temporary and that could be *extended* under limited circumstances. A small-refinery exemption may be extended only if it is currently in force—initially, only if the refinery received the statutory exemption through 2010, and subsequently only if that
exemption was extended for the intervening years, whether based on the Secretary of Energy's determination, petitions filed by the individual refinery, or both. This accords with the ordinary meaning of "extension," which is "an increase in length of time,' especially 'an increase in time allowed under agreement or concession," and the corresponding ordinary meaning of "extend," which is "To cause to be longer: Prolong." RFA, 948 F.3d at 1245 (quoting Extension and Extend, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary (brackets omitted)); see also id. (quoting other dictionaries); 42 Cal. Jur. 3d Landlord and Tenant § 342 ("Extension may be defined as the act of stretching or spreading out the former term of the lease."). As the Tenth Circuit put it, "the subject of an extension must be in existence before it can be extended," and so a refinery that did not receive an extension of their exemption "in prior years is ineligible for an extension [in a subsequent year], because at that point there is nothing to prolong, enlarge, or add to." Id.; see Black's Law Dictionary (5th ed. 1979) ("The word 'extension' ordinarily implies the existence of something to be extended."); Sunac Petroleum Corp. v. Parkes, 416 S.W.2d 798, 802 (Tex. 1967) ("It seems clear that the new lease was not an Extension of the old lease. An extension, as used in this context, generally means the prolongation or continuation of the term of the existing lease. ... [But here] the lease had long since expired"). Consequently, EPA has no authority to extend an exemption that has expired.

In EPA's view, however, it may issue a new exemption for any year for which a small refinery shows that compliance would cause it disproportionate economic hardship. EPA argues that "'[e]xtend' means 'to make available (as a fund or privilege) often in response to an explicit or implied request; GRANT." EPA *RFA* Br. 29 (quoting Webster's *Third International Dictionary* 804 (1986)); *accord* EPA Br. 50-51, *Advanced Biofuels Ass* 'n v. *EPA*, 792 F. App'x 1 (D.C. Cir. 2019) (No. 18-1115). But as noted, the primary and most common meaning of "extend" is "to prolong." A "court may not assume that Congress picked an unusual meaning unless some evidence supports that interpretation." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). Here, EPA's cherrypicked dictionary definition is foreclosed by every piece of evidence of Congress's intent.

For starters, if Congress had wanted to empower EPA to *grant* a new exemption irrespective of whether the refinery had been previously exempt, it had a readily available way to do so: by using the word "grant." Indeed, Congress regularly used that word in other provisions of the Clean Air Act authorizing EPA to issue something to a regulated entity. *See, e.g.*, 42 U.S.C. § 7545(c)(4)(C)(ii)(III) ("grant the waiver"); § 7545(f)(4) ("grant or deny an application"); § 7545(k)(B)(iv) ("the granting and use of credits"); § 7545(k)(7)(A) ("the granting of an appropriate amount of credits"); § 7545(m)(3)(C)(ii) ("waiver may be granted"); § 7545(o)(7)(C) ("A waiver granted"). Thus, Congress "knew how to draft the kind

of statutory language that [EPA] seeks to read into" the Act. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). "[H]ad Congress intended to" give EPA the power to *grant* new exemptions, it "would have said so." *Id.* at 443.

Instead, Congress clearly conveyed that "extensions" are to prolong the duration of an extant exemption. For example, the Act expressly frames the "extension" of exemptions in terms of expanding the initial, statutorily granted exemption's duration, not in terms of issuing a new exemption: the Act establishes a *temporary*—*i.e.*, a time-limited—exemption through 2010 and then allows EPA to "extend th[at] exemption ... for a *period* of ... additional years." Moreover, interpreting "extend" to mean "grant" yields absurd results. For example, replacing "extension" with "grant" in the provision under which individual small refineries petition for relief-a "small refinery may at any time petition the Administrator for [a grant] of the exemption under subparagraph (A) for the reason of disproportionate economic hardship," $\S7545(o)(9)(B)(i)$ —would merely authorize EPA to issue the very same exemption that Congress itself granted in another provision, see § 7545(*o*)(9)(A). That would render § 7545(*o*)(9)(B)(i) pointlessly duplicative. And "[i]t is a cardinal principle of statutory construction that [courts and agencies] must give effect, if possible, to every clause and word of a statute." N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 941 (2017) (alterations and quotation marks omitted). Indeed,

"[t]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quotation marks omitted).

Examining the rest of the Clean Air Act confirms that Congress unambiguously used "extend" and "extension" to mean "prolonging the duration of" a preexisting exemption rather than granting a new one. See Del. Dep't of Nat. Res. & Envtl. Control v. EPA, 895 F.3d 90, 97 (D.C. Cir. 2018) ("[W]e must look not only to the particular statutory language at issue, but also the language and design of the statute as a whole." (quotation marks omitted)). For example, the statute allows EPA to "extend the effective date" of certain regulations "for not more than 1 year" and to "renew th[at] extension ... for two additional periods." § 7545(h)(5)(C)(ii); see also 7545(k)(6)(A)(ii) (EPA "shall, by rule, extend the effective date of such prohibition ... for one additional year, and may, by rule, renew such extension for 2 additional one-year periods"); § 7545(m)(3) ("Upon petition, the Administrator may extend such effective date for one additional year."). Similarly, the statute directs EPA, under certain circumstances, to "extend the commencement date [of a prohibition] ... for not more than 1 year" and then permits EPA to "renew th[at] extension ... for 2 additional periods." § 7545(k)(6)(B)(iii). It makes no sense to speak of granting an effective date, granting a commencement date, or renewing the grant of either. In no other provision did Congress use "extend" or "extension" in

the Clean Air Act in a way that could plausibly be interpreted to mean "grant"; in all other instances, Congress used it solely to mean prolonging the duration of. *See also* § 7545(o)(7)(E) (if EPA determines that "disruption" that warranted "60-day" "[w]aiver" of requirement "is continuing beyond the 60-day period," EPA may "exten[d]" waiver "for up to an additional 60-day period"); § 7545(t)(2)(B) ("Each blending period authorized under subparagraph (A) shall extend for a period of no more than 10 consecutive calendar days."). There is no reason here to depart from the "presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Further, the purpose of the exemption program is served only by permitting an exemption to be extended for one year only if the small refinery was exempt in all prior years. "Congress, aware that small refineries would face greater difficulty complying with the renewable fuels requirements, created a three-tiered system of exemptions to afford small refineries a bridge to compliance." *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 572 (D.C. Cir. 2015). Congress initially bestowed the "*[t]emporary* exemption" through 2010 to give small refineries "time to develop compliance strategies and increase blending capacity." *Id.* at 572-73. But it did so "with an eye toward eventual compliance with the renewable fuels program for all refineries." *Id.* at 588. Congress intended that the "number [of exemptions] should ... taper[] down" after the initial blanket exemption. *RFA*, 948 F.3d at 1246. Thus, the second and third tiers for relief would "funnel[] small refineries toward compliance over time": extension of exemptions based on the Secretary of Energy's determination of disproportionate economic hardship or based on individual petitions showing disproportionate economic hardship. *Id*. The only way to ensure that the number of exemptions does taper down is if, as the Tenth Circuit recognized, "the only small refineries from [the initial original] group which continued to be eligible for extensions were ones that submitted meritorious hardship petitions each year." *Id*. "[O]nce a small refinery figures out how to put itself in a position of annual compliance, that refinery [should] no longer [be] a candidate for extending (really 'renewing' or 'restarting') its exemption." *Id*.

EPA has sought refuge in the fact that the statute permits a refinery to petition for an extension "'at any time." EPA *RFA* Br. 27-28 (quoting § 7545(o)(9)(B)(i)). That phrase, however, has no bearing on the meaning of "extension." That phrase merely specifies when a refinery may submit its extension petition; it says nothing about the period that may be covered by the extension or any other condition of eligibility.¹⁰ As the Tenth Circuit put it, "even if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*." *RFA*, 948 F.3d at 1248.

¹⁰ As discussed below, EPA has also misinterpreted the phrase "at any time" for purposes of when EPA may *act on* an exemption petition. *Infra* p.46.

II. EPA'S FAILURE TO PROVIDE A REASONABLE BASIS FOR GRANTING PETITIONS TO EXTEND SMALL REFINERY EXEMPTIONS WAS ARBITRARY, CAPRICIOUS, AND OTHERWISE CONTRARY TO LAW

The 2018 SRE Decision offers no reasoned analysis to demonstrate that any small refinery experienced "disproportionate economic hardship" caused by compliance with the RFS. *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result."). Instead, the Decision blindly relied on DOE's findings. Although EPA must consider DOE's findings, blind reliance on them is contrary to the Clean Air Act. And there is no indication that either EPA or DOE considered an important aspect of the problem: that refineries recover their RFS compliance costs, thereby mitigating if not eliminating any hardship they might otherwise suffer from complying.

A. The 2018 SRE Decision is Facially Deficient

The 2018 SRE Decision is demonstrably inadequate because it neither contains nor is accompanied by any analysis of the evidence relating to whether any of the refineries would incur disproportionate economic hardship from having to comply with their 2018 RFS obligations. This deficiency is highlighted when the 2018 SRE Decision is compared to EPA's past practice of issuing a several-page decision document for *each* small refinery. *See* Exhibit A (examples of EPA's

decision documents for small refineries for 2017 compliance year).¹¹ Those decision documents typically included DOE's recommendation, followed by EPA's own analysis of the specific factors affecting the small refinery. See, e.g., id.; supra note 11; see also Ergon-West Virginia, Inc. v. EPA (Ergon II), 2020 WL 6733480, at *6 (4th Cir. Nov. 17, 2020) (EPA's basis for its decision must be "apparent in the record"). And courts have found even those more robust extension decisions unpersuasive. See, e.g., RFA, 948 F.3d at 1257; Ergon-West Virginia, Inc. v. EPA (Ergon I), 896 F.3d 600, 601 (4th Cir. 2018). The contrast between EPA's prior approach and the 2018 SRE Decision is so stark that at least one small refinery contacted EPA to request EPA's "full analysis" of the refinery's petition, explaining that "[i]n light of EPA's prior course of conduct, [the refinery] anticipated that EPA would subsequently provide an individual decision document explaining its decision to deny [the refinery's] exemption petition." Suess Decl., supra note 11 at ¶15-16. EPA responded that "as of August 9, EPA had not prepared any written analysis in

¹¹ See also Pet'rs' Resp. in Opp. to EPA's Mot. to Dismiss, Suess Decl. ¶12, Sinclair Wyo. Ref. Co. v. EPA, Case No. 19-9562 (10th Cir. filed Aug. 22, 2019) ("Until this year, EPA has always provided Sinclair with a written decision document explaining EPA's decision *in detail*.") (emphasis added); Lion Oil Co. v. EPA, 792 F.3d 978, 980 (8th Cir. 2015) ("EPA's 23-page decision summarized DOE's analysis ..., [then] EPA 'independently' analyzed the pipeline disruption and Lion Oil's blending capacity, projected RFS-compliance costs, and financial position.").

response to [the refinery's] petition." *Id.* That admission is consistent with the administrative record, which includes no evidence that EPA analyzed the petitions.

B. EPA Cannot Blindly Adopt DOE's Analysis

The only acknowledgment in the 2018 SRE Decision of any analysis of disproportionate hardship was DOE's recommendations. EPA accepted those recommendations whole hog, without any further analysis: EPA announced that it was "granting full exemptions … where DOE recommended 100 percent relief," "denying exemptions … where DOE recommended no relief," and "granting full exemptions … where DOE recommended no relief," and "granting full exemptions … where DOE recommended no relief," and "granting full exemptions … where DOE recommended no relief," and "granting full exemptions … where DOE recommended 50 percent relief." GD-14 (2018 SRE Decision). But, as the Fourth Circuit has held, EPA cannot "blindly adopt" DOE's recommendations with respect to small refinery extensions. *Ergon I*, 896F.3d at 610 (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006)).

The Clean Air Act explicitly vests the decision to extend an exemption in the Administrator of EPA. 42 U.S.C. § 7545(*o*)(9)(B)(ii). And the Act directs EPA to make such decisions "in consultation with the Secretary of Energy," but ultimately EPA must conduct its own analysis that "considers … other economic factors." *Id.* Thus, EPA impermissibly abdicated its statutory duty in reflexively adopting DOE's analysis and recommendations. Moreover, without providing analysis of its own in the 2018 SRE Decision, EPA deprived the Court of the means of assessing whether "EPA's reliance on the DOE's Report is arbitrary and capricious." *Ergon I*, 896 F.3d

at 610; *cf. Lion Oil*, 792 F.3d at 982 (EPA's reliance on DOE's report was not arbitrary and capricious when EPA used DOE's analysis as a "primary factor" in its decision, but "EPA then independently analyzed" the key factors). That itself renders the 2018 SRE Decision arbitrary and capricious. Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given," *State Farm*, 463 U.S. at 43, but rather, the agency must provide an "explanation that will enable the court to evaluate the agency's rationale at the time of decision." *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). EPA provided no such explanation in the 2018 SRE Decision.

Recently, the Fourth Circuit upheld part of EPA's decision to deny a small refinery exemption petition based on the adequacy of EPA's independent analysis. *See Ergon II*, 2020 WL 6733480 (4th Cir. Nov. 17, 2020). The court had previously vacated and remanded EPA's initial denial of the same petition in 2018, finding the decision was arbitrary and capricious due to "EPA's failure to adequately explain its reasons for denying [the refinery's] petition." *Id.* at *6. The court "determined that the EPA made a 'clear error of judgment' by relying on the DOE's Scoring Matrix 'without explanation' and without 'conducting any independent analysis regarding'" DOE's decision not to score certain sections. *Id.* at *6 (quoting *Ergon I*, 896 F.3d at 611). In upholding parts of EPA's denial after the remand, the court explained that "though ... EPA briefly recited the DOE's conclusions and summarily expressed

that it 'agrees with DOE's' evaluation, that was not the end of its analysis"; EPA "also independently addressed and defended its decision based on a variety of other economic factors after explaining why it rejected some of [the refinery's] arguments in favor of its petition." *Id.* at *7.

Unlike the small refinery exemption decision reviewed by the Fourth Circuit in *Ergon II*, the 2018 SRE Decision does not "independently address[] and defend[]" its decision or make any effort to "independently analyze[] the question before it." *Id.* at *7. In fact, the 2018 SRE Decision does not even come close to including the same level of analysis contained in the decision vacated in *Ergon I*, which the Fourth Circuit specifically rejected "because of the inadequacy of the explanation." *Id.* at *6; *compare* Exhibit B *with* GD-14 (2018 SRE Decision).

Because EPA failed to articulate *any* explanation for its action, much less "a satisfactory explanation," *State Farm*, 463 U.S. at 43, but rather blindly relied on DOE's recommendations, the 2018 SRE Decision is contrary to law and arbitrary and capricious, and must be vacated.

C. EPA Failed to Reconcile its Findings of "Disproportionate Economic Hardship" with its Position that Refineries Recover the Cost of RFS Compliance

EPA's failure to provide an explanation for the 2018 SRE Decision is compounded by the conspicuous absence of any analysis reconciling the agency's finding of disproportionate hardship with its long-held, well-supported view that individual small refineries can *and do* recover their RFS compliance costs in the price of the goods they sell. By failing to reconcile that fact with the refineries' claims that RFS compliance would cause them disproportionate economic hardship, EPA failed to rationally account for an important aspect of the problem facing it and therefore acted arbitrarily and capriciously in the 2018 SRE Decision—as it did in granting some prior exemption petitions. *See RFA*, 948 F.3d at 1256; *Ergon I*, 896 F.3d at 613.

Based on extensive and careful analysis, EPA has concluded that big and small "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." Alon, 936 F.3d at 649 (quoting EPA, Denial of Petitions for Rulemaking to Change the *RFS Point of Obligation*, EPA-HO-OAR-2016-0544-0525, at 7 (Nov. 22, 2017) (EPA Denial)). This Court recently reviewed and upheld that conclusion, finding that EPA had "reasonably[] analyz[ed] the data and explain[ed] its decision." Alon, 936 F.3d at 653. EPA has consistently maintained this position since at least 2015, when an EPA report assessing the 2013 RIN market concluded that "obligated parties were generally able to recover [the] increase in the costs of meeting their RIN obligations in the price they received for their petroleum-based products," and thus "these higher costs have a *similar* impact on *all* obligated parties." GD-7 at 29 (emphasis added). And EPA has affirmed this position in recent rulemakings. For example, in the final rule setting the 2020 RFS standards, EPA stated: "We have reviewed and assessed the available information, which shows that obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS standards Even if we were to assume that the cost of acquiring RINs was not recovered by obligated parties ... a cost-to-sales ratio test shows that the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales." 85 Fed. Reg. at 7,067-68.

As the Tenth and Fourth Circuits have already concluded, the ability of small refineries to obtain recover their compliance costs is "material to any finding of 'disproportionate economic hardship' for a refinery." *RFA*, 948 F.3d at 1256. In *RFA*, the Tenth Circuit found three small refinery exemption decisions to be defective because, among other things, "EPA did not analyze the possibility of RIN cost recoupment"—*i.e.*, that the refinery would recover its compliance cost—"when it granted the Refineries' extension petitions." *Id.* Similarly, in *Ergon I*, the Fourth Circuit vacated a small refinery exemption decision because "EPA's cursory consideration and failure to address [the refinery's] specific evidence regarding RIN costs was an arbitrary and capricious action." *Ergon I*, 896 F.3d at 613.

The 2018 SRE Decision goes a step further in the wrong direction by failing to provide even a "cursory consideration" of RIN costs. *Id*. Even if the refineries had provided plausible evidence that RFS compliance would cause them prima facie economic hardship, EPA would still have needed to reconcile that evidence with the fact that those refineries can pass on or recover their compliance costs. EPA entirely failed to do so. And even that would not be enough: EPA would need to account for the refineries' cost recovery in assessing whether their supposed economic hardship was *disproportionate*, a difficult task given that both large *and* small refineries recover the cost of RFS compliance. *See RFA*, 948 F.3d at 1255 (fact that "EPA ignored or failed to provide reasons for deviating from prior studies showing that RIN purchase costs do not disproportionately harm refineries which are not vertically integrated" amounted to "significant" oversight "even with deferential review.").

In sum, because EPA failed to address this issue in the 2018 SRE Decision, the court cannot "know whether the pass-through studies previously performed or cited by the EPA matched up with each refinery's individual conditions (thereby precluding a finding of disproportionate hardship)." *Id.* at 1257. As such, EPA "failed to consider an important aspect of the problem, and its silence ran counter to the record." *id.*; *State Farm*, 463 U.S. at 43.

III. EPA'S DECISION TO FULLY EXEMPT REFINERIES WHERE DOE RECOMMENDED ONLY PARTIAL RELIEF EXCEEDED ITS STATUTORY AUTHORITY AND WAS ARBITRARY AND CAPRICIOUS

Even if DOE's recommendations constituted sufficient basis for EPA to find that the refineries would suffer disproportionate economic hardship, EPA still erred in granting full exemptions to the twenty refineries for which DOE recommended only 50% exemptions.¹² EPA made the leap from 50% to 100% not because of any additional evidence of greater hardship—there was none—but because EPA mistakenly concluded that the Clean Air Act required it to make that leap.

A. The Statute Did Not Foreclose EPA from Granting Partial Exemptions

In the 2018 SRE Decision, EPA "concluded that the best interpretation of [\$7545(o)(9)(B)] is that EPA shall either grant or deny petitions for small refinery hardship relief in full, and not grant partial relief." GD-14. EPA's "best interpretation" is wrong; therefore, the exemptions that EPA granted in full based on its erroneous conclusion that it could not grant a partial exemption are invalid.

It is certainly true that, as EPA points out, "the original [2006-2010] exemption ... was a full exemption" and that the exemption under 211(o)(9)(B) is an *extension* of that initial exemption, *see* GD-14—indeed, that is part of the

¹² DOE recommended "that EPA consider providing 50 percent exemption" to the following refineries: B, E, H, K, L, M, N, O, P, R, U, V, W, Y, AA, AB, AC, AD, AE, AH.

reasoning for why a refinery is eligible for an extension only if it has been exempt in all prior years, see supra pp.22-30. But it does not follow that EPA cannot extend an exemption on a partial basis. The original exemption was a blanket exemption for all refineries without any hardship requirement; once the hardship requirement applied, it stands to reason that there could be degrees of hardship, and that the exemption extensions would appropriately be calibrated to reflect those degrees. In fact, EPA subsequently rejected the 2018 SRE Decision's interpretation and recognized that the statute permits it to grant a partial extension.¹³ See 85 Fed. Reg. at 7,051-52; id. at 7,051 n.170 ("EPA has discretion to follow [DOE's] recommendation and grant a partial exemption."). EPA explained that following DOE's recommendations of partial relief "allow[s] EPA to ensure that the level of relief that it grants appropriately reflects the particular small refinery's disproportionate economic hardship" and "allows EPA to more precisely calibrate its RFS policy." 85 Fed. Reg. at 7,052.

Nor does ordinary use of "extension" does mean that every feature of the original must be identical in the extension. *See, e.g., Sunac Petroleum*, 416 S.W.2d

¹³ Although EPA's position now is that the statute is ambiguous, *see* 85 Fed. Reg. at 7,052, its position in the 2018 SRE Decision was that its interpretation was the "best," not merely reasonable. Deference is not warranted to the 2018 SRE Decision because (1) it purported to adopt the "best" interpretation, and it was wrong about that; and (2) as discussed *supra* at 17-19, no deference would be warranted anyway, and the best interpretation is that partial extensions are permitted.

at 802 ("An extension [of a lease] ... might also encompass the enlarging of the territory or strata to be covered by the lease," but not adopting "substantially different terms."). For example, when a professional athlete receives a "contract extension," some terms may vary from the original contract—for example, the player may receive a new bonus opportunity or a different termination clause.¹⁴ What makes it an extension is that the parties to the existing contract prolong the core of their relationship. So too with exemption extensions: what makes it an extension is the prolonging of relief from the refinery's RFS obligations. Even if the precise measure of relief differs, it is still the same type of relief—the refinery is still exempt from RFS obligations. Congress has confirmed this reading by urging DOE to recommend partial exemptions where appropriate.¹⁵ There would be no point in having DOE make such recommendations if EPA could not grant them.

¹⁴ Luke Adams, *Hoops Rumors Glossary: Veteran Contract Extension*, Hoops Rumors, Dec. 25, 2019, https://www.hoopsrumors.com/2019/12/hoops-rumors-glossary-veteran-contract-extension.html ("If a contract contains incentive bonuses, a veteran extension must contain the same bonuses. The bonus amounts can be increased or decreased by up to 8%, but they must still be part of the deal. ... If a contract includes an unearned trade bonus, it doesn't necessarily have to be applied to the extension.").

¹⁵ An explanatory statement accompanying Congress's Consolidated Appropriations Act for fiscal year 2016 provided that

According to [DOE's] March 2011 Small Refinery Exemption Study, disproportionate economic hardship must encompass two broad components: a high cost of compliance relative to the industry average

If partial extensions *are not* permitted, then the showing of disproportionate economic hardship must be sufficient to support a full exemption. That is, the refinery must show that *any* compliance would cause disproportionate economic hardship, such that it cannot be required to comply at all. Otherwise, the exemptions could be vastly overbroad, relieving the refinery of its entire obligation for a marginal hardship. There is no reason to think Congress intended that.

B. EPA's Decision to Increase DOE's Recommendations of Partial Relief to Full Exemptions Was Contrary to Law and Arbitrary and Capricious

Without EPA's incorrect interpretation of the Clean Air Act precluding EPA from granting partial exemptions, the twenty full exemptions EPA granted where DOE recommended only a partial exemption cannot stand. Much as EPA had no rational foundation to grant any 2018 small refinery exemptions at all, *see* Part II, *supra*, it had no basis to move from DOE's recommendation of a 50% exemption to its grant of a full exemption. EPA's decision to round up DOE's recommendations was not based on EPA finding that additional hardship due to RFS compliance

disproportionate impacts and an effect sufficient to cause a significant impairment of the refinery operations viability.

If the Secretary [of DOE] finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner.

Explanatory Statement to Division D at 35, Consolidated Appropriations Act, 2016 Pub. L. No. 114-113 (2015), *at* https://docs.house.gov/meetings/RU/RU00/20151216/104298/HMTG-114-RU00-20151216-SD005.pdf, *quoted in* GD-4.

existed warranting an enhanced exemption at that refinery. Even if DOE's recommendations were sufficient to justify a *partial* exemption, they could not support the *full* exemptions that EPA granted.

The statute requires that the "disproportionate economic hardship" used to justify an exemption extension be caused by "compliance with the [RFS volume] requirements." 42 U.S.C. § 7545(o)(9)(A)(ii), (B)(i). Therefore, as the Tenth Circuit has concluded, "renewable fuels compliance must be the cause of any disproportionate hardship." *RFA*, 948 F.3d at 1253. This causation requirement demands at least rough correspondence between the degree of disproportionate hardship and the extent of the exemption. But there is no rational connection or correspondence between a hardship that would be remedied by 50% relief, and 100% relief. EPA certainly cannot arbitrarily round up from 50% hardship to 100% exemption, and it exceeded its authority in attempting to do so without a finding of additional economic hardship.

EPA's attempt to ground its decision in Congressional intent falls short. EPA points to a 2019 House Report which provided that "regardless of [DOE's] recommendation, additional relief may be granted if [EPA] believes it is warranted." Consolidated Appropriations Act, 2019 Pub. L. No. 116-6 (2019), H.R. Rep. No.

116-9 at 741 (Feb. 13, 2019), *quoted in* GD-14; GD-6.¹⁶ To be sure—as discussed above—EPA is not permitted to blindly adhere to DOE's recommendations. But it does not follow that EPA can arbitrarily depart from DOE's recommendations, either. As the House Report noted, EPA's departure must be "warranted." Notably, Congress's explanation in its statement accompanying the 2016 Consolidated Appropriations Act that DOE could recommend partial exemptions would have been pointless if EPA were to simply round those recommendations up to 100% without any other evidence of larger hardship. *See supra* note 15.

Thus, as with any agency action, the extension decision must accord with the statute and there must be a "rational connection between the facts found"—the specific refineries' circumstances and DOE's recommendations of partial relief— "and the choice made"—EPA's decision to grant full exemptions. *State Farm*, 463 U.S. at 43. Here, however, EPA's jump from the recommended 50% exemptions to full exemptions disregards the statutory causation requirement and fails to reflect any rational connection to the facts. It therefore must be set aside.

¹⁶ Where EPA decides to depart from DOE's recommendations, it has to report such deviations to Congress, *see* S. Rep. No. 114-281, at 71 (2016); yet EPA has never submitted such a report to Congress explaining why it has decided to depart from DOE's recommendations.

IV. EPA EXCEEDED ITS AUTHORITY BY GRANTING PETITIONS FOR SMALL REFINERY EXEMPTIONS TO REFINERIES THAT PETITIONED AFTER THE COMPLIANCE YEAR

Six of the small refinery exemptions that EPA granted for 2018 also are facially invalid because the petitions were submitted after the 2018 compliance year ended on December 31, 2018.¹⁷ EPA has no power to grant exemptions that are submitted after the covered compliance year.

Both the Clean Air Act and its implementing regulations expressly envision that petitions for an extension of exemption will be submitted prospectively, that is, before the refinery must perform its compliance obligations. The Act provides that a refinery's exemption could be extended if the Secretary of Energy determined that the refinery "would be subject to a disproportionate economic hardship if required to comply." 42 U.S.C. § 7545(o)(9)(A)(ii)(II) (emphasis added). The Act then carries that through to individual petitions, stating that a refinery may petition for an disproportionate economic extension "for the reason of hardship," § 7545(o)(9)(B)(i)—meaning that the refinery, again, "would be subject to a disproportionate economic hardship if required to comply," § 7545(0)(9)(A)(ii)(II) (emphasis added); see RFA, 948 F.3d at 1253 (concluding that small refinery

¹⁷ Specifically: Company H (submitted Feb. 4, 2019); Company P (submitted Jan. 31, 2019); Company Q (submitted Jan. 31, 2019); Company T (submitted Jan. 7, 2019); Company AB (submitted Mar. 8, 2019); Company AF (submitted Mar. 8, 2019).

exemption petitions under § 7545(o)(9)(B)(i) must meet causation standard articulated in § 7545(o)(9)(A)(ii)(II) for extensions based on Energy Secretary's determination).

Similarly, EPA's implementing regulations require that extension petitions "provide a detailed discussion regarding the hardship the refinery would face in transportation fuel meeting the requirements." 40 C.F.R. producing § 80.1441(e)(2)(i) (emphasis added). The regulations also specify that a petitioning refinery "must be projected to meet the definition of 'small refinery' ... for the year or years for which an exemption is sought." Id. § 80.1441(e)(2)(iii). All these futuretense and forward-looking verbs show clearly that, under both the statute and the implementing regulations, exemption petitions must be submitted before the duty and opportunity to comply pass, which is to say, before the compliance year ends. This conclusion is confirmed by the fact that the statute requires EPA to decide extension petitions "not later than 90 days after" the petition is submitted, submitted—even if long after the compliance year—there would be no need for EPA to decide them within a strict timeframe.

Further, it would be irrational and contrary to Congress's purpose for the statute to permit petitions to be submitted after the compliance year. The express goal of exemptions is to provide compliance relief to refineries that suffer acute

injury from the burden of compliance. A refinery cannot credibly claim that compliance causes it the requisite "disproportionate economic hardship" *after* it has already completed its compliance duties. Consequently, there is no reason for Congress to have provided for petitions to be submitted in such circumstances.

EPA, however, draws on the statutory instruction that that a refinery "may at any time petition" for an extension of exemption. § 7545(*o*)(9)(B)(i). Even if in isolation that phrase appears to allow EPA to grant exemption petitions regardless of when they are filed, it must be interpreted in light of the full statutory context. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012) ("This is not to say that the word 'individual' invariably means 'natural person' when used in a statute. Congress remains free, as always, to give the word a broader or different meaning."). And as just discussed, that context makes clear that Congress intended extension petitions to be submitted prospectively and thus before the conclusion of the covered compliance year.

CONCLUSION

For the reasons above, this Court should vacate the 2018 SRE Decision and remand to EPA with instruction for EPA to either increase the RFS volume requirements in the next annual rulemaking by an amount equal to the volume avoided by the 2018 exemptions or to direct the refineries to retire a number of RINs

equal to those that were improperly reinstated by the 2018 exemptions.

Date: December 7, 2020

Respectfully submitted,

<u>/s/ Matthew W. Morrison</u> Matthew W. Morrison Cynthia Cook Robertson Shelby L. Dyl PILLSBURY WINTHROP SHAW PITTMAN LLP 1200 Seventeenth Street, NW Washington, DC 20036 (202) 663-8036 matthew.morrison@pillsburylaw.com cynthia.robertson@pillsburylaw.com shelby.dyl@pillsburylaw.com

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

- This brief complies with the type-volume limitation of Fed. R. App. P.
 32(a)(7)(B)(i) because it contains 10,880 words, excluding the exempted portions of the brief, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.
- This brief complies with the typeface and type style requirements of Fed. R.
 App. P. 32(a)(5)-(6) because it was prepared in proportionally-spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

December 7, 2020

<u>/s/ Matthew W. Morrison</u> Matthew W. Morrison

CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: December 7, 2020

Respectfully submitted,

/s/ Matthew W. Morrison Matthew W. Morrison

EXHIBIT A

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



WASHINGTON, D.C. 20460

MAR 2 3 2018

OFFICE OF AIR AND RADIATION

Mr. Timothy J. Parker Vice President & General Counsel Kapolei Refinery IES Downstream, LLC 91-480 Malakole Street Kapolei, Hawaii 96707-1807

Dear Mr. Parker:

I am writing in response to the petition from Island Energy Services Downstream, LLC ("IES") for a one-year extension of the small refinery exemption for 2017 from the requirements of the Renewable Fuel Standard (RFS) program for Island Energy Services Downstream, LLC's ("IES's") refinery in Kapolei, Hawaii (the "Kapolei Refinery"). As you know, the Clean Air Act (CAA) provided that small refineries would be temporarily exempt from the RFS requirements through December 31, 2010. The Kapolei Refinery qualified as a small refinery that was covered by this temporary exemption.

Pursuant to CAA section 211(0)(9)(B) and 40 CFR 80.1441(e)(2) small refineries may petition EPA to extend the temporary RFS exemption on the basis that compliance with the RFS requirements will cause "disproportionate economic hardship." Pursuant to these provisions, IES submitted a petition to EPA dated December 20, 2017 to extend the exemption for the Kapolei Refinery for 2017.

Based on the information submitted in your petition, and after consultation with the Department of Energy, EPA has decided to grant a one-year extension of IES's RFS small refinery temporary exemption. This means that from January 1, 2017 through December 31, 2017, the Kapolei Refinery's gasoline and diesel production are not subject to the percentage standards of 40 CFR 80.1405, and IES is not subject to the requirements of an obligated party for fuel produced at the Kapolei Refinery during that period.

If you have any questions, please contact Byron Bunker of my staff at 734-214-4155.

Sincerely,

Christopher, Grundler, Director Office of Transportation and Air Quality

Enclosure – Decision Document

Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standard Program For Island Energy Services Downstream, LLC's Kapolei, Hawaii Refinery

Contains Information Claimed by Island Energy Services Downstream, LLC To be Confidential Business Information

Office of Transportation and Air Quality

EPA received a petition from Island Energy Services Downstream, LLC ("IES") dated December 20, 2017, for a one-year extension of the Renewable Fuel Standard (RFS) small refinery exemption for IES's Kapolei, Hawaii refinery (the "Kapolei Refinery") in 2017. For the reasons described herein, EPA is granting IES's request for an extension of the Kapolei Refinery's RFS small refinery exemption for 2017.

Section 211(o)(9) of the Clean Air Act (CAA) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the RFS program on the basis of a finding of "disproportionate economic hardship" (DEH). The statute directs EPA, in consultation with the Department of Energy (DOE), to consider the (DOE) Small Refinery Study and "other economic factors" in evaluating small refinery exemption petitions, but CAA section 211(o)(9) leaves the definition of DEH to the Administrator's discretion for purposes of implementing this exemption provision.

After evaluating information submitted by the petitioner, DOE provides a recommendation to EPA on whether a refinery merits exemption from the RFS. As described in its study, DOE assesses the potential for DEH at a refinery on the basis of two sets of metrics. One set assesses structural and economic conditions that could disproportionately impact the refinery (described as "disproportionate impacts" for purposes of DOE's scoring metrics, and also described as "structural" factors or conditions here). The other set assesses economic factors that could cause viability concerns (described as "viability" for purposes of DOE's scoring metrics, and also described as "economic" factors or conditions here).

In previous year decisions, DOE and EPA considered that DEH exists only when a refinery experiences both disproportionate impacts and viability impairment. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹ Congress then directed EPA to follow DOE's recommendation.² Because the Kapolei Refinery's first ranking (disproportionate impacts) and second ranking (viability) are both greater than 1, DOE's recommendation to EPA is a 100 percent waiver for the Kapolei Refinery (i.e., a full extension of the Kapolei Refinery's temporary exemption).

For the purposes of implementing CAA section 211(o)(9) for 2017 small refinery exemption decisions, EPA has determined that DEH can exist on the basis of adverse structural conditions alone. A difficult year may exacerbate economic problems for small refineries that

¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: https://rules.house.gov/bill/114/hr-2029-sa.

² Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017); *See also* Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016.").

face disproportionate impacts, resulting in tangible effects including diminished refining margins, reduced profitability, cash flow limitations that can hinder its ability to acquire renewable fuel credits (Renewable Identification Numbers, or RINs) for compliance, and the potential to impair refinery operations. In addition, small refineries sometimes lack access to capital or credit that can also be necessary to achieve compliance.

In its industry-wide analysis, DOE has found that poor access to capital and credit, lack of other business lines, and high diesel production compared to the industry average can suggest a disproportionate structural impact. Poor refining margins, limited ability to blend ethanol, and market competition can suggest a disproportionate economic impact. As noted above, DOE scores the disproportionate structural and economic impacts together as half of its DEH analysis. Here, EPA acknowledges that DOE found that the Kapolei Refinery demonstrated unfavorable structural conditions. EPA's review of DOE's analysis is in accord with this conclusion. These conditions disadvantage the refinery relative to larger refineries that may not face similar structural challenges.

DOE also assessed economic factors as the second component of DEH. Here, EPA acknowledges that DOE found the Kapolei Refinery's viability was impacted; DOE determined that the cost of compliance with its RFS obligations would impair efficiency gains and impact the refinery's economic viability.³ Therefore, DOE recommended a 100 percent waiver for the Kapolei Refinery on the basis of both structural conditions and viability concerns.

1	Di	Disproportionate Structural Impact Metrics				
	а	Acc	ess to capital/credit	0 = Good access (BB- or above credit rating), 5 = Moderate access (rating in B's) 10 = Poor access (C rating or 50% D/E)	10	
	b	Oth and	er business lines besides refining I marketing	0 = Other Lines, 10 = No Other Lines	10	
	С	Loc Rer i	al market acceptance of newables	0 = Products accepted, 10 = Product not accepted 0 = High acceptance, 5 = Low acceptance	0	
		ii iii	E85 Biodiesel	10= No acceptance Not scored because of small E85 volumes Not available		
	d	Percentage of diesel production		0 = D/(G+D) < Industry Avg. 5 = D/(G+D) > Ind. Avg<40%. 10=D/(G+D) > 40%	0	
	e	Subject to exceptional state regulations		0 = not subject, 5= Some barriers for compliance 10 = subject to exceptional state regulations	0	

Table 1 ⁴	
DOE Evaluation of IES's Petition for the Kapolei Refi	nerv

³ From DOE recommendation for the Kapolei refinery transmitted to EPA on February 28, 2018.

⁴ The gray-shaded categories were developed as part of the DOE Small Refinery Study, but DOE has chosen not to assign scores in the gray-shaded categories for any small refinery evaluations at this time. See the DOE Small Refinery Study for DOE's explanation regarding why it does not assign scores for the gray-shaded categories.

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Contains Material Claimed as Confidential Business Information

2	Disproportionate Economic Impact Metrics							
			0 = Above 3 year industry average					
	а	Relative refining margin measure ⁵	5 = Positive, below 3 year industry average	10				
			10= Negative	2				
· · · · ·	b	Renewable fuel blending (% of production)						
		i Ethanol blending	0 = 75%+, 5 = 25-74%, 10 = <25%	0				
		ii Biodiesel blending (not used)	0 = 1.1% of diesel production,					
		ii biodiesei bieriding (not used)	1 = <1.1%					
		Other Advanced Biofuel	0 = some blending,					
		blending (not used)	10 = no blending					
			0 = niche					
	С	In a niche market	5 = moderate niche impact	10				
			10 = no niche					
	Ы	PINe not revenue or cost 6	0 = revenue > cost,					
	u	Kins het revenue of cost	10 = revenue < cost					
_	Su	ibtotal (average)		5.0				
	Ra	anking (subtotal x 0.50)						
3	Vi	bility Metrics						
		Compliance cost eliminates efficiency gains (impairment)	0 = no impact on efficiency,					
	а		5 = moderate impact,	10				
23			10 = impact on efficiency					
	b		0 = no special event,					
		Individual special events	5 = moderate event,	0				
			10 = special event impacting viability					
	С	Compliance costs likely to lead to shut	0 = not likely to shut down,	10				
		down	10 = likely to shut down	10				
		Subtotal (average)		6.7				
2		Ranking (subtotal x 0.50)						
1				5				

EPA's analysis extends beyond the metrics DOE applies in assessing potential DEH. EPA considers all of the information submitted by a petitioner when it considers "other economic factors" in evaluating a small refinery petition. For example, EPA considers the information submitted by the petitioner that documents or explains relevant economic conditions or business decisions by the petitioner. EPA may also consider other publicly available information regarding the petitioner that informs EPA's evaluation regarding how "other economic factors" may cause a small refinery to experience DEH if required to comply with its RFS obligations.

IES submitted a petition to EPA on December 20, 2017, for an extension of the RFS small refinery exemption for the Kapolei Refinery for 2017. In support of its petition, IES

⁵ DOE has calculated refining industry gross margins and net margins for 2014, 2015, and 2016, based on public data. The average industry gross and net margins for these three years were \$11.40/barrel and \$6.52/barrel, respectively (net margin only includes direct operating expenses, it does not include financial expenses such as interest, and depreciation/amortization). IES acquired the Kapolei Refinery on November 1, 2016, and financial data for the IES petition are only available for the period November 1, 2016, through December 31, 2017. The Kapolei Refinery's average gross margin and net margin (excluding financial expenses) for 2017 were \$9.00/barrel and -\$0.48 /barrel, respectively.

⁶ DOE has not scored this category for any hardship petition evaluations.

submitted financial and other information, including a completed DOE survey form PI-588, which specified the factors that IES believes demonstrate DEH. IES also submitted supplemental financial information on February 8, 2018. The petition stated that IES must import all feedstocks and blending components from U.S. or international sources. Therefore, because of its location, the refinery faces an economic cost disadvantage compared to U.S. mainland refineries.⁷ IES also stated that the costs of acquiring the refinery and its inventory, and securing future feedstocks have resulted in financing arrangements that have leveraged IES's assets and inventories, leaving no assets available to secure additional capital market financing.⁸ IES reported a pro-forma net loss of approximately \$24.4 million for 2017.⁹ IES also reported a net refining margin of negative \$0.48/barrel for fiscal year 2017.¹⁰ Although IES can blend most of its gasoline with 10% ethanol, IES stated that the cost of ethanol for blending may be higher than the cost of ethanol paid by a large mainland refinery due to the importation transportation cost.¹¹ IES stated that their capital budget for operating efficiency and regulatory compliance projects for the next five years to be at least \$200 million, in part due to decisions by the previous refinery owner to defer some of these projects.¹²

Section 211(o)(9)(B) of the CAA and 40 CFR 80.1441(e)(2) allow EPA to grant an extension of a small refinery's exemption from compliance with its RFS requirements based on a demonstration by the small refinery of DEH. As described above, IES's petition presents information demonstrating unfavorable structural conditions. IES's petition also presents financial information that documents an operating loss along with other metrics of poor economic performance in 2017. Based on our review of all of the available information about the Kapolei Refinery, and our consultation with DOE, EPA has concluded that the Kapolei Refinery will experience DEH that can be relieved in whole or in part by removing its RFS obligations for 2017. Therefore, EPA is granting IES's request for a temporary extension of the Kapolei Refinery RFS hardship exemption for 2017.

EPA's decision is consistent with DOE's finding that the Kapolei Refinery experienced disproportionate impacts and viability impairment in 2017 and therefore may be granted some level of relief from its 2017 RFS obligations. DOE recommended a 100% waiver, and EPA has decided to grant 100% relief. As explained above, this decision is appropriate under the statutory authority to consult with DOE, consider the 2011 DOE study, and "other economic factors" and it is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny RFS small refinery exemption petitions.¹³

⁷ Petition at 3.

⁸ Petition at 7.

⁹ IES profit and loss statement for fiscal year 2017, submitted as a petition supplement on December 20, 2017.

¹⁰ Form PI-588, Sec. 3.7, filed as part of the petition, dated June 26, 2017.

¹¹ Petition at 8.

¹² Petition at 11.

¹³ Sinclair, 874 F.3d at 1166; See also Hermes Consol., LLC v. EPA, 787 F.3d 568, 574-575 (D.C. Cir. 2015); Lion Oil Co. v. EPA, 792 F.3d 978, 982-983 (8th Cir. 2015).

This temporary extension of IES's exemption only applies to transportation fuel produced at the Kapolei Refinery, and does not apply to IES's imported transportation fuel.¹⁴ In CAA section 211(o)(9), Congress created a temporary exemption program for "small refineries," which it defined as refineries with an average annual aggregate daily crude oil throughput of no more than 75,000 barrels, CAA section 211(o)(1)(K); accord 40 CFR 80.1401. Thus, eligibility for the small refinery exemption program depends on the quantity of crude oil a refinery processes and potentially refines into transportation fuel. Imports of finished transportation fuel (i.e., fuel that the refinery itself has not refined from crude oil) do not fit into this scheme.

Moreover, EPA believes it would be inappropriate to exempt a petitioner's imports simply because it owns a small refinery. In the RFS program, Congress specifically distinguished between refineries and importers, see CAA 211(o)(2)(A)(iii), (o)(3)(B)(ii)(I),¹⁵ and created a temporary exemption only for small refineries, not for importers, small or otherwise. Likewise, EPA's regulations provide that the RFS small refinery exemption only applies to "[t]ransportation fuel produced at a refinery by a refiner," not to imports of finished transportation fuel. 40 CFR 80.1441(a).¹⁶

This decision is a final agency action for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1), judicial review of this final agency action may be sought in the United States Court of Appeals for the appropriate circuit. This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁴ IES's petition stated that in 2017, IES produced only gasoline diesel at the Kapolei Refinery. IES imported diesel into Hawaii, but did not produce any diesel at the Kapolei Refinery. Thus, this exemption only applies to gasoline produced at the Kapolei refinery, not to diesel imports.

¹⁵ See also CAA section 211(o)(5)(A)(i), (o)(5)(E) (distinguishing between refining and importing of transportation fuel).

¹⁶ See also 40 CFR 80.1441(a)(4) ("This exemption shall only apply to refineries that process crude oil through refinery processing units"); 40 CFR 80.1441(e)(1)-(2) (allowing for extensions of the exemption in paragraph (a)); 75 FR 14736 (stating that the original RFS2 small refinery exemption exempts "all transportation fuel produced by small refineries" and that refineries may apply for case-by-case hardship extension of that exemption).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

March 14, 2019

OFFICE OF AIR AND RADIATION

Mr. John R. Wagner Executive Vice President United Refining Company 15 Bradley Street Warren, Pennsylvania 16365

Dear Mr. Wagner:

I am writing in response to the petition from United Refining Company ("URC") for a one-year extension of the small refinery exemption for 2017 from the requirements of the renewable fuel standard (RFS) program for URC's refinery in Warren, Pennsylvania (the "Warren Refinery"). As you know, the Clean Air Act (CAA) provided that small refineries would be temporarily exempt from the RFS requirements through December 31, 2010, with an additional two-year extension of that exemption possible through 2012. CAA section 211(o)(9)(A). Small refineries may petition EPA to extend the RFS exemption for the reason of "disproportionate economic hardship." CAA section 211(o)(9)(B) and 40 CFR 80.1441(e)(2). Pursuant to these provisions, URC submitted a petition to EPA dated May 18, 2018 to extend the exemption for the Warren Refinery for 2017.

Based on the information submitted in your petition, and after consultation with the Department of Energy, EPA has decided to grant a one-year extension of URC's RFS small refinery exemption. This means that from January 1, 2017 through December 31, 2017, the Warren Refinery's gasoline and diesel production are not subject to the percentage standards of 40 CFR 80.1405, and URC is not subject to the requirements of an obligated party for fuel produced at the Warren Refinery during that period.

If you have any questions, please contact Byron Bunker of my staff at 734-214-4155.

Sincerely,

Ben Hengst, for

Christopher Grundler, Director Office of Transportation and Air Quality

Enclosure - Decision Document

Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standard Program For United Refining Company's Warren, Pennsylvania Refinery

Contains Information Claimed by United Refining Company To be Confidential Business Information

Office of Transportation and Air Quality
EPA received a petition from United Refining Company ("URC") dated May 18, 2018, for a one-year extension of the Renewable Fuel Standard (RFS) small refinery exemption for URC's Warren, Pennsylvania refinery (the "Warren Refinery") in 2017. For the reasons described herein, EPA is granting URC's request for an extension of the Warren Refinery's RFS small refinery exemption for 2017.

Section 211(o)(9) of the Clean Air Act (CAA) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the RFS program on the basis of a finding of "disproportionate economic hardship" (DEH). The statute directs EPA, in consultation with the Department of Energy (DOE), to consider the (DOE) Small Refinery Study and "other economic factors" in evaluating small refinery exemption petitions, but CAA section 211(o)(9) leaves the definition of DEH to the Administrator's discretion for purposes of implementing this exemption provision.

After evaluating information submitted by the petitioner, DOE provides a recommendation to EPA on whether a refinery merits exemption from the RFS. As described in its study, DOE assesses the potential for DEH at a refinery on the basis of two sets of metrics. One set assesses structural and economic conditions that could disproportionately impact the refinery (described as "disproportionate impacts" for purposes of DOE's scoring metrics, and also described as "structural" factors or conditions here). The other set assesses economic factors that could cause viability concerns (described as "viability" for purposes of DOE's scoring metrics, and also described as "economic" factors or conditions here).

In previous year decisions, DOE and EPA considered that DEH exists only when a refinery experiences both disproportionate impacts and viability impairment. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹ Congress then directed EPA to follow DOE's recommendation.² Because the Warren Refinery's first ranking (disproportionate impacts) is greater than 1, DOE's recommendation to EPA is a 50 percent waiver for the Warren Refinery is a 50 percent waiver of the warren Refinery's temporary exemption).

For the purposes of implementing CAA section 211(o)(9) for 2017 small refinery exemption decisions, EPA has determined that DEH can exist on the basis of adverse structural conditions alone. A difficult year may exacerbate economic problems for small refineries that

¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: https://rules.house.gov/bill/114/hr-2029-sa.

² Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017); *See also* Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016.").

face disproportionate impacts, resulting in tangible effects including diminished refining margins, reduced profitability, cash flow limitations that can hinder its ability to acquire renewable fuel credits (Renewable Identification Numbers, or RINs) for compliance, and the potential to impair refinery operations. In addition, small refineries sometimes lack access to capital or credit that can also be necessary to achieve compliance.

In its industry-wide analysis, DOE has found that poor access to capital and credit, lack of other business lines, and high diesel production compared to the industry average can suggest a disproportionate structural impact. Poor refining margins, limited ability to blend ethanol, and market competition can suggest a disproportionate economic impact. As noted above, DOE scores the disproportionate structural and economic impacts together as half of its DEH analysis. Here, EPA acknowledges that DOE found that the Warren Refinery demonstrated unfavorable structural conditions. EPA's review of DOE's analysis is in accord with this conclusion. These conditions disadvantage the refinery relative to larger refineries that may not face similar structural challenges.

DOE also assessed economic factors as the second component of DEH. Here, EPA acknowledges that DOE found the Warren Refinery to be a viable refinery because compliance with its RFS obligations "would not appear, based on the data we analyzed, to threaten the refinery's economic viability." ³ Therefore, DOE recommended a 50% waiver for the Warren Refinery on the basis of structural conditions alone.

1	Di	spro	portionate Structural Impact Metri	cs	Score
	a	Acc	ess to capital/credit	0 = Good access (BB- or above credit rating), 5 = Moderate access (rating in B's) 10 = Poor access (C rating or 50% D/E)	5
	b	Oth and	er business lines besides refining marketing	0 = Other Lines, 10 = No Other Lines	10
	C	Loc Rer i	al market acceptance of newables E10	0 = Products accepted, 10 = Product not accepted 0 = High acceptance, 5 = Low acceptance	0
		ii iii	E85 Biodiesel	Not scored because of small E85 volumes Not available	
	d	Per	centage of diesel production	0 = D/(G+D) < Industry Avg. 5 = D/(G+D) > Ind. Avg<40%. 10=D/(G+D) > 40%	5
	e	Sub regi	ject to exceptional state ulations	0 = not subject, 5= Some barriers for compliance 10 = subject to exceptional state regulations	0

Table 1 ⁴	
DOE Evaluation of URC's Petition for the Warren	Refinerv

³ From DOE recommendation for the Warren Refinery transmitted to EPA on September 13, 2018.

⁴ The gray-shaded categories were developed as part of the DOE Small Refinery Study, but DOE has chosen not to assign scores in the gray-shaded categories for any small refinery evaluations at this time. See the DOE Small Refinery Study for DOE's explanation regarding why it does not assign scores for the gray-shaded categories.

Usen Manuel Hasso and Department #1874746

Contains Material Claimed as Confidential Business Information

2	D	isproportionate Economic Impact Metri	cs					
			0 = Above 3 year industry average					
	а	Relative refining margin measure ⁵	5 = Positive, below 3 year industry average	5				
			10= Negative					
	b	Renewable fuel blending (% of production	n)					
		i Ethanol blending	0 = 75%+, 5 = 25-74%, 10 = <25%	0				
		ii Biodiesel blending (not used)	0 = 1.1% of diesel production,					
		ii Diodieser biending (not used)	1 = <1.1%					
		iii Other Advanced Biofuel	0 = some blending,					
		" blending (not used)	10 = no blending					
			0 = niche					
	С	In a niche market	5 = moderate niche impact	10				
			10 = no niche					
	d	PINs net revenue or cost 6	0 = revenue > cost,					
	Ч		10 = revenue < cost					
-	Su	ibtotal (average)		4.4				
	Ra	inking (subtotal x 0.50)		2.2				
3	Vi	ability Metrics						
		Compliance cost eliminates efficiency	0 = no impact on efficiency,					
	а	compliance cost eliminates enciency	5 = moderate impact,	0				
		gains (impaintent)	10 = impact on efficiency					
			0 = no special event,					
	b	Individual special events	5 = moderate event,	0				
			10 = special event impacting viability					
	•	Compliance costs likely to lead to shut	0 = not likely to shut down,	0				
	C	down	10 = likely to shut down	U				
		Subtotal (average)		0.0				
		Ranking (subtotal x 0.50)		0.0				
100								

EPA's analysis extends beyond the metrics DOE applies in assessing potential DEH. EPA considers all of the information submitted by a petitioner when it considers "other economic factors" in evaluating a small refinery petition. For example, EPA considers the information submitted by the petitioner that documents or explains relevant economic conditions or business decisions by the petitioner. EPA may also consider other publicly available information regarding the petitioner that informs EPA's evaluation regarding how "other economic factors" may cause a small refinery to experience DEH if required to comply with its RFS obligations.

URC submitted a petition to EPA on May 18, 2018, for an extension of the RFS small refinery exemption for the Warren Refinery for 2017. In support of its petition, URC submitted financial and other information, including a completed DOE survey form PI-588, which specified the factors that URC believes demonstrate DEH. URC stated that diesel production at

⁵ DOE has calculated refining industry gross margins and net margins for 2014, 2015, and 2016, based on public data. The average industry gross and net margins for these three years were \$11.40/barrel and \$6.52/barrel, respectively (net margin only includes direct operating expenses, it does not include financial expenses such as interest, and depreciation/amortization). The Warren Refinery's average gross margin and net margin (excluding financial expenses) for 2014-2016 were \$9.47/barrel and \$6.37/barrel, respectively.

⁶ DOE has not scored this category for any hardship petition evaluations.

the Warren Refinery represents 33.5 percent of its total transportation fuel production, and that this percentage is higher than the industry average.⁷

Section 211(0)(9)(B) of the CAA and 40 CFR 80.1441(e)(2) allow EPA to grant an extension of a small refinery's exemption from compliance with its RFS requirements based on a demonstration by the small refinery of DEH. As described above, URC's petition presents information demonstrating unfavorable structural conditions. URC's petition also presents financial information that documents a significant RFS compliance cost along with other metrics of economic performance in 2017. Based on our review of all of the available information about the Warren Refinery, and our consultation with DOE, EPA has concluded that the Warren Refinery will experience DEH that can be relieved in whole or in part by removing its RFS obligations for 2017. Therefore, EPA is granting URC's request for a temporary extension of the Warren Refinery's small refinery RFS hardship exemption for 2017.

EPA's decision is consistent with DOE's finding that the Warren Refinery experienced disproportionate impacts in 2017 and therefore may be granted some level of relief from its 2017 RFS obligations. While DOE recommended a 50% waiver, EPA has decided to grant 100% relief. As explained above, this decision is appropriate under the statutory authority to consult with DOE, consider the 2011 DOE study, and "other economic factors" and it is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny RFS small refinery exemption petitions.⁸

This decision is a final agency action for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1), judicial review of this final agency action may be sought in the United States Court of Appeals for the appropriate circuit. This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

⁷ URC petition at 5.

⁸ Sinclair, 874 F.3d at 1166; See also Hermes Consol., LLC v. EPA, 787 F.3d 568, 574-575 (D.C. Cir. 2015); Lion Oil Co. v. EPA, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

Denial of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program For Ergon-West Virginia, Inc.'s Newell, WV Refinery

Contains Information Claimed by Ergon-West Virginia, Inc. To be Confidential Business Information

Office of Transportation and Air Quality

EPA received a petition from Ergon-West Virginia, Inc. ("EWV") dated April 13, 2016, for a three-year extension of the RFS small refinery exemption for EWV's Newell, West Virginia refinery for its 2014, 2015, and 2016 RFS obligations. On June 30, 2016, EPA denied EWV's petition for 2014 and 2015, and on August 11, 2016, EWV withdrew its petition for 2016 with the intent of submitting a revised petition at a later date. On December 30, 2016, EWV submitted its revised 2016 petition. For the reasons described herein, EPA is denying EWV's request for an extension of its RFS small refinery exemption for 2016.

I. Required Information and Criteria for an Extension of the Small Refinery Exemption

A. Background - Overall RFS Program

The federal renewable fuel standard ("RFS") program is set forth in section 211(o) of the Clean Air Act ("CAA"), 42 U.S.C. 7545(o), as amended by the Energy Policy Act of 2005 (EPAct), and the Energy Independence and Security Act of 2007 (EISA). The CAA specifies that EPA is to promulgate regulations to ensure that transportation fuel sold or introduced into commerce in the United States, on an average annual basis, contains specified volumes of renewable fuel and three subcategories of renewable fuel - advanced biofuel, cellulosic biofuel, and biomass based diesel. CAA section 211(0)(2)(A)(i). Each year EPA is to use the relevant annual volumes along with an estimate (provided by the Department of Energy) of the amount of gasoline and diesel projected to be sold or introduced into commerce that year, to compute the percentages of total transportation fuel that should qualify as each type of renewable fuel. CAA section 211(0)(3). The relevant annual volumes may come directly from the statute, may be established by EPA for years for which the statute does not specify volumes, or may result from EPA using its statutory authority to adjust statutory volumes. Each of the various refiners and importers who are subject to the RFS standard ("obligated parties") then apply those percentages to their annual production or import of gasoline and diesel to determine the number of gallons of each type of renewable fuel for which they are responsible. CAA section 211(0)(3)(B)(ii).

EPA regulations implementing CAA section 211(o) do not require obligated parties to blend renewable fuel into gasoline themselves, but allow them to demonstrate compliance with the RFS by acquiring or generating Renewable Identification Numbers (RINs), which represent renewable fuel that has been produced or imported for use in the United States. 40 CFR 80.1427. An obligated party establishes to the EPA, after each calendar year, that it has accumulated sufficient RINs corresponding to each renewable fuel type to meet its renewable-fuel obligations. Obligated parties need not acquire RINs at the same time that they produce or import fuel but may, if they choose, simply purchase the required number of RINs by the end of the compliance period, once their annual production is known. An obligated party can also carry a surplus or deficit of RINs for one year into the following year. *See generally* 72 FR at 23929-23938.

Both the original RFS statutory provisions enacted pursuant to EPAct, and the current text of the statute as amended by EISA, specify that small refineries were exempt from the renewable fuel standards until calendar year 2011. CAA section 211(o)(9)(A)(i). In EPA's original implementing regulations ("RFS1"), EPA defined "small refineries" as those with an average crude oil input in 2004 that was no greater than 75,000 barrels/day (bpd). In EPA's regulations

implementing the EISA amendments ("RFS2"), EPA amended the definition of small refinery to include those with an average crude oil input no greater than 75,000 bpd crude in 2006. 40 CFR 80.1401. Exempt small refineries were required to notify EPA that they qualified for the exemption by sending verification letters stating their average crude oil input rate during the applicable qualification period. 40 CFR 80.1441(b).

B. Criteria for an RFS Exemption

CAA section 211(o)(9) enabled EPA to extend small refinery exemptions beyond December 31, 2010, through one of two mechanisms. First, if the U.S. Department of Energy (DOE) determined through a study mandated under the CAA that compliance with the RFS requirements would impose "disproportionate economic hardship" on a small refinery, EPA was required to extend the exemption for such refinery by at least two years (2011 and 2012). CAA section 211(o)(9)(A)(ii)(II).

Second, small refineries may, on a case-by-case basis, petition EPA for an extension of their exemption. CAA section 211(o)(9)(B). EPA may approve such petitions if it finds that "disproportionate economic hardship" exists. *Id.* EPA regulations require that a petition for an extension of the small refinery exemption specify the factors that demonstrate a "disproportionate economic hardship," provide a detailed discussion regarding the hardship the refinery would face in meeting the RFS requirements, and identify the date the refiner anticipates that compliance with the RFS requirements can reasonably be achieved at the small refinery. 40 CFR 80.1441(e)(2). EPA, in consultation with DOE, will consider the findings of the DOE Small Refinery Study and other economic factors in evaluating such petitions. CAA section 211(o)(9)(B)(ii). EPA is required to respond within 90 days of receipt of a petition, and has discretion to determine the length of any exemption that may be granted. CAA section 211(o)(9)(B)(i).

C. DOE Small Refinery Study

DOE conducted its initial study under CAA section 211(o)(9)(A)(ii)(I) and concluded that no small refineries should experience "disproportionate economic hardship" from the RFS program.¹ Congress subsequently directed DOE to re-examine its initial study and determine if its conclusions were still valid. Consequently, DOE issued a revised study in March 2011 containing different conclusions.² The excerpt below from the DOE Small Refinery Study explains the history of and differences between the two DOE studies, and summarizes DOE's revised approach to evaluating when "disproportionate economic hardship" may exist.³

¹ EPAct 2005 Section 1501 Small Refineries Exemption Study, Office of Policy and International Affairs, U.S. Department of Energy, January 2009.

² "Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

³ Excerpt from pp. 1–3 of the DOE Small Refinery Study. A complete explanation of DOE's hardship evaluation process and its conclusions is available in a redacted version of the DOE Small Refinery Study at, http://www.epa.gov/otaq/fuels/renewablefuels/compliancehelp/small-refinery-exempt-study.pdf.

On February 24, 2009, DOE transmitted its [initial] study [under CAA section 211(o)(9)(A)(ii)] with recommendations to EPA. The study concluded that the market for credits (Renewable Identification Numbers, or RINs) was currently competitive, and found no reason to believe that a competitive market would disproportionately disadvantage participants who purchase credits rather than generating them through blending renewable fuels into their products. Therefore, the study concluded that the exemption for small refineries should not be extended beyond 2010. It was noted that, should market conditions change or if individual small refineries were experiencing economic hardship, small refineries maintained the right under Section 211(o)(9)(B) of the CAA EPAct 2005 to individually petition EPA for an extension of their exemption.

Subsequent events required that the study be revisited. First, the economic downturn reduced the profitability of the refining industry, which has disproportionately impacted some small refiners. Second, the expiration of the biodiesel production credit reduced production and has caused the price of biomass-based diesel RINs to increase. Even though the credit was retroactively restored for 2010, these RINs remain relatively expensive. Finally, in order to capture the unique factors contributing to disproportionate economic hardship, additional consultation with individual refiners was necessary.

On a parallel track to the changed market conditions, Congress directed DOE to revisit the issue of disproportionate economic hardship for small refineries and report its findings.⁴ This study addresses the concerns of Congress in directing DOE to:

- Seek comments from owners of small refineries on the reasons why they may believe that they would experience disproportionate economic hardship if the small refinery exemption were not extended.
- Assess RFS compliance impacts on small refinery utilization rates and profitability.
- Evaluate the financial ability of individual small refineries to meet RFS requirements.
- Estimate small refinery impacts by region.
- Reassess whether small refinery compliance costs through the purchase of RINs is similar to the cost of compliance by purchasing and blending renewable fuels.
- Estimate the economic impact of RFS on small refineries on a regional basis.

Given this Congressional direction, this study needed to consider the unique factors contributing to disproportionate economic hardship for individual small refineries in the study. Consequently, a survey of small refineries was necessary, something not included in the previous DOE study.

⁴ The Senate Report (Senate Report 111-45) accompanying the FY2010 Energy and Water Development Appropriations Bill included language directing DOE to re-open the study and revisit the issue in greater detail completing the revised study by June 30, 2010. The Appropriations Bill directed DOE to collect data on small refineries and quantify the economic impact of RFS compliance. In addition, the Appropriations Conference Report (House Report 111-278) included language supporting the Senate Appropriations Report request.

In order to evaluate disproportionate economic hardship caused by the impact of compliance with the RFS on small refineries, these compliance strategies had to be characterized and their varying impact on refineries investigated. There is a direct cost associated with participation in the program. The RFS program is based on a national mandate for renewable fuels, enforced through obligated parties who are responsible to EPA for their pro-rata share of the renewable fuel mandate. However, the program incorporates a market solution to the process of fulfilling the mandates, allowing trading between the obligated parties from those who over-comply to those who find it less advantageous to blend renewable fuels into the transportation fuel mix. Transfer of the obligation is formally accomplished through the market for RINs.

The absolute cost of compliance is one of the key factors in determining disproportionate economic hardship from compliance with RFS2. There are two major pathways that may be followed for compliance. One compliance pathway is blending renewable fuels with gasoline, which may require capital expenditures for equipment. The second pathway is purchasing and maintaining a portfolio of RINs. If certain small refineries must purchase RINs that are far more expensive than those that may be generated through blending, this will lead to disproportionate economic hardship for those effected entities. Economic theory suggests that the price of RINs would reflect the marginal cost of compliance with the RFS, that is, the most expensive cost of blending renewable fuels. The average cost of compliance may be much lower than the marginal cost. If the economics of blending ethanol are favorable, that is, ethanol is less expensive than the gasoline components it replaces, the compliance cost may be essentially zero for refiners that fulfill their obligation through blending renewable fuels. Such refiners would have blended even without the mandate. While current RIN prices for ethanol are moderate (adding less than 2 cents per gallon of renewable fuel), there are numerous circumstances when RIN prices could rise, increasing the cost of compliance and perhaps increasing the cost of compliance more for refineries that rely on RINs for compliance compared to those that do not. These circumstances include both increases in the costs of renewable fuels and the inability to blend all of the mandated renewable fuel into conventional transportation fuels (the so-called blend wall).⁵

Small refineries could have particular obstacles that would make compliance more costly than those of large integrated companies. Compliance costs and characteristics of small refineries that make them more vulnerable to financial distress may be unique to each small refinery. Since much of the information is not publicly available, the small refineries were surveyed to make a determination of disproportionate economic hardship. This information was supplemented by publicly available data, which also yielded the baseline from which disproportionate economic impact may be discerned. Given the

⁵ EPA notes that after further review, contrary to statements in this paragraph from the DOE Study, it has been found that a refinery does <u>not</u> experience disproportionate economic hardship simply because it may need to purchase a significant percentage of its RINs for compliance from other parties, even though RIN prices have increased since the DOE study, because the RIN prices lead to higher sales prices obtained for the refineries' blendstock, resulting in no net cost of compliance for the refinery. *See* Dallas Burkholder, "A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects," US EPA Office of Transportation and Air Quality (May 14, 2015), available at <u>www regulations.gov</u> docket number EPA-HQ-OAR-2015-0111-0062.

unique nature of each refinery, it is not possible to make a recommendation on any refinery that did not submit a survey.

Disproportionate economic hardship must encompass two broad components: a high cost of compliance relative to the industry average, and an effect sufficient to cause a significant impairment of the refinery operations. The individual metrics for each refinery were grouped into two general categories: eight metrics representing disproportionate impacts on the refinery and three metrics representing the effect of compliance on the viability of the firm.

To gather necessary information for its revised study, DOE developed a survey form for distribution to an EPA-provided list of small refineries which had RFS temporary exemptions under the terms of the statute through December 31, 2010. DOE spent a significant amount of time and effort developing the survey methodology, including discussions with potential survey participants, and discussions and consultations with EPA. The DOE survey form PI-588 was also made available for public review and comment through publication in a Federal Register notice on July 15, 2010. 75 Fed. Reg. 41165 (July 15, 2010). Three companies submitted comments to DOE and DOE modified the proposed survey form to address the comments.

DOE developed a methodology for evaluating the survey data that is described in the DOE Small Refinery Study. In sum, DOE developed a scoring matrix to evaluate "disproportionate economic hardship" at small refineries. The matrix was comprised of two major sections: one section combining the scoring for disproportionate structural and economic weightings, and a separate section regarding the impact of compliance with the RFS program on the viability of the firm. Eight equally-weighted individual disproportionate structural and economic metrics were assigned a score of 0, 5 or 10 and were then averaged to derive a disproportionate impacts index between 0 and 10. The disproportionate impacts index was then scaled from 0 to 5 (by dividing the average score by 2), with 5 indicating conditions most likely to lead to "disproportionate economic hardship." Similarly, the three equally-weighted metrics were assigned a score of 0 or 10 for the viability index and were then averaged and scaled from 0 to 5 (by dividing the average score by 2). Disproportionate economic hardship was found if both indices were greater than 1. This requires, for example, a score of 10 for at least two of the eight metrics for the disproportionate structural and economic impact metrics index, and a score of 10 for at least one of the three metrics for the viability metrics index.

DOE sent survey questionnaires to 59 small refineries, and received valid responses from 18 refineries. Of the 18 respondents to its survey request, DOE determined that 13 small refineries scored a 1 or higher in both indices, thus concluding that these small refineries would experience "disproportionate economic hardship" from compliance with the RFS requirements.⁶

⁶ After DOE completed its study, DOE discovered a misplaced small refinery survey that was not included in the study. DOE determined that this small refinery also qualified for a two-year extension of its RFS exemption.

In May 2014, DOE issued an Addendum to the DOE Small Refinery Study.⁷ The DOE Addendum explains how DOE revised its scoring for the metrics in the viability index to better reflect the changed circumstances for small refineries:

For the 2011 DOE exemption study, the economic recession and the relative recent implementation of the RFS2 regulations resulted in a number of individual small refineries receiving individual viability metric scores of 10, and scores greater than one for the viability index as a whole. However, circumstances have changed since the 2011 study was completed. Generally, there is an improved business climate for refineries that is associated with the country's economic recovery. In addition, refiners have now had many years since the initiation of the RFS program in 2007 to develop business practices to meet RFS obligations.⁸ In assisting EPA in evaluating petitions for small refinery RFS exemptions for 2013, DOE has found that some small refineries should be scored an intermediate level of 5 for metric 3a. This intermediate score acknowledges an impact of RFS compliance costs on efficiency gains, but at a level lower than would justify a score of 10. DOE also has concluded that an intermediate score of 5 may be appropriate for viability metric 3b in certain circumstances. Both of these viability metrics address impacts that may occur across a continuum, and providing for the possibility of an intermediate score allows DOE to more accurately assess an individual refinery's economic situation. This is unlike [for] viability metric 3c which involves essentially a binary determination - whether or not RFS compliance costs would likely lead to a facility shut-down. For viability metric 3c, therefore, DOE continues to believe that it is appropriate to limit scores to either a 0 or 10.

The result of allowing intermediate scoring for viability metrics 3a and 3b is that a facility with only a moderate score of 5 in a single viability metric will not have a total viability index score indicating disproportionate economic hardship. On the other hand, a moderate score under both metrics 3a and 3b will be sufficient to generate a viability score indicating the existence of disproportionate economic hardship.⁹ DOE has determined that it is appropriate that a moderate score in two viability metrics would result in a total viability index score greater than 1. This reflects the real-world situation where different factors may combine to produce disproportionate economic hardship. In this regard, however, DOE notes that these are two distinct metrics: where DOE determines an intermediate score of 5 under metric 3b on the basis of an individual special event, that same event will not necessarily lead to an intermediate or higher score for viability metric 3a ("RFS compliance costs eliminates efficiency gains").

⁷ "Addendum to the Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Energy Policy and Systems Analysis, U.S. Department of Energy, May 2014 (DOE Addendum). ⁸ As the market for renewable fuels matures, obligated parties have developed a much wider suite of physical and contractual arrangements to meet their RFS mandates. In general, small refineries with an RFS exemption have a competitive advantage over the others. This advantage can be enhanced in situations where an exempt party separates some attached RINs through blending renewable fuels, and sells those RINs to improve profitability. A firm's competitive advantage during an exemption period, and any profits from RIN sales during an exemption period, could lead to lower scores in subsequent evaluations of disproportionate economic impact. ⁹ The facility must also score a 1 or higher in the structural and economic weightings index.

D. EPA Evaluation of Small Refinery Petitions

In evaluating a petition for the extension of an RFS small refinery exemption, EPA determines whether the petitioner's compliance with its RFS obligations would impose a disproportionate economic hardship. CAA section 211(o)(9)(B)(i). EPA, in consultation with DOE, considers the findings of the DOE Small Refinery Study (including the DOE Addendum) and other economic factors. CAA section 211(o)(9)(B)(i). Accordingly, as part of EPA's process for evaluating RFS small refinery hardship petitions, EPA asks DOE to evaluate all of the information EPA receives from each petitioner. DOE has expertise in evaluating economic conditions at U.S. refineries, which it used in developing an assessment process for identifying when "disproportionate economic hardship" exists in the context of the RFS program.

EPA considers DOE's assessment of whether a small refinery will face disproportionate impacts in complying with its RFS obligations. The DOE analysis informs EPA's finding of whether "disproportionate economic hardship" exists and in turn EPA's resulting decision about whether to grant or deny a petition for an extension of the RFS temporary exemption for a small refinery.¹⁰ In addition to the metrics DOE applies in assessing disproportionate economic hardship, EPA considers information petitioners submit that documents or explains relevant economic conditions or business decisions. EPA may also consider other publicly available information regarding the petitioner. These may inform EPA's evaluation regarding how "other economic factors" may cause a small refinery to experience "disproportionate economic hardship" if required to comply with its RFS obligations.

II. Compliance with Petition Requirements

EWV submitted a revised 2016 petition to EPA dated December 30, 2016 ("EWV Petition"), for an extension of the RFS small refinery exemption for EWV for 2016, ¹¹ and a supplement to its petition on January 27, 2017 ("EWV Supplemental Information"). In support of its petition, EWV submitted a completed DOE survey form PI-588, which specified the factors that EWV believes demonstrate disproportionate economic hardship. EWV also provided a petition document with additional explanation regarding the hardship the refinery would face in complying with the RFS program, along with financial statements for 2013–2016. EWV also provided EPA with anticipated compliance costs for RFS and an explanation of its efforts to comply with its RFS obligations. All of this information was forwarded to DOE for consideration in its analysis.

¹⁰ EPA also considers DOE's analysis of a small refinery's viability, which DOE assesses as the second component of "disproportionate economic hardship." DOE Small Refinery Study at 3 ("Disproportionate economic hardship must encompass two broad components...and an effect sufficient to cause a significant impairment of the refinery operations."); DOE Small Refinery Study at 27, 36 ("Refiner viability refers to the ability of the refiners to remain competitive and profitable."). In prior decisions, EPA considered that a small refinery could not show disproportionate economic hardship without showing an effect on "viability," but we are changing our approach. While a showing of a significant impairment of refinery operations may help establish disproportionate economic hardship, compliance with RFS obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its RFS obligations — even if the refinery's operations are not significantly impaired.

¹¹ EWV did not receive an exemption from its RFS obligations for 2011 through 2015.

EPA finds that EWV has submitted all of the information required under 40 CFR 80.1441(e)(2).

III. Background Information

This section summarizes some of the more significant historical and present-day information regarding EWV's operations, RFS compliance costs, and financial condition. EWV provided most of this information to EPA in its petition and in other supporting documents (e.g., EWV financial information, RFS compliance cost estimates). EPA obtained the remaining information from public sources and from DOE (e.g., average refining industry margins). EPA has not independently verified the accuracy of this information.

A. Summary of EWV's Operations

EWV's refinery is located in Newell, West Virginia. EWV is owned by Ergon, Inc. (or "Ergon"), which is a privately-held company in the oil and gas business, with operations primarily in southeastern states.

EWV qualified as a small refinery under both the RFS1 and RFS2 regulations, and was exempted from the RFS standards from 2006 through 2010. EWV's maximum crude capacity is 23,000 barrels per day (bpd).¹² EWV processes primarily Pennsylvania grade crude oil and produces gasoline and diesel, along with a significant amount of paraffinic base oils.¹³ A list of typical production rates is shown below in Table 1.

Processing Unit	Volume
Crude distillation unit capacity	23,000 bpd
Volume of transportation fuel produced in 2016 ¹⁴	(b)(4) (b)(4)
Geographic locations in which fuel will be sold	PADD 1 (East Coast Region) and PADD 2 (Midwest Region) ¹⁶

Table 1
EWV Process Information

EWV sells nearly all of its gasoline and diesel fuel (b)(4) within a 170-mile radius of the refinery. (b)(4)

to customers

¹² EWV Petition at 1.

¹³ EWV Petition at 1, 3.

¹⁴ As noted earlier, EWV produces a significant amount of paraffinic base oils, along with gasoline and diesel.
¹⁵ EWV Petition Tab C.

¹⁶ PADDs 1 and 2 are two of several Petroleum Administration for Defense Districts (PADDs), which are geographic regions used for analysis of petroleum product supply and movements.

EWV installed ethanol- and biodiesel-blending infrastructure at its facility (b) (4) ¹⁷ EWV states that (b) (4)

B. Summary of EWV's RFS Compliance Costs

EWV provided EPA with the following information regarding EWV's RFS compliance costs in 2016, showing a total RFS compliance cost of (b) (4) for 2016.²⁰

renewable fuel type	2016 standard	2016 RVO	2016 renewable volume blended	2016 cost of blended renewable	2016 total blended renewable fuel cost	2016 RINs separated EtOH-equiv	Carryover RINS from 2015	2016 RIN shortfall EtOH- equiv	2016 purchased RIN cost ²¹	2016 total purchased RIN cost	2016 total RFS cost
	%	gallons	gallons	\$/gallon	\$				\$/RIN	\$	\$
cellulosic biofuel	0.128	11	1	1	A						
biomass-based diesel	1.590	1r	11								
advanced biofuel	2.010]]	1							
renewable fuel	10.100	1									
total cost											



C. EWV's Financial Condition

As described in Section III.A, EWV is owned by Ergon, Inc. Table 3 summarizes data from EWV's condensed balance sheets showing EWV's cash, short-term debt, long-term debt, and debt-to-equity ratios for 2013-2016.²²

¹⁷ EWV Petition Tab A at 4.6.

¹⁸ EWV Petition at 3.

¹⁹ EWV Petition Tab C.

²⁰ EWV Petition Tab C.

²¹ EPA is using EWV's estimates of purchased RIN costs, although it notes that EWV's estimated costs for purchased RINs are significantly higher than the RIN prices in early 2017 in advance of the 2016 compliance deadline. EPA notes that 2016 D6 RINs were trading at \$0.44/RIN, 2016 D5 RINs were trading at \$0.85/RIN, and 2016 D4 RINs were trading at \$0.85/RIN on February 2, 2017 using public data from Progressive Fuels Limited, http://web.archive.org/web/20170203005005/http://progressivefuelslimited.com/web_data/pfldaily.pdf.

²² According to DOE, debt to equity ratio is a key indicator that the financial industry considers in determining whether a company is a good candidate for taking on additional debt - financially sound petroleum refiners typically have a debt to equity ratio of 1.0 or less.



EWV (b) (4)

Table 4 summarizes data from EWV's condensed balance sheets for 2013 through 2016.²⁵ EWV's three-year average gross refining margin for 2014–2016 was (b) (4) the three-year industry average of \$11.40/bbl.²⁶ EWV's three-year average net refining margin for 2014–2016 was (b) (4) the three-year industry average of \$6.52/bbl. For 2016, both the gross and net refining margins of EWV were (b) (4)

24

²³ EWV Supplemental Information Tab B.

²⁴ EWV Petition Tab A at 3.13-15.

²⁵ Gross refining margin is a measure of a refinery's profitability. It is typically calculated by summing total product revenue, subtracting the total cost of raw material (primarily crude oil), and dividing by total product volume. Net refining margin is typically calculated by also subtracting operating expenses such as purchased fuel, electricity, labor, and routine maintenance expenses, although different refiners may include different expenses in their net margin calculations. Margins are typically calculated prior to accounting for taxes, depreciation, and finance charges.

²⁶ EPA calculated the three-year average industry gross and net refining margins for 2014-2016 based on public information.

Table 4	
EWV Refining Margins	Data ^{27, 28, 29}

	2013	2014	2015	2016
Gross refining margin, \$ per bbl	(b) (4)			
National 2016 average gross refining margin, \$ per bbl				8.68
Net refining margin, \$ per bbl	(b) (4)			
National 2016 average net refining margin, \$ per bbl				4.09

EWV also states that "the refinery is focused on producing paraffinic base oils," and (b) (4) (b) (4) EWV's (b) (4)

Table 5 contains data taken from EWV's condensed income statements, which shows that EWV (b) (4)

²⁷ EWV Supplemental Information Tab B. (b) (4)(b) (4)

, EWV

Following our general practice, EPA

used the net margin figures reported by EWV.

²⁹ EWV originally submitted its financial information on a fiscal year basis. Subsequently, upon EPA's request,

See id.; cf. also id. (b) (4)

Ergon's (b) (4)

EWV Supplemental Information at 1-2.

³⁰ EWV Petition at 1–2.

²⁸ EPA calculated the 2016 national average refining margins from publically available data.

EWV submitted financial information on a calendar year basis. In this latter submission, EWV noted t(b) (4)

Table 5	
EWV Condensed Income Statements,	\$ ³¹

	2013	2014	2015	2016
Revenues				
Cost of Sales				
- Cost of Crude Oil to Production				
- Cost of Ethanol				
- Cost of Biodiesel				
- Cost of Raw Materials				- /
Gross Margin After Raw Materials				
- Other Cost of Sales				
Net Margin after all Cost of Sales				
Operating Expenses Before				
Depreciation				
Operating Income Before				
Depreciation				
Depreciation and Amortization				
Operating Income				
Other Income and Expenses				
Net Income Before Taxes				
Provision for Income Taxes				
Net Income (Loss)				

IV. Application of the Criteria for Hardship Relief

EPA may extend the small refinery exemption for EWV if EPA determines that the refinery would experience "disproportionate economic hardship" in complying with the RFS program. This section provides the analysis and rationale for our denial of EWV's petition to extend its small refinery exemption for 2016.

A. DOE's Evaluation of EWV for 2016

EPA asked DOE to evaluate whether EWV will experience "disproportionate economic hardship" in complying with the RFS requirements. EPA provided DOE all of the information described in Section III above. Tables 6 summarizes the results of DOE's evaluation. A detailed description of DOE's methodology is provided in the DOE Small Refinery Study.

³¹ EWV Supplemental Information Tab B.

Contains Material Claimed as Confidential Business Information

1	Di	isproportionate Structural Impact Met	rics	Score					
ł	a	Access to capital/credit	0 = Good access (BB- or above credit rating) 5 = Moderate access (rating in B's) 10 = Poor access (C rating or 50% D/E)	0					
1	b	Other business lines besides refining and marketing	0 = Other Lines 10 = No Other Lines	0					
	c	Local market acceptance of Renewables i E10	0 = Products accepted 10 = Product not accepted 0 = High acceptance 5 = Low acceptance 10= No acceptance Not secred because of small E85 volumes	0					
		iii Biodiesel	Not available						
	d	Percentage of diesel production	0 = D/(G+D) < Industry Avg. 5 = D/(G+D) > Ind. Avg. < 40%. 10 = D/(G+D) > 40%	10					
	e	Subject to exceptional state regulations	0 = not subject 5 = Some barriers for compliance 10 = subject to exceptional state regulations	0					
2	Disproportionate Economic Impact Metrics								
	a	Relative refining margin measure ³³	0 = Above 3-year industry average 5 = Positive, below 3-year industry average 10= Negative	0					
	b	Renewable fuel blending (% of product i Ethanol blending	ion) 0 = 75%+, 5 = 25-74%, 10 = <25%	0					
		ii Biodiesel blending (not used)	0 = 1.1% of diesel production 1 = <1.1%						
		iii Other Advanced Biofuel blending (not used)	0 = some blending 10 = no blending						
	c	In a niche market	0 = niche 5 = moderate niche impact 10 = no niche	0					
	d	I RINs net revenue or cost ³⁴ 10 = revenue < cost							
	Subtotal (average)								
_	-	and the deside the test of EQL		0.0					

Table 6³² DOE Evaluation of EWV's Petition for 2016

³² The gray-shaded categories were developed as part of the DOE Small Refinery Study, but DOE has chosen not to assign scores in the gray-shaded categories for any small refinery evaluations at this time. See the DOE Small Refinery Study for DOE's explanation regarding why it does not assign scores for the gray-shaded categories. ³³ DOE calculates three-year average industry refining gross and net margins for 2013, 2014, and 2015 based on public data (complete year industry data for 2016 was not publically available when DOE performed their evaluation). The three-year average industry gross and net margins for these years were \$12.32/bbl and \$7.35/bbl, respectively (net margin only includes direct operating expenses, it does not include financial expenses such as interest, and depreciation/amortization). EWV's three-year average gross and net margins for 2013-2015 were (b)(4), respectively. In scoring this metric, DOE only uses the three-year average refining net margins for the industry and for EWV.

³⁴ DOE has not scored this category for any hardship petition evaluations. See further discussion on this issue below.

а	Compliance cost eliminates efficiency gains (impairment)	0 = no impact on efficiency 5 = moderate impact 10 = impact on efficiency	0
b	Individual special events	0 = no special event 5 = moderate event 10 = special event impacting viability	0
с	Compliance costs likely to lead to shut down	0 = not likely to shut down 10 = likely to shut down	0
SL	ubtotal (average)		0.0
Ra	anking (subtotal x 0.50)		0.0

The first ranking in Table 6 (disproportionate impacts) is a combination of the disproportionate structural index and the disproportionate economic impact index, and the second ranking in Table 6 is the viability index. (b)(4) applied by DOE

EWV(b)(4) applied by DOE

(see DOE's Small Refinery Study for more detailed explanation).

DOE has not changed its basic methodology for evaluating small refinery RFS hardship petitions, but it now recommends a "50% waiver" of a small refinery's RFS requirements if <u>either</u> of the rankings in the scoring matrix is equal to or greater than 1. This is due to language included in an explanatory statement accompanying the 2016 Consolidated Appropriations Act instructing DOE as follows: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."³⁵(b)(4) applied by EWV's (b)(4) applied by DOE

WV.

B. EPA's Evaluation of EWV's Hardship Petition for 2016

EPA evaluated all of the information described in Section III, as well as DOE's analysis of EWV, to determine whether EWV will experience "disproportionate economic hardship" from compliance with its RFS requirements for 2016. In the discussion that follows, EPA independently reviews the information as we consider other economic factors in our analysis, including, but not limited to, profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for refinery improvement projects, corporate structure, debt and other financial obligations, RIN prices, and the cost of compliance through RIN purchases. After considering all of this information, EPA finds that EWV will not experience "disproportionate economic hardship" from compliance with the RFS program for 2016.

In determining whether EWV will experience disproportionate economic hardship, EPA considers whether compliance with its RFS obligations disproportionately impacts EWV. EPA generally defers to DOE's assessment due to DOE's expertise on the refining industry. In its industry-wide analysis, DOE has found that poor access to capital and credit, lack of other

³⁵ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: https://rules.house.gov/bill/114/hr-2029-sa.

business lines, and high diesel production compared to the industry average can suggest a disproportionate structural impact. Poor refining margins, limited ability to blend ethanol, and market competition can suggest a disproportionate economic impact. These disproportionate impacts could disadvantage a refinery relative to the industry average and make compliance with RFS obligations relatively more burdensome. However, (b)(4) applied by DOE EWV (b)(4) applied by DOE

Notwithstanding DOE's finding, EWV may nonetheless demonstrate disproportionate economic hardship based on other economic factors. It has not done so. EPA acknowledges that throughout the industry, refineries reported lower net refining margins in 2016. This industry-wide downward trend may also have affected EWV, but did not cause tangible effects sufficient to hinder the refinery's ability to acquire RINs for compliance or to impair refinery operations. To the contrary, EWV's particular circumstances indicate that it would not suffer disproportionate economic hardship from compliance with its RFS obligations.

EWV's 2016 gross and net refining margins (b) (4) the 2016 industry averages (\$8.68/bbl and \$4.09/bbl, respectively). Likewise, EWV has been (b) (4)

. While EWV's (b) (4) (b) (4)

EWV still

EWV (b) (4) . Furthermore, EWV (b) (4)

EWV (b) (4) . EWV's (D) (4) provides further evidence that the refinery would not suffering disproportionate economic hardship from compliance with its RFS obligations.

EPA further considered the language in the explanatory statement for the 2016 Consolidated Appropriations Act, which states: "The Secretary [of DOE] is reminded that the RFS program may impose a disproportionate economic hardship on a small refinery even if the refinery makes enough profit to cover the cost of complying with the program." Consistent with this statement, EPA has adopted an approach which recognizes that disproportionate economic and structural impact can cause disproportionate economic harm even if the refiner cannot show an effect on "viability." However, as noted in Section IV.A, (b)(4) applied by DOE

EWV.57

³⁶ EWV Petition at 1.

³⁷ Pursuant to the explanatory statement, had one of the two rankings in Table 6 been equal to or greater than 1 then DOE would have recommended a 50% waiver of the refinery's RFS obligations.

EWV argues that because it "is focused on producing paraffinic base oils, which require the refinery to run a limited slate of crude oils, (b) (4)

³⁸ EPA disagrees that it should only look at the

transportation fuel-specific net refining margins when evaluating EWV's petition. A loss or reduced profit on one of multiple product lines does not necessarily indicate a hardship for the refinery overall. Instead, EPA looks at the overall margins for the crude oil that a small refinery processes, as this is a better indicator of the overall financial condition of the refinery and its ability to fulfill its RFS obligations. (b) (4)

reinforcing EPA's determination that EWV's financial condition allows it to comply with its 2016 RFS obligations without causing disproportionate economic hardship.

EWV states that "(b) (4)

⁴⁰ EPA disagrees,

."³⁹ EWV (b) (4)

and finds that it is unnecessary to resolve whether the fact that EWV (b) (4) . Cf. supra n.5. EPA

does not assess disproportionate economic hardship by comparing a petitioner to any one competitor, but rather to the industry average. Thus, even if EWV's (b) (4)

EWV, as we explain, has not shown that it has a

disproportionate economic or structural impact relative to the industry average or otherwise demonstrated disproportionate economic hardship.

EWV argues that (b) (4)

.⁴¹ EPA disagrees. EWV (b) (4)

While EPA delayed the compliance deadlines for the

2013-2015 RFS standards, that fact in and of itself does not relieve EWV of the duty to prepare for eventual compliance. Indeed, EWV (b) (4)

⁴² (b) (4)

⁴⁴ And EWV had

adequate time to prepare to meet its obligation, either by acquiring RINs at any time throughout the four years sufficient to cover its estimated RVO, or by allocating financial resources to

³⁸ EWV Petition at 1–2.

³⁹ EWV Petition at 2.

⁴⁰ EWV Petition at 1–3.

⁴¹ EWV Petition at 4.

⁴² See 80 FR 33100 (June 10, 2015); 78 FR 9282 (Feb. 7, 2013).

⁴³ See 78 FR 49794 (Aug. 15, 2013).

⁴⁴ Cf. *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 920–21 (D.C. Cir. 2014) (rejecting Monroe Energy's argument that obligated parties lacked sufficient notice to make informed business decisions about their compliance obligations because, among other things, obligated parties could readily estimate their obligations based on statutory volumes, EIA projections, and EPA's proposed volume rule).

eventually purchase RINs when compliance is eventually required. EPA believes that the revised deadlines for the 2013-2015 RFS standards gave all obligated parties sufficient time to prepare for compliance for each year, and that no hardship was created for any obligated party simply by delaying the compliance deadlines.

EWV states (b) (4)

EWV's (b) (4) ⁴⁵ EWV also states (b) (4)

⁴⁶ EWV raises (b) (4) .⁴⁷ EPA acknowledges that EWV (b) (4)

EWV (b) (4)

EWV (b) (4) . See supra n.5. EPA further recognizes that the cost of complying with the RFS program has a varying impact on efficiency gains for different refineries. It is a normal practice in the refining industry for refineries to identify and implement, when possible, projects that improve refinery efficiency, reliability, or safety. The cost of RFS compliance, either through purchasing and blending renewable fuels, or purchasing RINs, or a combination of both, may reduce funds available to pay for other potential projects to improve the efficiency, reliability, and safety of a refinery, but that fact does not establish entitlement to an exemption.

For all of these reasons, we find that EWV has not demonstrated that compliance with its 2016 RFS requirements will result in "disproportionate economic hardship." Based on this evaluation, an extension of the small refinery temporary exemption is not warranted for the year 2016.

V. Conclusion

Section 211(o)(9)(B) of the CAA and 40 CFR 80.1441(e)(2) allow EPA to grant an extension of a small refinery's exemption based on a demonstration by the small refinery of a "disproportionate economic hardship" from compliance with its RFS requirements. Based on our analysis of all of the available information about EWV, and our consultation with DOE, EPA has concluded that EWV will not experience "disproportionate economic hardship" in complying with its 2016 RFS requirements. Therefore, EPA is hereby denying EWV's request for a temporary extension of its small refinery RFS hardship exemption for 2016.

This decision is a final agency action for purposes of CAA section 307(b)(1). Pursuant to CAA section 307(b)(1), judicial review of this final agency action may be sought only in the United States Court of Appeals for the appropriate circuit. Judicial review of this final agency action may not be obtained in subsequent proceedings, pursuant to CAA section 307(b)(2). This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

⁴⁵ EWV Petition at 2–3.

⁴⁶ EWV Petition at 3.

⁴⁷ EWV Petition at 4.

ORAL ARGUMENT NOT YET SCHEDULED No. 19-1220

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

On Petition for Review of Final Agency Actions of the United States Environmental Protection Agency

ADDENDUM OF STANDING DECLARATIONS IN SUPPORT OF PETITIONERS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF GEOFF COOPER

- My name is Geoff Cooper. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge, published data, and studies and information developed by the Renewable Fuels Association ("RFA"). I am submitting this Declaration on behalf of the Petitioners' opening brief in the above-captioned matter.
- 2. Since 1981, RFA has served as a non-profit, national trade association and voice for the United States' ethanol industry both domestically and

internationally. Ethanol is a renewable fuel produced from plant-based feedstocks, primarily grains. The members of RFA include companies that manufacture ethanol fuel and market it to blenders and marketers of gasoline, as well as companies that provide goods and services (such as process technologies and raw feedstocks) to ethanol producers. RFA's members operate facilities across the United States, from California to New York, and are responsible for a substantial share of the nation's ethanol production. Among RFA's purposes is representing its members in lawsuits affecting the ethanol industry.

3. I am currently the President and CEO of RFA and have served in that capacity since 2018. I have been employed with RFA since 2008, when I was hired as the organization's director of research and analysis. I have served in various capacities throughout my tenure, most recently as Executive Vice President. In recent years, I led RFA's regulatory activities, oversaw the group's research and technical initiatives, supported public and media relations efforts, assisted with legislative initiatives and managed the Renewable Fuels Foundation. Prior to RFA, I worked on ethanol issues for the National Corn Growers Association and served as a captain in the U.S. Army, where I specialized in bulk petroleum product logistics. Throughout my 12 years working for RFA and years of prior work experience, I have

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developed an in-depth understanding of the business and operations of the members of RFA, and the market for ethanol fuel in the United States.

- 4. Operators of domestic petroleum refineries are obligated to comply with the Renewable Fuel Standard ("RFS"), which mandates that transportation fuel sold or introduced into commerce domestically contain, on an average annual basis, specified volumes of renewable fuel and three subcategories of renewable fuel: cellulosic and advanced biofuel, and biomass-based diesel.
- 5. The statute establishes annual volumes for each subcategory, though EPA adjusts these volumes if specific statutory criteria are satisfied. EPA uses these annual volumes and estimates of transportation fuel (gasoline and diesel) to calculate the annual percentage of total transportation fuel that should qualify as each type of renewable fuel. *See* 40 C.F.R. § 80.1405.
- 6. Obligated parties under the RFS then apply those annual percentages to their own annual production or import volume of gasoline and diesel to determine the number of gallons of each type of renewable fuel for which they are responsible each year (their renewable volume obligation, or "RVO").
- 7. Obligated parties demonstrate compliance with their renewable volume obligations by accumulating quantities of renewable identification numbers ("RINs"), which represent physical gallons of renewable fuel, either by blending renewable fuel into transportation fuel themselves and "separating"

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RINs, or by purchasing RINs from other parties who have blended renewable fuel.

- 8. Obligated parties can obtain RINs at any time during the compliance period. They may "bank" any RINs they obtained for compliance with their volume obligations. Any RIN credits that aren't used to meet an obligated party's current year RFS obligation may be "carried over" and held in inventory. The "carryover RINs" may be used to meet up to 20 percent of an obligated party's compliance requirements for the following year.
- 9. RFA's members primarily produce a type of renewable fuel, ethanol, that can be used by obligated parties to meet their RFS renewable fuel obligations. Some RFA members also produce small volumes of biomassbased diesel, renewable diesel, or cellulosic ethanol—which can be used by obligated parties to meet the biomass-based diesel, advanced biofuel and cellulosic biofuel portions of the RFS.
- 10.RFA filed a petition for review of the U.S. Environmental Protection Agency's ("EPA's") "Decision on 2018 Small Refinery Exemption Petitions," signed August 9, 2019, which memorialized EPA's decision to exempt 31 small refineries from their renewable volume obligations for the 2018 compliance year.¹

¹ See Pet. for Review, Ex. A, ECF No. 1812533.

- 11.EPA granted 31 of the 42 small refinery exemption petitions it originally received for compliance year 2018.² As for the remaining 2018 petitions, EPA denied six and declared two ineligible, and three were withdrawn.³ On June 18, 2020, EPA disclosed that two additional petitions for retroactive 2018 compliance year exemptions had been received and are pending.⁴
- 12.EPA updated its RFS dashboard on August 9, 2019 to show that 31 small refinery exemptions had been granted for compliance year 2018. However, EPA's decision document on the 2018 exemptions was not published in the Federal Register, and its existence remained a secret to RFA until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit.⁵
- 13.When EPA exempted 31 small refineries from their RFS obligations for 2018, it retroactively relieved those refineries from the percentage standards of 40 C.F.R. § 80.1405 and the applicable volume obligations. The exempt

² EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

³ See id.

⁴ See id.

⁵ See EPA Mot. to Dismiss, Bunker Decl., Ex. A, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

refineries were not subject to the requirements of obligated parties for fuel produced at those refineries during the 2018 compliance year.

- 14.RFA economist Scott Richman conducted an analysis of the impacts of the 2018 small-refinery exemptions on the ethanol industry and market. See
 Declaration of Scott Richman. As explained in this analysis, RFA's ethanol producers have been harmed by lower revenues resulting from a combination of reduced blending volumes and lower per-gallon prices.
- 15.In its final rule for the 2020 RVO, EPA increased its estimate of available carryover RINs by 1.29 billion RINs from the estimate given in the proposed rule, an increase which EPA explained as "primarily the result of the millions of RINs that were unretired by small refineries that were granted hardship exemptions [for compliance year 2018] after the July 29 proposal."⁶ Because the 31 refineries receiving 2018 compliance exemptions no longer needed the RINs they had acquired, the RIN market was flooded with excess credits. In turn, the dramatic increase in carryover RINs available to obligated parties contributed to a large drop in RIN prices.
 - incentive to blend renewable fuel. This is because obligated parties may

⁶ 85 Fed. Reg. 7,016, 7,021 (Feb. 6, 2020). As of publication of the proposed rule, EPA was still evaluating 39 of the 42 petitions received for 2018. 84 Fed. Reg. 36,762, 36,807 n. 208 (July 29, 2019).

easily comply with their RFS obligations by purchasing low-cost surplus RINs in lieu of blending physical volumes of renewable fuel. Demand for renewable fuels produced by RFA members is lower compared to the demand for renewable fuels that would have existed under the RFS in the absence of the 31 small refinery exemptions granted for 2018.

- 17.It is my understanding that RFA's member ethanol producers have experienced lower revenues resulting from a combination of reduced blending volumes and lower per-gallon prices.
- 18.In addition, when D6 RIN⁷ prices fall below the level necessary to incentivize E15 and E85 consumption, then small refinery exemptions can erode demand for this segment of physical ethanol consumption.⁸
- 19.The increase in carryover RINs attributable to exempt small refineries means that RFA and its members will continue to be harmed as obligated parties use carryover RINs to satisfy their renewable volume obligations for future compliance years. Even if exempt small refineries do not use these RINs for their own compliance and instead sell the RINs to other obligated parties,

⁷ D6 RINs are the credits generated by blending corn-based ethanol into gasoline.

⁸ See Gabriel E. Lade, Sébastien Pouliot, and Bruce A. Babcock, *E15 and E85 Demand Under RIN Price Caps and an RVP Waiver*, Iowa State University 4 (March 2018), https://www.asudi.estate.edu/www.hlisetieng/pdf/18ph21.pdf

https://www.card.iastate.edu/products/publications/pdf/18pb21.pdf.

RFA and its members are harmed when other obligated parties use the carryover RINs for compliance instead of new blending renewable fuel or obtaining RINs representing additional blending from other parties.

- 20.The secrecy surrounding EPA's granting of small refinery exemptions undermines the integrity of RIN markets, especially if only the firms receiving the exemptions know of their existence. Lack of transparency increases market participants' uncertainty of mandate levels and can lead to volatility in the RIN markets. In the long-run, I believe that uncertainty hinders investments in the very biofuel infrastructure that Congress intended to incentivize by creating the RFS program.
- 21.A favorable decision in this Court is likely to redress RFA's injury because EPA can require that any volumes improperly exempted be made up by the exempted obligated party (or another obligated party) in a future year.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal knowledge and information prepared by RFA.

Executed this 5th day of December, 2020 in Ellisville, Missouri.

Geoff Cooper

GeoffCooper

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF SCOTT RICHMAN

- My name is Scott Richman. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge, published data, and studies and information developed by my employer, the Renewable Fuels Association ("RFA"). I am submitting this declaration on behalf of the Petitioners' opening brief in the above-captioned matter.
- The RFA, a non-profit, national trade association, has represented the United States ethanol industry domestically and internationally since 1981.

Ethanol is a renewable fuel produced from plant-based feedstocks, primarily grains. The members of RFA include companies that manufacture fuel ethanol and market it to blenders and marketers of gasoline, as well as companies that provide goods and services (such as process technologies and feedstocks) to ethanol producers. RFA's members operate facilities across the United States, from California to New York, and are responsible for a substantial share of the nation's ethanol production. Among RFA's purposes is advocating for its members' interests in lawsuits affecting the ethanol industry.

3. I have been employed with RFA since August 2018, when I was hired as the organization's chief economist. I previously served as senior vice president and co-head of North America consulting for Informa Agribusiness Consulting, a global firm specializing in research and intelligence on agricultural commodities, biofuels, food production, seed and crop protection, fertilizers, animal health and policy and regulation. I developed two successful practice areas at Informa—ethanol and agricultural biotechnology—and co-managed a 15-person North American team. While at Informa, I conducted multiple studies and analyses for RFA, as well as individual clients involved in ethanol production and marketing, private equity firms and other bioenergy investors, and the U.S. Department of

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Agriculture. As a result of providing economic consulting services for over 25 years, I have developed an in-depth understanding of the business and operations of the members of RFA and the market for fuel ethanol in the United States.

- 4. I earned my bachelor's degree in economics from Vanderbilt University and a master's degree from Columbia University, where I specialized in international business and was an Honorary International Fellow.
- 5. In September 2020, I undertook an analysis of the economic effects of the 31 small refinery exemptions granted by the U.S. Environmental Protection Agency ("EPA") from the Renewable Fuel Standard ("RFS") for 2018 ("2018 SREs") that are the subject of RFA and its coalition partners' petition before this Court. As explained below, the 2018 SREs have contributed to reduced demand and lower per-gallon prices for ethanol. These factors have resulted in lower revenues received by RFA's ethanol-producing members.
- 6. Part I of this declaration discusses how the 2018 SREs reduced demand for renewable fuels. Part II explains how this reduction in demand itself negatively impacts the price paid for ethanol sold by RFA members. Part III explains that these economic injuries to RFA members are expected to

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continue but can be redressed by a favorable decision in this Court.

I.

- 7. The RFS mandates that refiners and importers of transportation fuel, or "obligated parties," blend a specified volume of renewable fuel into transportation fuel (gasoline and diesel). The statute specifies renewable fuel volume requirements through 2022.
- 8. RFA's members produce a type of renewable fuel, ethanol, that is used by obligated parties to meet these RFS blending obligations. To comply with the law, obligated parties can purchase gallons of ethanol to blend themselves with gasoline or purchase renewable identification numbers ("RINs"), credits which represent physical volumes of renewable fuel, from other parties who have blended renewable fuels with transportation fuel.
- 9. When EPA exempted 31 small refineries from their RFS obligations for 2018, these refineries were relieved of the need to comply with the 2018 volume obligations. Because EPA granted all of the 2018 SREs after the March 31, 2019 deadline for submission of 2018 RFS Annual Compliance Reports, it is my understanding that EPA made those refineries whole by reinstating RINs that such refineries had previously retired to meet their

2018 volume obligations.¹

10.In addition to the benefit that the refineries that were granted 2018 SREs received by being excused from compliance with the RFS, those refineries could use reinstated RINs in many ways, since RINs are fungible. For example, refineries could sell reinstated RINs to other obligated parties. Alternatively, parties owning multiple refineries could use reinstated RINs from the exempt refinery to help satisfy the annual RFS obligations of other refineries that did not receive an exemption. Additionally, since RINs from one year can be used to meet up to 20 percent of an obligated party's requirements in the following year, refineries could have used reinstated 2018 RINs for compliance with their 2019 obligations, thereby allowing them to bank 2019 RINs for future use. Moreover, according to a researcher from Colorado State University, RIN costs that are initially incurred by refineries are then "fully passed-through to gasoline and diesel prices nationwide. This implies that small, exempt refineries that do not comply with RFS blending requirements, and therefore do not pay the RIN costs but receive higher output prices, may receive substantial

¹ See 85 Fed. Reg. 7,021 (Feb. 6, 2020).

benefits from the policy."²

- 11. The 2018 SREs reduced the obligated volumes of gasoline and diesel for 2018 by 13.42 billion gallons, effectively reducing the required volume of total renewable fuel for 2018 by 1.43 billion RINs.³
- 12.In its final rule establishing the 2020 renewable volume obligations, EPA increased its estimate of available carryover RINs by 1.29 billion RINs from the estimate given in the proposed rule, an increase which EPA explained as "primarily the result of the millions of RINs that were unretired by small refineries that were granted hardship exemptions [for compliance year 2018] after the July 29 proposal."⁴ Consequently, due to the increased supply, the market price for RINs dropped in the wake of the 2018 SREs and, except for a three-week period in the fall of 2019, remained substantially below pre-SRE levels for the following six months. Because cheap RINs are an attractive alternative means of RFS

² Jesse Burkhardt, *The Impact of the Renewable Fuel Standard on US Oil Refineries*, 130 Colo. State Univ. Energy Policy 429 (2019).

³ 85 Fed. Reg. at 7,050.

⁴ *Id.* at 7,021. EPA received a total of 42 small refinery exemption petitions for compliance year 2018. *See* EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions</u>. As of publication of the proposed rule, EPA was still evaluating 39 of the 2018 petitions. 84 Fed. Reg. 36,762, 36,807 n. 208 (July 29, 2019).

compliance compared to the physical consumption of ethanol, this caused a reduction in ethanol demand. RIN prices strengthened again only after a January 24, 2020 ruling by the United States Court of Appeals for the Tenth Circuit invalidated three SREs granted for compliance years 2016 and 2017.

13.The earlier round of SREs for compliance years 2016 and 2017 adversely affected ethanol consumption. The SREs were first disclosed not by EPA, but rather in a series of investigative news articles in early 2018 that revealed the extent of the exemptions.⁵ Total ethanol consumption fell in 2018 for just the second time since 1996, with the only other decline occurring in the drought year of 2012. Before these SREs were granted and became known, the ethanol "blend rate"—representing ethanol's average inclusion level in the nation's gasoline supply—had trended

⁵ See, e.g., Jarrett Renshaw & Chris Prentice, *Exclusive: EPA Gives Giant Refiner a 'Hardship' Waiver from Regulation*, Reuters, Apr. 3, 2018, <u>https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P</u>; Jennifer A. Dlouhy, Mario Parker & Laura Blewitt, *EPA Waiving Biofuel Quotas Spurs Rebuke from Ethanol Supporters*, Bloomberg, Apr. 4, 2018, <u>https://www.bloomberg.com/news/articles/2018-04-04/epa-waiving-biofuel-</u> <u>quotas-spurs-rebuke-from-ethanol-supporters</u>; Tom Benning, *Trump's EPA Gives 'Hardship' Waivers to Some Texas Refiners, Stoking Ethanol Mandate Debate*, The Dallas Morning News, Apr. 9, 2018, <u>https://www.dallasnews.com/business/</u> <u>energy/2018/04/09/trump-s-epa-gives-hardship-waivers-to-some-texas-refiners-</u> <u>stoking-ethanol-mandate-debate/</u>.

upward over the prior few decades, accelerating after enactment of the RFS in 2005 and its expansion in 2007. However, data from the U.S. Energy Information Administration ("EIA") shows that the annual blend rate fell in 2018 (i.e., compared to the previous year) for the first time since 1996.⁶

- 14. The blend rate reached a record high of 10.13 percent on average in calendar year 2017, and it hit a monthly record of 10.62 percent in November 2017 – a level it would not regain for another two years. It is my understanding that the 2016 SREs were granted starting in February 2017 and that the 2017 SREs were granted starting in March 2018,⁷ but as noted above these were first publicly disclosed in a series of investigative news articles in early 2018.⁸ As a result, the blend rate slumped in early 2018, falling to 9.67 percent by that April, as the marketplace became increasingly aware of the large-scale increase in SREs granted by EPA.
- 15.A similar pattern can be seen following the granting of the 2018 SREs on

⁶ U.S. Department of Energy, Energy Information Administration, Monthly Energy Review, <u>https://www.eia.gov/totalenergy/data/monthly/</u>.

⁷ See EPA Response to FOIA Request EPA-HQ-2018-010014.

⁸ See supra note 5.

August 9, 2019.⁹ The blend rate had averaged 10.14 percent from January to July 2019 and 10.25 percent in the three months prior to the granting of the 2018 SREs. However, it fell to 9.74 percent in August and remained subdued in September, as refiners and blenders realized the newly granted SREs had increased the available supply of RIN credits, which drove RIN prices lower.

16.Moreover, over the course of a given year, the blend rate follows a seasonal pattern. Between 2015 and 2017 (the three years prior to the impact of the first large-scale round of SREs), the blend rate was slightly less than the annual average between January and July and moderately above the average between August and December. Given that the blend rate averaged 10.20 percent for calendar year 2019, the rates in August and September would have been expected to be 10.21 percent and 10.22 percent, respectively, based on these seasonal factors.¹⁰ Thus, the actual

⁹ EPA updated its RFS dashboard on August 9, 2019 to show that 31 SREs had been granted for compliance year 2018. *See* EPA, RFS Small Refinery Exemptions, *supra* note 4. EPA also issued a decision document for the 2018 SREs that was signed on August 9, 2019; however, it was not published in the Federal Register, so its existence remained a secret until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit. *See* EPA Mot. to Dismiss, Bunker Decl., Ex. A, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

¹⁰ The annual average blend rate for 2019 was multiplied by the seasonal factors

blend rate was 0.47 percent lower than would have been expected in August and 0.18 percent lower in September. (This ignores that the annual blend rate could well have been higher if not for the lull in August and September.)

	Actual Blend Rate	Rate Based on 2015-17 Seasonal	Difference
August	9.74%	10.21%	-0.47%
September	10.04%	10.22%	-0.18%

17. This decline in the blend rate resulted in ethanol consumption during

August and September 2019 that was 81 million gallons lower than it

otherwise would have been.

18.If valued simply at the \$1.33-per-gallon average price received by

Midwest ethanol plants in August and September (\$1.35 in August and

\$1.31 in September),¹¹ the 81-million-gallon reduction in ethanol

for August and September, in order to estimate the blend rates that would have been expected for those months if large-scale SREs had not been announced. The actual blend rates were subtracted from those expected blend rates, and the differential was then multiplied by the volume of gasoline consumed in each month, in order to determine the impact of the SREs on ethanol consumption.

¹¹ U.S. Department of Agriculture, Agricultural Marketing Service, <u>https://www.ams.usda.gov/</u>. (Excludes Wisconsin due to intermittent data availability).

consumption directly resulted in an estimated \$109 million reduction in revenues across the industry and a reduction in revenues to RFA members alone of \$26 million.

19.It should be noted that the estimated 81-million-gallon impact of the 2018 SREs does not capture the full effect of the exemption program on 2019 ethanol consumption, since it doesn't reflect the deviation from the upward consumption trajectory that existed through 2017 that has been caused by the subsequent large-scale exemptions. Between January 2018 (just before the first round of 2016 and 2017 SREs became widely known) and September 2019 (after the 2018 SREs were announced), the EIA's forecast of 2019 ethanol consumption fell by 450 million gallons, or approximately 3%.¹²

II.

20.Moreover, the revenue reduction estimated above understates the economic injury to RFA's members because it focuses only on the value of the foregone volume in August and September 2019. It is a basic principle of economics that a reduction in demand – in this case caused by the 2018 SREs – results in lower prices, *ceteris paribus* (i.e., other

¹² U.S. Department of Energy, Energy Information Administration, Short-Term Energy Outlook, <u>https://www.eia.gov/outlooks/steo/.</u>

things equal). Accordingly, RFA members and other producers had to sell their entire ethanol output for lower prices than they would have received had the 2018 SREs not been granted.

21.The extent to which prices were affected can be estimated through the use of a basic regression, in which the price of ethanol in Chicago (the central pricing point for U.S. ethanol) is a function of two independent variables: the corn futures price and the ratio of ethanol stocks to consumption over the prior twelve months. Utilizing monthly data from March 2010 (after the financial crisis and the rapid build-out of the ethanol industry) to July 2019, the coefficients for the regression equation are as follows:

Ethanol Price = 2.64 + (0.28 x Corn Futures Price) - (33.17 x Stocks/Trailing 12 Month Usage)

22.The coefficient of determination for this regression, which is more commonly referred to as the R-squared statistic, is 0.86. In layman's terms, this indicates that 86 percent of the variation in the price of ethanol was "explained" by the variation in the two independent variables. (It is possible to develop an equation explaining a higher share of the variation, but it would be more difficult to relate it in a straightforward manner to the impact of the SREs.)

- 23. For this analysis, a counterfactual trajectory of monthly ethanol consumption in August and September 2019, as if the 2018 SREs had not been granted, was developed based on the method described in paragraph 16. Eighty-one million gallons of consumption were restored, with 60 million gallons occurring in August and 21 million gallons in September. End-of-month stocks were then calculated using July 2019 stocks and this counterfactual consumption trajectory for August and September. To avoid unnecessary complication, it was assumed that corn futures prices would have remained the same in the counterfactual case.
- 24.Based on this method, it can be estimated that ethanol prices would have been \$0.15 per gallon higher in August and \$0.20 per gallon higher in September in the absence of the 2018 SREs.
- 25.Actual ethanol production was 1.34 billion gallons in August 2019 and 1.23 billion gallons in September. By multiplying monthly production by the monthly price impact, it can be estimated that the 2018 SREs resulted in \$439 million in lower revenues to the U.S. ethanol industry in August and September. The prorated impact to RFA members alone exceeded \$100 million.
- 26. The decline in consumption and prices that resulted from the 31 new

SREs contributed significantly to the idling of ethanol plants and a reduction in output in August and September 2019, especially given the industry's experience in 2018 following the first large-scale round of SREs. According to information available to RFA, five ethanol plants idled production during those two months, and one permanently closed. These facilities had a combined annual production capacity of 417 million gallons and directly employed more than 200 people. Ethanol production remained below May-July 2019 levels (the three months prior to the SRE announcement) until December. As a result, total ethanol production fell in calendar year 2019 (i.e., compared to the previous calendar year) for just the second time since 1996, with the only other decline being in the drought year of 2012.

III.

27.EPA acknowledges that the 2018 SREs directly increased the number of carryover RINs expected to be available for compliance with the 2020 standards.¹³ Due to this large increase in carryover RINs attributable to the exemptions, and the resulting downward pressure on RIN prices, I believe the ethanol blend rate was lower in the months following the

¹³ See 85 Fed. Reg. at 7,021.

announcement of the SREs than it would otherwise have been.

- 28.As obligated parties continue to use carryover RINs resulting from the 2018 SREs to satisfy their future RFS obligations, RFA's members will continue to suffer economic harm. Even if parties that received 2018 SREs do not use these RINs for their own compliance and instead sell the RINs to other obligated parties, RFA and its members are harmed when those obligated parties use such RINs for compliance instead of blending ethanol or obtaining RINs representing additional blending from other parties.
- 29.Because RINs are fungible and because the interplay between physical ethanol consumption and the market for RINs is governed by the law of supply and demand, a favorable decision in this Court remanding the petitions back to EPA could prompt EPA either to direct refineries to retire a number of RINs equal to those that were improperly reinstated by the 2018 SREs or to increase the annual RFS applicable volumes by an amount equal to that avoided by the 2018 SREs. Either solution would redress the injury to RFA's members.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed this 29th day of October, 2020 in Ellisville, Missouri.

StattRichma

Scott Richman

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION,	
AMERICAN COALITION FOR	
ETHANOL,	
GROWTH ENERGY,	
NATIONAL BIODIESEL BOARD,	
NATIONAL CORN GROWERS	
ASSOCIATION, and	
NATIONAL FARMERS UNION,	
Petitioners,	
	Core No. 10 1220
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF EMILY SKOR

- My name is Emily Skor. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge. I am submitting this Declaration on behalf of the Petitioners' opening brief in the above-captioned matter.
- 2. I serve as the CEO of Growth Energy. Growth Energy is a national trade association dedicated to promoting the commercial production and use of renewable fuels, particularly conventional and cellulosic ethanol. Growth

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Energy's 89 producer members make more than 7.5 billion gallons of ethanol that is used to meet the blending requirements of the Renewable Fuel Standard (RFS).

- 3. The RFS was first enacted by the Energy Policy Act of 2005 and then further broadened by the Energy Independence and Security Act of 2007. In order to reduce our dependence on foreign oil imports and to reduce greenhouse gas emissions, the RFS program was established to blend more renewable fuels into our nation's transportation fuel system. The statutory requirements called for 36 billion gallons of renewable fuel to be blended by 2022.
- In the market for transportation fuel, renewable fuel competes with fossil fuels. Any renewable fuel that is used for transportation purposes displaces the fossil fuel that would otherwise be used.
- 5. The RFS annual volume requirements define the amount of renewable fuel that must be used in the nation's transportation fuel supply. Thus, the requirements define a guaranteed level of demand for renewable fuel.
- 6. The volume requirements address four "nested" categories of renewable fuel: (1) cellulosic biofuel and (2) biomass-based diesel are types of (3) advanced biofuel, and all three of these are types of renewable fuel that can be credited toward (4) the total renewable fuel obligation.

- 7. Once the required volume requirements are determined for a given year, EPA converts those volumes into volume obligations, which are expressed as a percentage of the total transportation fuel projected to be consumed in the year. Each obligated party must ensure that the fuel it refines contains the required percentages of renewable fuel, sometimes called "RVOs."
- 8. An obligated party may meet its RVOs directly by blending renewable fuel with the fossil fuel it refines to make transportation fuel (and thereby displacing some amount of fossil fuel). Or an obligated party may meet its RVOs indirectly by buying credits, called RINs, from others—either those who themselves blended renewable fuel (thereby displacing fossil fuel) or those who acquired the RINs from yet another party who blended.
- 9. Ethanol is, by far, the most commonly used renewable fuel in the transportation-fuel market. Roughly three-quarters of the renewable fuel used to comply with the RFS annually is ethanol. And in the segment of the market where all types of renewable fuels compete among themselves—that is, once the advanced RFS standard is met—conventional ethanol accounts for roughly 95% of the renewable fuel that is used to comply with the RFS annually.
- 10.Conventional ethanol generates D6 RINs, and thus D6 RIN prices best reflect the overall level of demand for renewable fuel.

- 11.Growth Energy's membership includes producers of conventional and cellulosic ethanol.
- 12.Under certain limited circumstances, EPA has the statutory power to exempt certain obligated parties—"small" refineries—from their RVOs. Because historically EPA has not required obligated parties to make up the exempt volumes (whether prospectively or retrospectively), the effect of small refinery exemptions (or "SREs") has been to reduce the RFS volume requirements gallon-for-gallon. In other words, SREs have reduced the demand for renewable fuel.¹
- 13.On August 9, 2019, EPA exempted 31 small refineries from their RVOs for the 2018 compliance year. That decision is the subject of this lawsuit.²
- 14.EPA updated its RFS dashboard on August 9, 2019 to show that 31 SRE petitions had been granted.³ However, EPA's decision document on the 2018 SREs was never published in the Federal Register, and its existence remained a secret to Growth Energy and the other Petitioners until

¹ In setting the 2020 RFS, EPA attempted to prospectively account for *projected* 2020 SREs. 85 Fed. Reg. 7016, 7019 (Feb. 6, 2020). EPA had never done that before.

² See Pet. for Review, Ex. A, ECF No. 1812533.

³ EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions;</u> <u>https://www.epa.gov/newsreleases/epa-announces-biofuel-and-small-refinery-exemption-priorities.</u>

September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit.⁴

- 15.The 31 2018 SREs covered 1.43 billion gallons of volume obligations, which was about 7.5% of the total volume requirement of 19.29 billion gallons.⁵
- 16. The significant adverse effect of the 2018 SREs on ethanol producers can be seen in various ways.
- 17.By reducing the 2018 RVOs—again, the amount of renewable fuel that refineries were required to blend into transportation fuel—the 2018 SREs exposed renewable fuel producers to additional competition with fossil fuel producers to determine the composition of transportation fuel.
- 18.Similarly, by reducing the RVOs the 2018 SREs also substantially reduced the demand for renewable fuel.
- 19.It does not matter that the 2018 SREs were granted after the compliance deadline for 2018. The belated grant merely shifted their effect to the 2019 compliance year and beyond.

⁴ See EPA Mot. to Dismiss, Bunker Decl., Ex. A, Sinclair Wyo. Ref. Co. v. EPA, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

⁵ EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions;</u> <u>https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards.</u>

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- 20.Indeed, the poolwide concentration of ethanol—the percentage of all transportation fuel that is ethanol—was markedly lower in August and September 2019 than in the preceding months (even on a seasonally adjusted basis).
- 21.And as EPA has noted, the number of carryover RINs available for compliance in 2019 increased by 1.29 billion in the second half of 2019. As EPA has acknowledged, this increase is "primarily the result" of the 2019 SREs.⁶ In other words, in practice the 2018 SREs reduced the demand for renewable fuel in 2019; because of the extra carryover RINs generated by the 2018 SREs, correspondingly less renewable fuel needed to be used to achieve RFS compliance in 2019.
- 22. The 2018 SREs' effect on the demand for renewable fuel was also reflected in the price of RINs, i.e., the cost of acquiring a credit to show compliance. Following EPA's announcement on August 9, 2019, that it had exempted 1.43 billion RINs for 2018, D6 RIN prices immediately fell by 41%, which was (at least at the time) the largest ever three-day decline in D6 RIN prices.
- 23.A favorable decision in this Court is likely to redress Growth Energy's injury because EPA can restore the exempted volume requirements and require compliance through current-year RINs.

⁶ 2020 RFS Rule, 85 Fed. Reg. 7016, 7021 (Feb. 6, 2020).

Executed this 23rd day of September, 2020 in Washington, D.C.

Emily Skor

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION,	
AMERICAN COALITION FOR	
ETHANOL,	
GROWTH ENERGY,	
NATIONAL BIODIESEL BOARD,	
NATIONAL CORN GROWERS	
ASSOCIATION, and	
NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL	
PROTECTION AGENCY,	
Respondent.	

DECLARATION OF JON DOGGETT

1. My name is Jon Doggett. I am over 18 years of age and am

competent to give this Declaration. This Declaration is based on

personal knowledge.

2. I serve as Chief Executive Officer of the National Corn Growers Association ("NCGA").

- 3. Prior to my appointment as Chief Executive Officer in September 2018, I served as NCGA Executive Vice President since late 2014. Prior to that, I served as Vice President of Public Policy, and I have continuously managed NCGA's Washington, DC office and led its public policy efforts since joining NCGA in July of 2002.
- 4. Raised on my family's Montana ranch, I have substantial knowledge of production agriculture and agribusiness, as well as more than 30 years of agricultural policy and leadership experience. Prior to NCGA, I served eleven years at the American Farm Bureau Federation, and I also worked for the National Cattlemen's Beef Association/Public Lands Council and on Capitol Hill as a senior House legislative assistant.
- 5. Founded in 1957, NCGA represents more than 40,000 dues-paying corn farmers nationwide and more than 300,000 corn growers who contribute to NCGA through the corn programs (known as "checkoff" programs) in their states. NCGA and its 49 affiliated state organizations work together to create and increase opportunities for corn growers. Among NCGA's purposes is representing its members in lawsuits affecting corn growers.
- 6. Corn is used as a feedstock to make ethanol, a renewable fuel under the Renewable Fuels Standard ("RFS"). The RFS establishes applicable

volume requirements for renewable fuel and three subcategories of renewable fuel (cellulosic, advanced, and biomass-based diesel).¹ Although there is no statutory volume requirement for ethanol in the RFS, almost all of the non-advanced portion of the total renewable fuels volume requirement (that is, the applicable volume requirement of total renewable fuel minus the applicable volume requirement of advanced biofuel) is met today with ethanol, resulting in an implied volume.

- 7. NCGA filed a petition for review of the U.S. Environmental Protection Agency's ("EPA's") *Decision on 2018 Small Refinery Exemption Petitions, signed August 9, 2019* ("2018 SRE Decision").² This Declaration is offered in support of that legal action.
- 8. Through the 2018 SRE Decision, EPA granted 31 of the 42 small refinery exemption petitions it received for compliance year 2018.³
- 9. NCGA did not have an opportunity to comment or participate in the final agency action being challenged here. The 2018 SRE Decision was not published in the Federal Register, and its existence remained a secret to

¹ See 42 U.S.C. § 7545(o)(2)(B).

² ECF No. 1812533.

³ EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions</u>.

NCGA until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit.⁴

- 10.My understanding is that the small refinery exemptions mean the exempt refineries no longer need to demonstrate compliance with the applicable volumes for those years through the retirement of credits, referred to as renewable identification numbers ("RINs"), which represent physical volumes of renewable fuel.
- 11.Based on my experience with the RFS, the exempt refineries would have obtained RINs necessary to satisfy their obligations either by blending renewable fuel with transportation fuel themselves (and generating RINs) or by purchasing RINs from another party that had already blended renewable fuel with transportation fuel.
- 12. To the extent that the exempt refineries did blend renewable fuel with transportation fuel or otherwise obtained RINs prior to the exemption being granted, these refineries now in the absence of any compliance mandate may sell those RINs on the market to other parties who can purchase the RINs instead of blending.
 13. It is my understanding that if EPA's exemptions to these 31

⁴ See EPA Mot. to Dismiss, Bunker Decl., Ex. A, Sinclair Wyo. Ref. Co. v. EPA, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

refineries no longer require the refineries to acquire RINs for compliance, that reduces demand for renewable fuels and results in a lower price for renewable fuel. Lower prices for their products mean that renewable fuel producers will pay less for their feedstocks, including corn. Lower demand for their products means that renewable fuel producers will purchase fewer feedstocks, including less corn.

- 14. This understanding is supported by EPA's estimate that,
 cumulatively for 2018, RFS obligations that would have required
 1.43 billion RINs were effectively removed by exemptions to small
 refineries for the 2018 compliance year. ⁵
- 15.Reducing demand for gallons of ethanol erodes demand for corn.
- 16.According to U.S. Department of Agriculture conversion factors, one bushel of corn yields approximately 2.7 gallons of ethanol.⁶
- 17.Using that ratio, every million gallons of non-advanced (conventional) renewable fuel that EPA exempted for the exempt refineries reduced demand for corn by up to 370,000 bushels.

⁵ 85 Fed. Reg. 7,016, 7,050 (Feb. 6, 2020).

⁶ U.S. Dep't of Agriculture, Documentation-Conversion Factors, <u>https://www.ers.usda.gov/data-products/us-bioenergy-</u><u>statistics/documentation/</u> (accessed June 15, 2020).

- 18.Prior studies have shown that modest reductions to ethanol blending also reduce the price of corn; a 1.4-billion-gallon reduction in ethanol blending is estimated to reduce corn prices by \$0.25 per bushel.⁷
- 19.Even if lower ethanol prices were to encourage blending in spite of the exemptions, the lower prices that NCGA members are receiving for bushels of corn are causing significant hardship to them.Although a number of factors including weather and trade policies impact the price of corn, the small refinery exemptions clearly are also contributing to downward price pressure on America's corn growers compared to what the price would be in the absence of the small refinery exemptions.
- 20.Based on my experience at NCGA, corn farmers have experienced six consecutive years of low commodity prices and income since 2013, with net farm income falling 50 percent between 2003 and 2018. In 2019, national farm income was down 8 percent, when increased federal government assistance is not counted. Corn

⁷ See Bruce Babcock and Wei Zhou, Impact on Corn Prices from Reduced Biofuel Mandates 9-11 (Nov. 2013), available at https://www.card.iastate.edu/products/publications/pdf/13wp543.pdf.

farmers in 2019 experienced more than a five percent decline in total production compared to 2018, driven by lower crop yields, and increased prevent plant acres caused by weather-related planting delays. In addition to the 2019 production challenges, corn farmers have faced continued reductions in demand, driving lower corn prices, and ultimately further erosion of already weakened total farm economics.

- 21.For the 2018-2019 corn marketing year, the U.S. Department of Agriculture reported a 227 million-bushel decline in corn used for ethanol production compared to the 2017-2018 marketing year. This occurred during a time period where total U.S. finished motor gasoline sales reported by the U.S. Energy Information Administration increased slightly from 142.98 billion gallons in 2017 to 143.01 billion gallons in 2018. My understanding is, in absence of small refinery waivers, the corn industry would have seen flat to slight growth in demand for ethanol correlating to the slight growth seen in total finished motor gasoline sales.
- 22.EPA estimated that the 2018 exemptions directly increased the number of carryover RINs that will likely be available for compliance with the 2020 standards by approximately 1.29 billion

RINs.⁸

- 23. It is my understanding that the jump in carryover RINs attributable to the exempt refineries means that NCGA and its members will continue to be harmed as obligated parties use carryover RINs to satisfy their RVOs for future compliance years. Even if the exempt refineries do not use these RINs for their own compliance and instead sell the RINs to other obligated parties, NCGA and its members are harmed when that obligated party uses the carryover RINs for compliance instead of blending or obtaining RINs representing additional blending from other parties.
- 24.A favorable decision by this Court would redress NCGA's injury because EPA can require that any volumes to refineries improperly exempted be made up by the exempted obligated party (or another obligated party) in a future year. Restoring the volume obligation for previously exempted volumes will increase demand for corn and help support corn demand and corn prices.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

⁸ 85 Fed. Reg. at 7,021.

Executed this 4th day of August, 2020 in Woodbridge, Virginia.



UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF DONNELL REHAGEN

- 1. My name is Donnell Rehagen. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge.
- 2. I joined the National Biodiesel Board ("NBB") in 2004 and currently serve as the CEO. Before becoming CEO, I served as NBB's Chief Operating Officer, managing the implementation and execution of NBB's annual budget. Prior to working for NBB, I was the fleet administrator for the Missouri Department of Transportation, where I was responsible for all

aspects of the department's fleet including implementation of their biodiesel (B20) use program.

- I have a Masters in Public Administration from the University of Missouri Columbia and a Bachelor's Degree in Computer Information Systems from Missouri State University.
- 4. NBB is the national trade association representing America's first advanced biofuels -- biodiesel and renewable diesel (collectively, "biomass-based diesel" or "BBD"). NBB has approximately 130 members, including biodiesel producers, feedstock and feedstock processor organizations, fuel marketers and distributors, and technology providers. The group works to create sustainable BBD industry growth through education, communication, government affairs, technical, and quality assurance programs.
- 5. The Renewable Fuel Standard ("RFS") first introduced in 2005 sets annually increasing volumetric requirements for use of renewable fuels in U.S. transportation. The policy was expanded in 2007 ("RFS2") to include requirements for advanced biofuels, such as biomass-based diesel, and to set goals for greenhouse gas reductions and reduced reliance on petroleum fuels. Under RFS2, Congress set specific BBD volume requirements, starting at 500 million gallons in 2009 and increasing to 1 billion gallons in 2012. Since 2013, the Environmental Protection Agency ("EPA") has set annual

BBD volumes through a rulemaking process, increasing the required volumes from 1.28 billion gallons in 2013 to 2.43 billion in 2021. Congress specified that BBD volumes should never fall below the 2012 level. BBD annually meets more than 90% of the advanced biofuel obligation under the RFS.

- 6. Biodiesel, renewable diesel, renewable jet, and heating oil from most feedstocks are recognized as advanced biofuels. Because advanced biofuels have higher energy values than conventional renewable fuels, they typically earn 1.5 to 1.7 RINs per gallon.¹
- 7. Since soybean oil is a major feedstock for biodiesel and renewable diesel, the RFS supports 13% of the value of every bushel of soybeans produced in the United States.
- 8. NBB members own and operate BBD facilities in the United States and are registered to participate in the RFS program. They use renewable biomass to produce BBD, including, but not limited to, soybean oil, canola oil, distiller's corn oil, waste cooking oil, and animal fats.
- 9. NBB filed a petition for review of EPA's Decision on 2018 Small Refinery

¹ Renewable fuels generate credits – called "Renewable Identification Numbers" or "RINs" – that are used by the obligated parties to demonstrate compliance with the RFS. Each gallon of renewable fuel typically generates 1 RIN.

Exemption Petitions, signed August 9, 2019, which documented EPA's decision to exempt 31 small refineries from their RVOs for the 2018 compliance year.²

- 10.EPA received 42 small refinery exemption petitions for compliance year 2018. Of these, it granted 31, denied six, declared two ineligible, and three were withdrawn. EPA updated its RFS dashboard on August 9, 2019 to show these metrics.³ However, EPA's decision document on the 2018 exemptions was not published in the Federal Register, and its existence remained a secret to NBB until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit.⁴
- 11.EPA's issuance of small refinery exemptions creates a significant shortfall in the volumes of renewable fuel EPA actually requires through annual Renewable Volume Obligations ("RVOs"). The shortfall violates the agency's duty to ensure that the RVOs are met.⁵
- 12.EPA's failure to account for the small refinery exemptions in annual rules has a significant impact on demand for BBD in particular, since BBD is used

² See Pet. for Review, Ex. A, ECF No. 1812533.

³ EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions</u>.

⁴ See EPA Mot. to Dismiss, Bunker Decl., Ex. A, Sinclair Wyo. Ref. Co. v. EPA, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.
⁵ 42 U.S.C. § 7545(o)(3)(B)(i).

to comply with multiple RVOs (advanced, BBD and total renewable fuel). NBB estimates that through the granting of 31 retroactive small refinery exemptions in August of 2019, EPA returned RINs to small refiners representing 185 million gallons of BBD. Since the refiners were then permitted to reuse those RINs for future compliance years or sell them to other refiners, the loss of demand for BBD carried through to future years. Since 2017, as EPA began increasing the number of retroactive exemptions, the BBD industry has lost more than 550 million gallons from the RFS volumes set by EPA.

- 13.A "small" refiner (as defined in the RFS) that processes 75,000 barrels of oil per day (bpd) can produce 850 million gallons of gasoline and diesel in a year. The 2018 RFS obligation on that fuel would include only about 20 million gallons of advanced biofuel such as biodiesel. Every small refinery exemption can thereby eliminate the market for a small biodiesel facility– many produce less than 20 million gallons in a year. In 2019, 10 biodiesel production facilities were forced to shut down by market headwinds resulting from the 2018 small refinery exemptions.
- 14.Professor Scott Irwin, Norton Chair of Agricultural Marketing at the University of Illinois, estimates that nearly one billion gallons of demand for BBD was lost through the 2018 exemptions. He further estimates that the

economic loss for the BBD industry exceeded \$2 billion each year since 2017, and could reach \$7.7 billion this year if EPA continues to grant exemptions at the same rate.⁶

15. A favorable decision in this Court is likely to redress NBB's injury because EPA can restore the exempted volume requirements and require compliance through current year RINs.

Executed this 4th day of September, 2020 in Jefferson City, Missouri.

Jouwell M. Rihrgen

Donnell M. Rehagen

⁶ S. Irwin, Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction, farmdoc daily (9):45, Dep't of Agric. and Consumer Econ., Univ. of Illinois at Urbana-Champaign, (March 14, 2019), <u>https://farmdocdaily.illinois.edu/2019/03/small-refinery-exemptions-andbiomass-based-diesel-demand-destruction.html</u>.
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF BRIAN JENNINGS

- 1. My name is Brian Jennings. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge.
- 2. American Coalition for Ethanol ("ACE") is a non-profit grassroots organization that advocates for the domestic ethanol industry. ACE's members include U.S. ethanol biorefineries, investors in biofuel facilities, farmers, and companies that supply goods and services to the U.S. ethanol industry. A list of ACE's members is attached as Exhibit A. Among ACE's purposes is representing its members in lawsuits affecting the ethanol

industry.

- 3. I have been employed with ACE since 2004. I am ACE's Chief Executive Officer and previously served as Executive Vice President. I also have worked as an advisor to U.S. Senator Tim Johnson and for a South Dakota farm organization in support of farmers, ranchers, and renewable fuels. In recent years, I have overseen ACE's regulatory and legislative initiatives, litigation concerning the implementation of the Renewable Fuel Standard ("RFS"), and public and media relations activities. I am also a fourth generation South Dakotan who has helped raise cattle and crops on land that my family has homesteaded for the past century. Throughout my years working for ACE, I have developed an in-depth understanding of the business and operations of the members of ACE, and of the market for ethanol fuel in the United States.
- 4. ACE and the other petitioners in this case are challenging the U.S. Environmental Protection Agency's ("EPA's") decision to exempt 31 small refineries from compliance with the Renewable Fuel Standard ("RFS") for the 2018 compliance year (the "2018 SREs").
- 5. EPA received 42 small refinery exemption petitions for compliance year 2018. EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuelsregistration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

EPA granted 31, denied six, and declared two ineligible, and three were withdrawn. *See id.* This information was posted to EPA's RFS portal on August 9, 2019.

- 6. EPA's decision on the 2018 SRE petitions was not published in the Federal Register. ACE first learned of its existence when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit. *See* EPA Mot. to Dismiss, Bunker Decl., Ex. A, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.
- 7. The RFS mandates that refiners and importers of transportation fuel (collectively, "obligated parties") blend a specified volume of renewable fuel into transportation fuel (gasoline and diesel). The statute specifies renewable fuel volume requirements through 2022, but EPA can reduce and has reduced these volumes if certain conditions are met and if EPA satisfies specified considerations.
- 8. Many of ACE's members produce a type of renewable fuel, ethanol, that can be used by obligated parties for compliance with these RFS obligations.
- 9. Other members grow crops, primarily corn, that are used in the production of renewable fuels.
- 10.As explained more fully below, it is my understanding that ACE's ethanol producers have experienced lower revenues resulting from a combination of

reduced blending volumes and lower per-gallon prices than would have occurred in the absence of the exemptions. Similarly, it is my understanding that lower demand for ethanol reduces demand and prices for renewable fuel feedstocks grown by ACE's agricultural members.

- 11.To comply with the law, obligated parties can purchase gallons of ethanol to blend with gasoline at their refineries or terminals or purchase renewable identification numbers ("RINs"), which represent physical volumes of renewable fuel, from other parties who have blended renewable fuels with transportation fuel.
- 12.Obligated parties can also "bank" any RINs they obtained for compliance with their volume obligations. These "Carryover RINs" are credits that are held in inventory by market participants that may be used to meet up to 20 percent of an obligated party's compliance requirements for the following year.¹
- 13.The "cost savings" to exempt small refineries represent the amount that the companies would have spent to purchase 1) renewable fuel (each gallon of which comes with a RIN) for blending or 2) already-separated RINs (which represent physical gallons of renewable fuel blended by others).

¹ For general discussion of carryover RINs, *see* Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 32,024, 32,029 fn.18 (July 10, 2018).

RINs are attached to the ethanol that ACE's members produce and sell. If obligated parties no longer need to purchase RINs to comply with the RFS, ACE's ethanol producer members have lost potential customers for that year.

- 14.EPA's exemptions to the 31 refineries for 2018 reduced demand for and the price of commodities produced by ACE members when American farmers are facing another year of prices at or below the cost of production and of increasing farm debt.
- 15.In the final rule setting the 2020 RVO, EPA "estimate[d] approximately
 3.48 billion total carryover RINs available, an increase of 1.29 billion RINs
 from the previous estimate of 2.19 billion total carryover RINs in the July
 29 proposal." 85 Fed. Reg. 7,016, 7,021 (Feb. 6, 2020) ("2020 Final Rule").
 EPA explained that "[t]his increase in the carryover RIN bank is primarily
 the result of the millions of RINs that were unretired by small refineries that
 were granted hardship exemptions after the July 29 proposal." *Id.*Specifically, at the time EPA issued the July 29 proposal, EPA was still
 evaluating 39 exemption petitions for compliance year 2018. 84 Fed. Reg.
 36,762, 36,807 n. 208 (July 29, 2019). EPA had adjudicated all 2018 small
 refinery exemption petitions at the time of the 2020 Final Rule. 85 Fed.
 Reg. at 7,052 n. 180.
- 16. This additional supply of carryover RINs contributed to a decline in RIN

as shown below.

prices following the announcement of the 2018 SREs on August 9, 2019,



Source: U.S. EPA, RIN Trades and Price Information (May 10, 2020), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rintrades-and-price-information.

- 17.Based on my experience with the RFS, lower RIN prices in turn reduce the incentive to blend renewable fuels. Demand for renewable fuels produced by ACE member companies is consequentially lower compared to the demand for renewable fuels under the RFS that would have existed in the absence of these 31 exemption extensions.
- 18.But decreasing—or even flatlined—ethanol blending levels potentially understate the economic impact to ACE's ethanol producer members because the reduction in ethanol demand attributable to the small refinery exemption extensions has created a buyer's market that forces ethanol producers to lower prices in order to compete.
- 19. These lower prices squeeze margins for ethanol producers and put marginal

plants at risk of idling or permanent closure.²

20.A favorable decision in this Court is likely to redress ACE's injury because EPA can require that any volumes improperly exempted be made up by the exempted obligated party (or another obligated party) in a future year. This would restore the demand lost through the exemptions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

Executed this 29th day of July 2020.

B.C

Brian Jennings

² See Todd Neeley, POET Cuts Production After RFS Waivers, Progressive Farmer (Aug. 20, 2019), <u>https://www.dtnpf.com/agriculture/web/ag/news/</u> <u>business-inputs/article/2019/08/20/one-nations-largest-ethanol-job-cuts</u> ("One of the nation's largest ethanol companies announced Tuesday it will idle a 92million-gallon plant in Cloverdale, Indiana, following EPA's decision to grant 31 small-refinery waivers to the Renewable Fuel Standard for 2018.").

Exhibit A

ACE Membership Directory

Company	City	State
Red River Valley Sugarbeet	Fargo	ND
Growers Association		
Miner Enterprises Inc	Geneva	IL
Buckman	Ankeny	IA
JC Ramsdell Enviro Services Inc	Flandreau	SD
Solenis LLC	Hamilton	ON
Halstad Telephone Company	Halstad	MN
BioFuels Journal	Decatur	IL
Chief Industries	Kearney	NE
Beta Tec Hop Products	Kansas City	MO
Millwright & Technical Engineers	Bettendorf	IA
Jasper Engineering & Equipment	Medina	MN
Со		
Westcon Inc	Bismarck	ND
Malloy Electric	Sioux Falls	SD
Southeastern Electric Cooperative	Marion	SD
Inc		
Arjay Automation Inc.	Burnsville	MN
Steele-Waseca Cooperative	Owatonna	MN
Electric		

Company	City	State
Eco-Energy Inc	Franklin	TN
RSM US LLP	Sioux Falls	SD
Brown Tank LLC	St Paul	MN
INNOSPEC Fuel Specialties	Shawnee	KS
DRSG Partnership	Cresco	IA
Conveyor Engineering & Mfg Co	Cedar Rapids	IA
Farmers & Merchants Coop Oil	Madison	SD
Howalt+McDowell Insurance	Sioux Falls	SD
McGrath North Mullin & Kratz PC LLO	Omaha	NE
Minnesota Wheat Research and	Red Lake	MN
Promotion Council	Falls	
Monsanto	St. Louis	MO
Wess Inc	Clear Lake	IA
Lake Region Electric Association Inc.	Webster	SD
Farm Credit Services of America	Omaha	NE
Federated Rural Electric	Jackson	MN
Association		
Rushmore Electric Power Cooperative	Rapid City	SD
The Walling Company	Omaha	NE
Golden Growers Cooperative	West Fargo	ND

Company	City	State
Bosselman Enterprises	Grand Island	NE
Fremont Industries Inc	Shakopee	MN
K-Coe Isom	Lenexa	KS
Wheat Belt Public Power	Sidney	NE
Flottweg Separation Technology Inc	Independence	KY
Granite Falls Bank	Granite Falls	MN
Wisconsin Corn Growers Association	Lisbon	WI
Fluid Quip Process Technologies	Cedar Rapids	IA
Clay-Union Electric Corporation	Vermillion	SD
CF Industries	Washington	DC
CoBank	Omaha	NE
Central Counties Cooperative	Litchfield	MN
INTL FCStone	West Des Moines	IA
Indeck Energy Services Inc	Buffalo Grove	IL
Murex LLC	Plano	ТХ
Redwood Electric Cooperative	Clements	MN
Agtegra Cooperative	Aberdeen	SD
Swanson Flo-Systems Company	Plymouth	MN

Company	City	State
Dedert Corporation	Homewood	IL
Eide Bailly LLP	Sioux Falls	SD
Hi Roller Conveyors	Sioux Falls	SD
Charles Mix Electric Association Inc	Lake Andes	SD
Lallemand Biofuels & Distilled Spirits	Duluth	GA
US Water Services	St Michael	MN
Nobles Cooperative Electric	Worthington	MN
Arkansas County Co-op	Almyra	AR
Boulay	Minneapolis	MN
Corn Energy Investors LLC	Sioux Falls	SD
ERI Solutions Inc	Colwich	KS
Harms Oil Company	Brookings	SD
Midland Scientific Inc	Omaha	NE
Northwest Rural Electric Cooperative	Orange City	IA
EcoEngineers	Des Moines	IA
Rosedale Products Inc	Ann Arbor	MI
Warrior Mfg LLC	Hutchinson	MN
Hydrite	Brookfield	WI
Faegre Baker Daniels LLP	Minneapolis	MN

Company	City	State
TotalCoGen Services	Austin	TX
BBI International	Grand Forks	ND
GSI	Woodbury	MN
Kemin Industries North America	Des Moines	IA
Saola Energy LLC	Wichita	KS
Whitefox Technologies	London	
Encore Energy	La Vista	NE
Renew Kansas	Topeka	KS
Wisconsin BioFuels Assocation	Madison	WI
Wisconsin Agri-Business Association	Madison	WI
Iowa Renewable Fuels Association	Johnston	IA
Renewable Fuels Nebraska	Lincoln	NE
Metrohm USA	Farmington	MN
Chippewa Valley Ethanol Company	Benson	MN
Redfield Energy LLC	Redfield	SD
Granite Falls Energy, LLC	Granite Falls	MN
Little Sioux Corn Processors, LLLP	Marcus	IA
Absolute Energy, LLC	St. Ansgar	IA
Bushmills Ethanol	Atwater	MN

Company	City	State
Prairie Horizon Agri-Energy	Phillipsburg	KS
Al-Corn Clean Fuels	Claremont	MN
Golden Grain Energy	Mason City	IA
Pinal Energy LLC	Maricopa	AZ
Highwater Ethanol	Lamberton	MN
KAAPA Ethanol, LLC - Minden	Minden	NE
POET Biorefining - Big Stone, SD	Big Stone City	SD
Big River Resources - West	West	IA
Burlington	Burlington	
Mid-Missouri Energy	Malta Bend	MO
Quad County Corn Processors	Galva	IA
Ace Ethanol, LLC	Stanley	WI
Adkins Energy LLC	Lena	IL
Dakota Ethanol, LLC	Wentworth	SD
Fox River Valley Ethanol, LLC	Oshkosh	WI
Big River Resources - Boyceville	Boyceville	WI
Husker Ag Processing, LLC	Plainview	NE
Badger State Ethanol, LLC	Monroe	WI
Siouxland Ethanol	Jackson	NE
UWGP	Friesland	WI

Company	City	State
Cardinal Ethanol, LLC	Union City	IN
Chief Ethanol Fuels	Hastings	NE
Homeland Energy Solutions	Lawler	IA
East Kansas Agri-Energy, LLC	Garnett	KS
Didion Ethanol	Cambria	WI
South Dakota Farmers Union	Huron	SD
Protec Fuel LLC	Boca Raton	FL
ICM, Inc.	Colwich	KS
Syngenta Seeds, Inc.	Minnetonka	MN
Novozymes North America Inc	Franklinton	NC
Nebraska Public Power District	Ogallala	NE
Basin Electric Power Cooperative	Bismarck	ND
Full Circle Ag	Britton	SD
Sioux Valley Energy	Colman	SD
South Dakota Soybean Research/Promo Council	Sioux Falls	SD
Prairie Feed and Trucking	Milford	IA
South Dakota Corn Growers Association	Sioux Falls	SD
Minnkota Power Coop Inc.	Grand Forks	ND
Nebraska Corn Board	Lincoln	NE

Company	City	State
Central Electric Cooperative Inc	Mitchell	SD
North Dakota Corn	Fargo	ND
Fagen Inc.	Granite Falls	MN
FEM Electric Association, Inc.	Ipswich	SD
Iowa Corn Growers Association	Johnston	IA
Minnesota Corn Growers Association	Shakopee	MN
Christianson PLLP	Willmar	MN
Corn Belt Power Coop	Humboldt	IA
Dakota Valley Electric Cooperative	Edgeley	ND
Michael Best & Friedrich, LLP	Madison	WI
Nebraska Ethanol Board	Lincoln	NE
Sukup Manufacturing Company	Sheffield	IA
Northern Electric Cooperative	Bath	SD
Ohio Corn Marketing Program	Delaware	ОН
South Central Electric Association	St. James	MN
RPMG, Inc.	Shakopee	MN
East River Electric Cooperative	Madison	SD
Herseth Ranch	Houghton	SD
Indiana Corn Marketing Council	Indianapolis	IN

Company	City	State
Missouri Corn Growers	Jefferson	MO
Association	City	
PhibroChem	Teaneck	NJ
Kansas Corn Growers Association	Garnett	KS
Corn Marketing Program of	Lansing	MI
Michigan		
SUEZ Water Technologies &	Viola	IL
Solutions		
North Dakota Ethanol Producers	Bismarck	ND
Association		

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION	
INATIONAL PARMERS UNION,	
Petitioners,	
v.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	
*	

DECLARATION OF ROB LAREW

- My name is Rob Larew. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge.
- I serve as president of the National Farmers Union ("NFU"). NFU represents roughly 200,000 family farmers, ranchers, and rural members.
 Since 1902, NFU has worked to improve the well-being and quality of life of family farmers, ranchers and rural communities by advocating for grassroots-driven policy adopted annually by our membership. Among

NFU's purposes is representing its members in lawsuits affecting farmers and rural communities.

- 3. I have served as President of NFU since March 2020. Prior to leading NFU, I served as NFU's Senior Vice President of Public Policy and Communications since fall 2016. Prior to joining NFU, I served over 22 years in Congress and the U.S. Department of Agriculture working on agriculture policy and communication. I graduated from Virginia Polytechnical Institute and State University with a Bachelor of Science in Dairy Science and completed graduate work in Agronomy at Pennsylvania State University. Throughout my entire career I have been working in the agricultural sector and developed an in-depth understanding of the business and operations of the members of NFU, as well as the market for agricultural products.
- 4. NFU's members include family farmers and growers of crops such as corn and soybeans, which can be used as feedstocks in renewable fuel production.
- 5. Corn is used to produce most of the non-advanced portion of renewable fuels (convention renewable fuel), and soybeans are used to produce biomass-based diesel. These are both types of renewable fuel required under the Renewable Fuels Standard ("RFS").

- 6. According to U.S. Department of Agriculture conversion factors, one bushel of corn yields approximately 2.7 gallons of ethanol, a renewable fuel.¹ A bushel of soybeans yields approximately 1.5 gallons of biodiesel.²
- 7. NFU is challenging U.S. Environmental Protection Agency's ("EPA's") decision granting small refinery disproportionate economic hardship exemptions ("small refinery exemptions" or "exemptions") under 42 U.S.C. § 7545(o)(9)(B) to 31 small refineries for compliance year 2018.³ I provide this declaration in support of the legal action against EPA regarding this decision.
- 8. EPA updated its RFS dashboard on August 9, 2019 to show that 31 SREs had been granted for compliance year 2018. However, NFU was not aware of the decision document for the 2018 small refinery exemptions until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit.⁴
- 9. The small refinery exemptions mean the exempt refineries no longer need to demonstrate compliance with the applicable volumes for those years through

¹ U.S. Dep't of Agriculture, Documentation-Conversion Factors, <u>https://www.ers.usda.gov/data-products/us-bioenergy-statistics/documentation/</u> (accessed Oct. 31, 2018).

 ² University of Arkansas, Division of Agriculture, Biodiesel, FSA1050-PD-3-2017RV, https://www.uaex.edu/publications/PDF/FSA-1050.pdf.
 ³ ECF No. 1812533.

⁴ See EPA Mot. to Dismiss, Bunker Decl., Ex. A, Sinclair Wyo. Ref. Co. v. EPA, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

the retirement of credits, referred to as renewable identification numbers ("RINs"), which represent physical volumes of renewable fuel.

- 10.According to EPA, RFS obligations that would have required 1.43 billion RINs for 2018 were effectively removed by small refinery exemptions.⁵
- 11.It is my understanding that if the exemptions EPA granted no longer require the exempt refineries to acquire RINs for RFS compliance, the exemptions reduce their demand for RINs.
- 12.Based on my experience since the enactment of the RFS, reducing demand for total renewable fuel would erode demand for agricultural crops including corn and soybeans (just as increasing demand for renewable fuels through the RFS has increased demand for feedstock crops and helped farmers).
- 13.It is my understanding of basic economics that reduced demand pushes the price for renewable fuel lower. Based on my experience, lower prices for their products mean that renewable fuel producers will pay less for feedstocks, including corn and soybeans. For example, I am aware of previous studies that have shown that modest reductions to ethanol blending decrease the cost of corn; a 1.4-billion-gallon reduction in ethanol blending is estimated to reduce corn prices by \$0.25 per bushel.⁶

⁵ 85 Fed. Reg. 7,016, 7,050 (Feb. 6, 2020).

⁶ See Bruce Babcock and Wei Zhou, Impact on Corn Prices from Reduced Biofuel Mandates 9-11 (Nov. 2013), available at https://www.card.iastate.edu/products/publications/pdf/13wp543.pdf.

- 14. Although several factors including weather and trade policies impact corn and soybean prices, the 2018 small refinery exemptions contribute in part to downward price pressure on feedstock crops. America's family farmers of crops such as corn and soybeans are receiving lower prices per bushel of corn and soybeans compared to what the prices would be in the absence of the small refinery exemptions.
- 15.A favorable decision in this Court is likely to redress the injury to NFU and its members if EPA requires that any volumes improperly exempted be made up by the exempted obligated party (or another obligated party in a future year). Restoring the previously-exempted volume obligations for the exempt refineries will restore demand for feedstock crops such as corn and soybeans and help restore price trends to what they would have been pre-exemption.
- 16.Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

Executed this 27 day of August 2020.

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Rob Larew

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
v.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF JIM LEITING

- My name is Jim Leiting. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on my personal knowledge as CEO of Big River Resources, LLC. I am submitting this Declaration on behalf of the Petitioners' opening brief in the above-captioned matter.
- 2. I received a Bachelor of Science Degree from Iowa State University.
- 3. I was appointed CEO of Big River Resources in February 2020. I joined Big River Resources in March of 2005 as General Manager, then served as Chief

Operating Officer beginning in October of 2013 until being appointed as CEO. I am active in Iowa, Illinois, and Wisconsin Renewable Fuels State organizations and participate as a Board member for the Renewable Fuels Association ("RFA") and Growth Energy. Prior to joining Big River Resources, I spent 22 years with Cargill, Inc., holding various management positions across the Midwest in Cargill's Grain division.

- 4. Big River Resources began as a single grass roots ethanol facility and has now grown to four ethanol facilities: West Burlington, Iowa (100 million gallons per year (mgy)), Dyersville, Iowa (120 mgy), Galva, Illinois (120 mgy), and Boyceville, Wisconsin (60 mgy). Big River Resources also has 14 million bushels of grain elevator storage capacity.
- 5. Ethanol, such as that produced by Big River Resources' facilities, can be used by domestic petroleum refiners to comply with their obligations under the Renewable Fuel Standard ("RFS"). The RFS requires that refiners meet a Renewable Volume Obligation ("RVO") set by the U.S. Environmental Protection Agency ("EPA") by blending renewable fuels into transportation fuel, or by obtaining credits called Renewable Identification Numbers or "RINs."
- 6. The passing of the RFS in 2007 supported local investment for the growth of the ethanol industry. Clear volume blend obligations gave the industry faith

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to build the capacity to supply the market to meet the blend targets.

- 7. The RIN system was implemented to ensure compliance and a level playing field for importers and refiners of petroleum product in meeting their obligation. The party blending the renewable fuel separates the RIN to either meet their obligation as a refiner or sells the RIN for a value to reduce the cost of their finished fuel product to be distributed for retail sale. EPA's own studies indicate the cost of RIN compliance is circular as the cost is included in the refiner's sales value of gasoline.
- This Declaration is offered in support of RFA and Growth Energy's challenge of EPA's decision to exempt 31 small refineries from their RFS obligations for the 2018 compliance year.
- 9. When one obligated party is exempted from their obligation, they are provided a competitive advantage over other refiners and obligated parties. These exemptions also reduce the overall blend obligation as established by law. The effect has been to reduce the demand for renewable fuels such as ethanol below the legal blend requirement of the RFS. This reduction in demand erodes the support and reassurance provided by Congress to the renewable fuels industry.
- 10. It is my understanding that when refineries are exempt from their RFS obligations, there is an increase in the supply of RINs, which in turn causes

the price of RINs to fall. When the price of RINs falls, it is cheaper for refiners to satisfy their RFS obligations by buying RINs rather than by blending additional ethanol into gasoline. This reduces the demand for and price of ethanol, including the ethanol produced by Big River Resources.

- 11. Over the past three years, EPA has drastically increased the number of exemptions granted. The resulting reduced demand for ethanol has significantly eroded margins, creating economic stress on the renewable fuels industry.
- 12. After EPA granted 31 small refinery exemptions in August 2019, Big River Resources had to reduce operating volumes at times due to a lack of demand and had a clear decline in earnings in the months following the exemptions.
- 13. Vacating these exemptions and restoring the exempted volume requirements would relieve some of the harm caused to Big River Resources by these 31 small refinery exemptions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

Executed this 28th day of August, 2020 in West Burlington, Iowa.

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Jim Leiting

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RENEWABLE FUELS ASSOCIATION,	
AMERICAN COALITION FOR	
ETHANOL,	
GROWTH ENERGY,	
NATIONAL BIODIESEL BOARD,	
NATIONAL CORN GROWERS	
ASSOCIATION, and	
NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL	
PROTECTION AGENCY,	
Respondent.	

DECLARATION OF SCOTT MUNDT

1. My name is Scott Mundt. I am over 18 years of age and am competent to

give this Declaration. This Declaration is based on my personal

knowledge as President and Chief Executive Officer of Dakota Ethanol.

I have 15 years of experience in ethanol production, sales, and

marketing in the Midwest. I am submitting this Declaration on behalf of the Petitioners' opening brief in the above-captioned matter.

- 2. Dakota Ethanol is a producer of ethanol and ethanol co-products such as wet and dry distillers' grains and corn oil. Dakota Ethanol owns and operates one production facility in Wentworth, South Dakota. That plant has ethanol production capacity of 90 million gallons per year (MGY). In expectation of regulatory certainty regarding the Renewable Fuels Standard ("RFS") Dakota Ethanol also acquired ownership interests in two additional facilities in South Dakota and North Dakota. One of those plants has a production capacity of 145 MGY and the other has production capacity of 80 MGY. Together, these three plants have ethanol production capacity of 315 MGY.
- Dakota Ethanol is a member company of the American Coalition for Ethanol.
- 4. Ethanol produced at Dakota Ethanol plants is purchased by obligated parties for blending and compliance with the RFS.
- 5. The RFS requires refiners to use specified volumes of renewable fuel, such as ethanol, to reduce the quantity of petroleum-based transportation fuel. These obligations can be met by either blending renewable fuels into

transportation fuel, or by purchasing credits. These credits are known as Renewable Identification Numbers, or "RINs," and represent physical gallons of renewable fuels purchased and blended by other parties.

- 6. The EPA granted RFS hardship exemptions to 31 small refineries for compliance year 2018.¹ I believe these exemptions have coincided with a materially reduced demand for U.S. ethanol.
- 7. It is my understanding that these exemptions have led to an increased supply of RINs. In the final rule setting the 2020 renewable volume obligations ("RVOs"), EPA estimated an increase of 1.29 billion RINs caused by the hardship exemptions granted for compliance year 2018. 85 Fed. Reg. 7,016, 7,021 (Feb. 6, 2020) ("2020 Final Rule").
- 8. I understand that as the supply of RINs increases, the price of RINs falls. When this happens, blenders can satisfy RFS obligations more cheaply by buying RINs rather than by blending additional ethanol into gasoline, thereby reducing the overall demand for and price of ethanol, including the price of Dakota Ethanol's product.
- 9. As a result of the reduced demand for ethanol and RINs caused by the

¹ EPA, RFS Small Refinery Exemptions, <u>https://www.epa.gov/fuels-registration-</u> $\frac{reporting-and-compliance-help/rfs-small-refinery-exemptions}{3}$

exemptions, ethanol industry inventory levels have been and remain higher than optimal, and margins for Dakota Ethanol (like the ethanol industry in general) have remained compressed throughout 2018.

- 10. The gallons Dakota Ethanol sells are at a lower price than the company would have received in the absence of the small refinery exemption extensions. Ethanol future prices on the Chicago Board of Trade have fallen from approximately \$1.55 in the summer of 2017 to approximately \$1.20 today, a decline of 22%.² The current prices for ethanol hurt the company's earnings. This is true even though Dakota Ethanol's cost of corn for ethanol production has decreased somewhat between third quarter 2017 and third quarter 2018.
- 11. The secrecy surrounding the small refinery exemption extensions generates uncertainty in the RIN market.
- 12. Restoring the exempted volume requirements and requiring compliance through current year RINs would help alleviate some of the harm caused by these 31 small refinery exemption extensions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the

² See Trading Economics, Ethanol,

https://tradingeconomics.com/commodity/ethanol.

foregoing is true and correct based on my personal knowledge.

Executed this 27 day of July, 2020 in Wentworth, South Dakota.

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Scott Mundt

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION,	
Petitioners,	
V.	Case No.: 19-1220
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

DECLARATION OF CHRIS EDGINGTON

1. My name is Chris Edgington. I am over 18 years of age and am

competent to give this Declaration. This Declaration is based on my
personal knowledge from 36 years as a corn and soybean farmer in
Iowa. I am a member of the Corn Board of the National Corn Growers
Association ("NCGA") and am submitting this Declaration on behalf of
the Petitioners' opening brief in the above-captioned matter.

2. I have a Bachelor of Science degree in animal science from Iowa State

University.

- 3. I chair the NCGA Finance Committee and have been elected by the Corn Board as NCGA's first vice president for the next fiscal year, beginning October 1. I have also served on the CornPAC and the Governance Committees, as well as chaired the Iowa Corn Promotion Board.
- 4. Our Iowa farming operation is multi-generational. My brother and I farm alongside our father and my son and niece. We raise corn for ethanol production and soybeans for both livestock feed and exports.
- 5. More than 95 percent of the corn we produce is sold for use in ethanol, which in turn is purchased by obligated parties for blending and compliance with the Renewable Fuel Standard ("RFS"). The RFS has allowed the opportunity for my son and niece to return to our operation and farm alongside us.
- 6. The RFS obligates refiners to use specified volumes of renewable fuel, such as ethanol, to reduce the quantity of petroleum-based transportation fuel. These obligations can be met by either blending renewable fuels into transportation fuel, or by purchasing credits, referred to as Renewable Identification Numbers, or "RINs."
- 7. NCGA filed a petition for review of the U.S. Environmental Protection

Agency's ("EPA's") decision to exempt 31 small refineries from their RFS obligations for the 2018 compliance year. This Declaration is offered in support of that legal action.

- 8. It is my understanding that when these refineries were exempted from their RFS obligations, the supply of RINs increased which in turn caused the price of RINs to fall by 30 to 40 percent. When RIN prices are low, refiners can satisfy their RFS obligations more cheaply by buying RINs rather than by blending additional ethanol into gasoline.
- 9. With these exemptions for refineries and refineries' ability to meet their RFS obligations without blending additional ethanol because of the drop in RIN value, our ability to profitably sell corn to our local ethanol producer also diminished. The ethanol producer that buys our farm's corn lowered the offering price for corn by nearly 10 percent for the three months immediately following EPA granting these exemptions. A 10 percent loss in price represents the difference between a profit and loss on corn production for my farm.
- 10.Restoring the exempted volume requirements and requiring compliance through current year RINs would help alleviate some of the harm caused by these 31 small refinery exemption extensions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based on my personal knowledge.

Executed this 30th day of July, 2020.

Chris Edgington

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ADDENDUM OF STATUTES AND REGULATIONS **TABLE OF CONTENTS**

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from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as "advanced biofuel" may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term "baseline lifecycle greenhouse gas emissions" means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term "cellulosic biofuel" means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term "conventional biofuel" means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term "greenhouse gas" means carbon dioxide, hydrofluorocarbons, methane, ni-

(o) Renewable fuel program (1) Definitions

In this section:

(A) Additional renewable fuel

The term "additional renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term "advanced biofuel" means renewable fuel, other than ethanol derived

⁸So in original. Probably should be section "7550(2)".

trous oxide, perfluorocarbons,⁹ sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term ''renewable biomass'' means each of the following:

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on nonfederal ¹⁰ land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal ¹⁰ forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term "renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term "small refinery" means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75.000 barrels.

(L) Transportation fuel

The term "transportation fuel" means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomassbased diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

⁹ So in original. The word "and" probably should appear. ¹⁰ So in original. Probably should be "non-Federal".

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(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not-

(aa) restrict geographic areas in which renewable fuel may be used; or (bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

	Applicable volume of renewable fuel
Calendar year:	(in billions of
-	gallons):
2006	
2007	
2008	
2009	
2010	
2011	
2012	
2013	
2014	
2015	
2016	
2017	
2018	
2019	
2020	
2021	
2022	
	-1

(II) Advanced biofuel

Calendar year:

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

> Applicable volume of advanced biofuel (in billions of gallons):

2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar vear: (in	Applicable volume of cellulosic biofuel billions of
	gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

	Applicable
	volume of
	biomass-
	based diesel
Calendar year:	(in billions of
	gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomassbased diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages (i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D)(relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired cornbased ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

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).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use (A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of \$0.25 per gallon or the amount by which \$3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomassbased diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomassbased diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomassbased diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct

for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel-

- (i) supplies and prices;
- (ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph $\left(A\right)$ for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A)shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;

(B) the feasibility of achieving compliance with the requirements; and

(C) the impacts of the requirements described in subsection $(a)(2)^{11}$ on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

 $^{^{11}\,\}mathrm{So}$ in original. Subsection (a) does not contain a par. (2).



(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,³ any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)¹ of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title. \mathbf{or} his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and pub-

⁴So in original. Probably should be "subsection,".

lishes that such action is based on such a determination. Any petition for review under this subsection shall 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. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).



§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."



§80.1400

§80.1401 Definitions.

The definitions of §80.2 and of this section apply for the purposes of this Subpart M. The definitions of this section do not apply to other subparts unless otherwise noted. Note that many terms defined here are common terms that have specific meanings under this subpart M. The definitions follow:

A-RIN means a RIN verified during the interim period by a registered independent third-party auditor using a QAP that has been approved under §80.1469(a) following the audit process described in §80.1472.

Actual peak capacity means 105% of the maximum annual volume of renewable fuels produced from a specific renewable fuel production facility on a calendar year basis.

(1) For facilities that commenced construction prior to December 19, 2007, the actual peak capacity is based on the last five calendar years prior to

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2008, unless no such production exists, in which case actual peak capacity is based on any calendar year after startup during the first three years of operation.

(2) For facilities that commenced construction after December 19, 2007 and before January 1, 2010 that are fired with natural gas, biomass, or a combination thereof, the actual peak capacity is based on any calendar year after startup during the first three years of operation.

(3) For all other facilities not included above, the actual peak capacity is based on the last five calendar years prior to the year in which the owner or operator registers the facility under the provisions of \$0.1450, unless no such production exists, in which case actual peak capacity is based on any calendar year after startup during the first three years of operation.

Adjusted cellulosic content means the percent of organic material that is cellulose, hemicellulose, and lignin.

Advanced biofuel means renewable fuel, other than ethanol derived from cornstarch, that has lifecycle greenhouse gas emissions that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

Agricultural digester means an anaerobic digester that processes predominantly cellulosic materials, including animal manure, crop residues, and/or separated yard waste.

Algae grown photosynthetically are algae that are grown such that their energy and carbon are predominantly derived from photosynthesis.

Annual cover crop means an annual crop, planted as a rotation between primary planted crops, or between trees and vines in orchards and vineyards, typically to protect soil from erosion and to improve the soil between periods of regular crops. An annual cover crop has no existing market to which it can be sold except for its use as feedstock for the production of renewable fuel.

Areas at risk of wildfire are those areas in the "wildland-urban interface", where humans and their development meet or intermix with wildland fuel. Note that, for guidance, the SILVIS laboratory at the University of Wisconsin maintains a Web site that

provides a detailed map of areas meeting this criteria at: http:// www.silvis.forest.wisc.edu/projects/

US_WUI_2000.asp. The SILVIS laboratory is located at 1630 Linden Drive, Madison, Wisconsin 53706 and can be contacted at (608) 263-4349.

B-RIN means a RIN verified during the interim period by a registered independent third-party auditor using a QAP that has been approved under §80.1469(b) following the audit process described in §80.1472.

Baseline lifecycle greenhouse gas emissions means the average lifecycle greenhouse gas emissions for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

Baseline volume means the permitted capacity or, if permitted capacity cannot be determined, the actual peak capacity of a specific renewable fuel production facility on a calendar year basis.

Biodiesel means a mono-alkyl ester that meets ASTM D 6751 (incorporated by reference, *see* §80.1468).

Biogas means a mixture of hydrocarbons that is a gas at 60 degrees Fahrenheit and 1 atmosphere of pressure that is produced through the anaerobic digestion of organic matter.

Biomass-based diesel means a renewable fuel that has lifecycle greenhouse gas emissions that are at least 50 percent less than baseline lifecycle greenhouse gas emissions and meets all of the requirements of paragraph (1) of this definition:

(1)(i) Is a transportation fuel, transportation fuel additive, heating oil, or jet fuel.

(ii) Meets the definition of either biodiesel or non-ester renewable diesel.

(iii) Is registered as a motor vehicle fuel or fuel additive under 40 CFR part 79, if the fuel or fuel additive is intended for use in a motor vehicle.

(2) Renewable fuel that is co-processed with petroleum is not biomassbased diesel.

Cellulosic biofuel means renewable fuel derived from any cellulose, hemicellulose, or lignin that has lifecycle greenhouse gas emissions that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions. Cellulosic diesel is any renewable fuel which meets both the definitions of cellulosic biofuel and biomass-based diesel, as defined in this section 80.1401. Cellulosic diesel includes heating oil and jet fuel made from cellulosic feedstocks.

Combined heat and power (CHP), also known as cogeneration, refers to industrial processes in which waste heat from the production of electricity is used for process energy in the renewable fuel production facility.

Co-processed means that renewable biomass was simultaneously processed with fossil fuels or other non-renewable feedstock in the same unit or units to produce a fuel that is partially derived from renewable biomass.

Corn oil extraction means the recovery of corn oil from the thin stillage and/or the distillers grains and solubles produced by a dry mill corn ethanol plant, most often by mechanical separation.

Corn oil fractionation means a process whereby seeds are divided in various components and oils are removed prior to fermentation for the production of ethanol.

Crop residue means biomass left over from the harvesting or processing of planted crops from existing agricultural land and any biomass removed from existing agricultural land that facilitates crop management (including biomass removed from such lands in relation to invasive species control or fire management), whether or not the biomass includes any portion of a crop or crop plant. Biomass is considered crop residue only if the use of that biomass for the production of renewable fuel has no significant impact on demand for the feedstock crop, products produced from that feedstock crop, and all substitutes for the crop and its products, nor any other impact that would result in a significant increase in direct or indirect GHG emissions.

Cropland is land used for production of crops for harvest and includes cultivated cropland, such as for row crops or close-grown crops, and non-cultivated cropland, such as for horticultural or aquatic crops.

Diesel, for the purposes of this subpart, refers to any and all of the products specified at §80.1407(e).

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Ecologically sensitive forestland means forestland that meets either of the following criteria:

(1) An ecological community with a global or state ranking of critically imperiled, imperiled or rare pursuant to a State Natural Heritage Program. For examples of such ecological communities, see "Listing of Forest Ecological Communities Pursuant to 40 CFR 80.1401; S1-S3 communities," which is number EPA-HQ-OAR-2005-0161-1034.1 in the public docket, and "Listing of Forest Ecological Communities Pursuant to 40 CFR 80.1401; G1-G2 communities," which is number EPA-HQ-OAR-2005-0161-2906.1 in the public docket. This material is available for inspection at the EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington DC. The telephone number for the Air Docket is (202) 566–1742.

(2) Old growth or late successional, characterized by trees at least 200 years in age.

Energy cane means a complex hybrid in the Saccharum genus that has been bred to maximize cellulosic rather than sugar content. For the purposes of this subpart:

(1) Energy cane excludes the species *Saccharum spontaneum*, but may include hybrids derived from *S. spontaneum* that have been developed and publicly released by USDA; and

(2) Energy cane only includes cultivars that have, on average, at least 75% adjusted cellulosic content on a dry mass basis.

EPA Moderated Transaction System, or EMTS, means a closed, EPA moderated system that provides a mechanism for screening and tracking Renewable Identification Numbers (RINs) as per §80.1452.

Existing agricultural land is cropland, pastureland, and land enrolled in the Conservation Reserve Program (administered by the U.S. Department of Agriculture's Farm Service Agency) that was cleared or cultivated prior to December 19, 2007, and that, on December 19, 2007, was:

(1) Nonforested; and

(2) Actively managed as agricultural land or fallow, as evidenced by records which must be traceable to the land in question, which must include one of the following:

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(i) Records of sales of planted crops, crop residue, or livestock, or records of purchases for land treatments such as fertilizer, weed control, or seeding.

(ii) A written management plan for agricultural purposes.

(iii) Documented participation in an agricultural management program administered by a Federal, state, or local government agency.

(iv) Documented management in accordance with a certification program for agricultural products.

Exporter of renewable fuel means:

(1) A person that transfers any renewable fuel from a location within the contiguous 48 states or Hawaii to a location outside the contiguous 48 states and Hawaii; and

(2) A person that transfers any renewable fuel from a location in the contiguous 48 states or Hawaii to Alaska or a United States territory, unless that state or territory has received an approval from the Administrator to opt-in to the renewable fuel program pursuant to §80.1443.

Facility means all of the activities and equipment associated with the production of renewable fuel starting from the point of delivery of feedstock material to the point of final storage of the end product, which are located on one property, and are under the control of the same person (or persons under common control).

Fallow means cropland, pastureland, or land enrolled in the Conservation Reserve Program (administered by the U.S. Department of Agriculture's Farm Service Agency) that is intentionally left idle to regenerate for future agricultural purposes with no seeding or planting, harvesting, mowing, or treatment during the fallow period.

Foreign ethanol producer means a person from a foreign country or from an area that has not opted into the program requirements of this subpart who produces ethanol for use in transportation fuel, heating oil, or jet fuel but who does not add denaturant to their product as described in paragraph (2) of the definition of renewable fuel in this section.

Forestland is generally undeveloped land covering a minimum area of 1 acre

upon which the primary vegetative species are trees, including land that formerly had such tree cover and that will be regenerated and tree plantations. Tree-covered areas in intensive agricultural crop production settings, such as fruit orchards, or tree-covered areas in urban settings, such as city parks, are not considered forestland.

Fuel for use in an ocean-going vessel means, for this subpart only:

(1) Any marine residual fuel (whether burned in ocean waters, Great Lakes, or other internal waters);

(2) Emission Control Area (ECA) marine fuel, pursuant to §§ 80.2(ttt) and 80.510(k) (whether burned in ocean waters, Great Lakes, or other internal waters); and

(3) Any other fuel intended for use only in ocean-going vessels.

Gasoline, for the purposes of this subpart, refers to any and all of the products specified at \$80.1407(c).

Heating oil means:

(1) A fuel meeting the definition of heating oil set forth in \$80.2(ccc); or

(2) A fuel oil that is used to heat interior spaces of homes or buildings to control ambient climate for human comfort. The fuel oil must be liquid at 60 degrees Fahrenheit and 1 atmosphere of pressure, and contain no more than 2.5% mass solids.

Importers. For the purposes of this subpart, an importer of transportation fuel or renewable fuel is any U.S. domestic person who:

(1) Brings transportation fuel or renewable fuel into the 48 contiguous states of the United States or Hawaii, from a foreign country or from an area that has not opted in to the program requirements of this subpart pursuant to §80.1443; or

(2) Brings transportation fuel or renewable fuel into an area that has opted in to the program requirements of this subpart pursuant to §80.1443 from a foreign country or from an area that has not opted in to the program requirements of this subpart.

Independent third-party auditor means a party meeting the requirements of §80.1471(b) that conducts QAP audits and verifies RINs.

Interim period means the period between February 21, 2013 and December 31, 2014. Membrane separation means the process of dehydrating ethanol to fuel grade (>99.5% purity) using a hydrophilic membrane.

Motor vehicle has the meaning given in Section 216(2) of the Clean Air Act (42 U.S.C. 7550(2)).

Nameplate capacity means the peak design capacity of a facility for the purposes of registration of a facility under \$80.1450(b)(1)(v)(C).

Naphtha means a blendstock or fuel blending component falling within the boiling range of gasoline which is composed of only hydrocarbons, is commonly or commercially known as naphtha and is used to produce gasoline through blending.

Neat renewable fuel is a renewable fuel to which 1% or less of gasoline (as defined in this section) or diesel fuel has been added.

Non-ester renewable diesel, also known as renewable diesel, means renewable fuel that is not a mono-alkyl ester and that is either:

(1) A fuel or fuel additive that meets the ASTM D 975-13a (incorporated by reference, see §80.1468) Grade No. 1-D or No. 2-D specifications and can be used in an engine designed to operate on conventional diesel fuel; or

(2) A fuel or fuel additive that is registered under 40 CFR part 79 and can be used in an engine designed to operate using conventional diesel fuel.

Nonforested land means land that is not forestland.

Non-qualifying fuel use means a use of renewable fuel in an application other than transportation fuel, heating oil, or jet fuel.

Nonroad vehicle has the meaning given in Section 216(11) of the Clean Air Act (42 U.S.C. 7550(11)).

Q-RIN means a RIN verified by a registered independent third-party auditor using a QAP that has been approved under §80.1469(c) following the audit process described in §80.1472.

Quality assurance audit means an audit of a renewable fuel production facility conducted by an independent third-party auditor in accordance with a QAP that meets the requirements of §80.1469 and requirements of §80.1472.

Quality assurance plan, or QAP, means the list of elements that an independent third-party auditor will

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check to verify that the RINs generated by a renewable fuel producer or importer are valid. A QAP includes both general and pathway specific elements.

Pastureland is land managed for the production of select indigenous or introduced forage plants for livestock grazing or hay production, and to prevent succession to other plant types.

Permitted capacity means 105% of the maximum permissible volume output of renewable fuel that is allowed under operating conditions specified in the most restrictive of all applicable preconstruction, construction and operating permits issued by regulatory authorities (including local, regional, state or a foreign equivalent of a state, and federal permits, or permits issued by foreign governmental agencies) that govern the construction and/or operation of the renewable fuel facility, based on an annual volume output on a calendar year basis. If the permit specifies maximum rated volume output on an hourly basis, then annual volume output is determined by multiplying the hourly output by 8,322 hours per year.

(1) For facilities that commenced construction prior to December 19, 2007, the permitted capacity is based on permits issued or revised no later than December 19, 2007.

(2) For facilities that commenced construction after December 19, 2007 and before January 1, 2010 that are fired with natural gas, biomass, or a combination thereof, the permitted capacity is based on permits issued or revised no later than December 31, 2009.

(3) For facilities other than those described in paragraphs (1) and (2) of this definition, permitted capacity is based on the most recent applicable permits.

Planted crops are all annual or perennial agricultural crops from existing agricultural land that may be used as feedstocks for renewable fuel, such as grains, oilseeds, sugarcane, switchgrass, prairie grass, duckweed, and other species (but not including algae species or planted trees), providing that they were intentionally applied by humans to the ground, a growth medium, a pond or tank, either by direct application as seed or plant, or through intentional natural seeding or vegetative propagation by mature plants introduced or left undisturbed for that purpose.

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Planted trees are trees harvested from a tree plantation.

Pre-commercial thinnings are trees, including unhealthy or diseased trees, removed to reduce stocking to concentrate growth on more desirable, healthy trees, or other vegetative material that is removed to promote tree growth.

Raw starch hydrolysis means the process of hydrolyzing corn starch into simple sugars at low temperatures, generally not exceeding 100 °F (38 °C), using enzymes designed to be effective under these conditions.

Renewable biomass means each of the following (including any incidental, de minimis contaminants that are impractical to remove and are related to customary feedstock production and transport):

(1) Planted crops and crop residue harvested from existing agricultural land cleared or cultivated prior to December 19, 2007 and that was nonforested and either actively managed or fallow on December 19, 2007.

(2) Planted trees and tree residue from a tree plantation located on nonfederal land (including land belonging to an Indian tribe or an Indian individual that is held in trust by the U.S. or subject to a restriction against alienation imposed by the U.S.) that was cleared at any time prior to December 19, 2007 and actively managed on December 19, 2007.

(3) Animal waste material and animal byproducts.

(4) Slash and pre-commercial thinnings from non-federal forestland (including forestland belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States) that is not ecologically sensitive forestland.

(5) Biomass (organic matter that is available on a renewable or recurring basis) obtained from within 200 feet of buildings and other areas regularly occupied by people, or of public infrastructure, in an area at risk of wildfire. (6) Algae.

(7) Separated yard waste or food waste, including recycled cooking and trap grease, and materials described in §80.1426(f)(5)(i).

Renewable compressed natural gas (CNG) means biogas or biogas-derived pipeline quality gas that is compressed for use as transportation fuel and meets the definition of renewable fuel.

Renewable electricity means electricity that meets the definition of renewable fuel.

Renewable fuel means a fuel which meets all of the requirements of paragraph (1) of this definition:

(1)(i) Fuel that is produced from renewable biomass.

(ii) Fuel that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel, heating oil, or jet fuel.

(iii) Has lifecycle greenhouse gas emissions that are at least 20 percent less than baseline lifecycle greenhouse gas emissions, unless the fuel is exempt from this requirement pursuant to §80.1403.

(2) Ethanol covered by this definition shall be denatured as required and defined in 27 CFR parts 19 through 21. Any volume of denaturant added to the undenatured ethanol by a producer or importer in excess of 2 volume percent shall not be included in the volume of ethanol for purposes of determining compliance with the requirements under this subpart.

Renewable gasoline means renewable fuel made from renewable biomass that is composed of only hydrocarbons and which meets the definition of gasoline in \$80.2(c).

Renewable gasoline blendstock means a blendstock made from renewable biomass that is composed of only hydrocarbons and which meets the definition of gasoline blendstock in §80.2(s).

Renewable Identification Number (RIN), is a unique number generated to represent a volume of renewable fuel pursuant to §§ 80.1425 and 80.1426.

(1) *Gallon-RIN* is a RIN that represents an individual gallon of renewable fuel used for compliance purposes pursuant to §80.1427 to satisfy a renewable volume obligation.

(2) *Batch-RIN* is a RIN that represents multiple gallon-RINs.

Renewable liquefied natural gas (LNG) means biogas or biogas-derived pipeline quality gas that goes through the process of liquefaction in which it is cooled below its boiling point, and which meets the definition of renewable fuel.

Slash is the residue, including treetops, branches, and bark, left on the ground after logging or accumulating as a result of a storm, fire, delimbing, or other similar disturbance.

Small refinery means a refinery for which the average aggregate daily crude oil throughput (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

Transportation fuel means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except fuel for use in oceangoing vessels).

Tree plantation is a stand of no less than 1 acre composed primarily of trees established by hand- or machine-planting of a seed or sapling, or by coppice growth from the stump or root of a tree that was hand- or machine-planted. Tree plantations must have been cleared prior to December 19, 2007 and must have been actively managed on December 19, 2007, as evidenced by records which must be traceable to the land in question, which must include:

(1) Sales records for planted trees or tree residue together with other written documentation connecting the land in question to these purchases;

(2) Purchasing records for seeds, seedlings, or other nursery stock together with other written documentation connecting the land in question to these purchases;

(3) A written management plan for silvicultural purposes;

(4) Documentation of participation in a silvicultural program sponsored by a Federal, state or local government agency;

(5) Documentation of land management in accordance with an agricultural or silvicultural product certification program;

(6) An agreement for land management consultation with a professional forester that identifies the land in question; or

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(7) Evidence of the existence and ongoing maintenance of a road system or other physical infrastructure designed and maintained for logging use, together with one of the above-mentioned documents.

Tree residue is slash and any woody residue generated during the processing of planted trees from tree plantations for use in lumber, paper, furniture or other applications, provided that such woody residue is not mixed with similar residue from trees that do not originate in tree plantations.

Verified RIN means a RIN generated by a renewable fuel producer that was subject to a QAP audit executed by an independent third-party auditor, and determined by the independent thirdparty auditor to be valid. Verified RINs includes A-RINS, B-RINS, and Q-RINS.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26035, May 10, 2010, and 75 FR 37733, June 30, 2010; 75 FR 79976, Dec. 21, 2010; 77 FR 1354, Jan. 9, 2012; 78 FR 14215, Mar. 5, 2013; 78 FR 62470, Oct. 22, 2013; 79 FR 42159, July 18, 2014; 79 FR 42113, July 18, 2014; 80 FR 77517, Dec. 14, 2016]



\$80.1406 Who is an obligated party under the RFS program?

(a)(1) An obligated party is any refiner that produces gasoline or diesel fuel within the 48 contiguous states or Hawaii, or any importer that imports gasoline or diesel fuel into the 48 contiguous states or Hawaii during a compliance period. A party that simply blends renewable fuel into gasoline or diesel fuel, as defined in §80.1407(c) or (e), is not an obligated party.

(2) If the Administrator approves a petition of Alaska or a United States territory to opt-in to the renewable fuel program under the provisions in §80.1443, then "obligated party" shall also include any refiner that produces gasoline or diesel fuel within that state or territory, or any importer that imports gasoline or diesel fuel into that state or territory.

(b) For each compliance period starting with 2010, an obligated party is required to demonstrate, pursuant to §80.1427, that it has satisfied the Renewable Volume Obligations for that compliance period, as specified in §80.1407(a).

(c) Aggregation of facilities—(1) Except as provided in paragraphs (c)(2), (d) and (e) of this section, an obligated party may comply with the requirements of paragraph (b) of this section in the aggregate for all of the refineries that it operates, or for each refinery individually.

(2) An obligated party that carries a deficit into year i+1 must use the same approach to aggregation of facilities in year i+1 as it did in year i.

(d) An obligated party must comply with the requirements of paragraph (b) of this section for all of its imported gasoline or diesel fuel in the aggregate.

(e) An obligated party that is both a refiner and importer must comply with the requirements of paragraph (b) of this section for its imported gasoline or diesel fuel separately from gasoline or diesel fuel produced by its domestic refinery or refineries.

(f) Where a refinery or import facility is jointly owned by two or more parties, the requirements of paragraph (b) of this section may be met by one of the joint owners for all of the gasoline or diesel fuel produced/imported at the facility, or each party may meet the requirements of paragraph (b) of this section for the portion of the gasoline or diesel fuel that it produces or imports, as long as all of the gasoline or diesel fuel produced/imported at the facility is accounted for in determining the Renewable Volume Obligations under §80.1407. In either case, all joint owners are subject to the liability provisions of §80.1461(d).

(g) The requirements in paragraph (b) of this section apply to the following compliance periods: Beginning in 2010, and every year thereafter, the compliance period is January 1 through December 31.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26037, May 10, 2010]

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RVO_{BBD.i} = The Renewable Volume Obligation for biomass-based diesel for the obligated party or renewable fuel exporter for calendar year i after 2010, in gallons, pursuant to §80.1407 or §80.1430.

(iii) Advanced biofuel.

 $(\Sigma RINNUM)_{AB,i}$ + $(\Sigma RINNUM)_{AB,i-1}$ = $RVO_{AB,i}$

Where

- $(\Sigma RINNUM)_{AB,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i, and are being applied towards the RVO_{AB,i}, in gallons.
- $(\Sigma RINNUM)_{AB,i-1} =$ Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i-1, and are being applied towards the RVO_{AB,i}, in gallons.
- $\mathrm{RVO}_{AB,i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated party or renewable fuel exporter for calendar year i, in gallons, pursuant to \$80.1407 or \$80.1430.

(iv) Renewable fuel.

Where:

- $$\begin{split} &(\Sigma RINNUM)_{RF,i} = Sum \mbox{ of all owned gallon-} \\ &RINs \mbox{ that are valid for use in complying with the renewable fuel RVO, were generated in year i, and are being applied towards the RVO_{RF,i}, in gallons. \end{split}$$
- $\mathrm{RVO}_{\mathrm{RF},i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party or renewable fuel exporter for calendar year i, in gallons, pursuant to 80.1407 or 80.1430.

(2) Except as described in paragraph (a)(4) of this section, RINs that are valid for use in complying with each Renewable Volume Obligation are determined by their D codes.

(i) RINs with a D code of 3 or 7 are valid for compliance with the cellulosic biofuel RVO.

(ii) RINs with a D code of 4 or 7 are valid for compliance with the biomassbased diesel RVO.

(iii) RINs with a D code of 3, 4, 5, or 7 are valid for compliance with the advanced biofuel RVO.

(iv) RINs with a D code of 3, 4, 5, 6, or 7 are valid for compliance with the renewable fuel RVO.

§80.1427 How are RINs used to demonstrate compliance?

(a) Renewable Volume Obligations. (1) Except as specified in paragraph (b) of this section or \$80.1456, each party that is an obligated party under \$80.1406 and is obligated to meet the Renewable Volume Obligations under \$80.1407, or is an exporter of renewable fuels that is obligated to meet Renewable Volume Obligations under \$80.1430, must demonstrate pursuant to \$80.1451(a)(1) that it is retiring for compliance purposes a sufficient number of RINs to satisfy the following equations:

(i) Cellulosic biofuel.

 $(\Sigma RINNUM)_{CB,i}$ + $(\Sigma RINNUM)_{CB,i-1}$ = $RVO_{CB,i}$

Where:

- $(\Sigma RINNUM)_{CB,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i, and are being applied towards the RVO_{CB,i} in gallons.
- $(\Sigma RINNUM)_{CB,i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i-1, and are being applied towards the RVO_{CB,i}, in gallons.
- $\mathrm{RVO}_{\mathrm{CB},i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party or renewable fuel exporter for calendar year i, in gallons, pursuant to \$80.1407 or \$80.1430.

(ii) Biomass-based diesel. Use the equation in this paragraph, except as provided in paragraph (a)(7) of this section.

 $(\Sigma RINNUM)_{BBD,i}$ + $(\Sigma RINNUM)_{BBD,i-1}$ = $RVO_{BBD,i}$

Where:

- $(\Sigma RINNUM)_{\rm BBD,i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i, and are being applied towards the RVO_{BBD,i}, in gallons.
- $(\Sigma RINNUM)_{BBD,i-1} =$ Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i-1, and are being applied towards the RVO_{BBD,i}, in gallons.

(3)(i) Except as provided in paragraph (a)(3)(i) of this section, a party may use the same RIN to demonstrate compliance with more than one RVO so long as it is valid for compliance with all RVOs to which it is applied.

(ii) A cellulosic diesel RIN with a D code of 7 cannot be used to demonstrate compliance with both a cellulosic biofuel RVO and a biomass-based diesel RVO.

(4) Notwithstanding the requirements of \$80.1428(c) or paragraph (a)(6)(i) of this section, for purposes of demonstrating compliance for calendar years 2010 or 2011, RINs generated pursuant to \$80.1126 that have not been used for compliance purposes may be used for compliance in 2010 or 2011, as follows, insofar as permissible pursuant to paragraphs (a)(5) and (a)(7)(iii) of this section:

(i) A RIN generated pursuant to §80.1126 with a D code of 2 and an RR code of 15, 16, or 17 is deemed equivalent to a RIN generated pursuant to §80.1426 having a D code of 4.

(ii) A RIN generated pursuant to §80.1126 with a D code of 1 is deemed equivalent to a RIN generated pursuant to §80.1426 having a D code of 3.

(iii) All other RINs generated pursuant to §80.1126 are deemed equivalent to RINs generated pursuant to §80.1426 having D codes of 6.

(iv) A RIN generated pursuant to §80.1126 that was retired pursuant to §80.1129(e) because the associated volume of fuel was not used as motor vehicle fuel may be reinstated for use in complying with a 2010 RVO pursuant to §80.1429(g).

(5) The value of $(\Sigma RINNUM)_{i-1}$ may not exceed values determined by the following inequalities except as provided in paragraph (a)(7)(iii) of this section and §80.1442(d)

 $(\Sigma RINNUM)_{CB,i-1} \leq 0.20 * RVO_{CB,i}$

 $(\Sigma RINNUM)_{BBD,i^{-1}} \leq 0.20 \, \ast \, RVO_{BBD,i}$

 $(\Sigma RINNUM)_{AB,i\text{-}1} \leq 0.20 \text{ * } RVO_{AB,i}$

 $(\Sigma RINNUM)_{RF,i\text{-}1} \leq 0.20 \ * \ RVO_{RF,i}$

(6) Except as provided in paragraph (a)(7) of this section:

(i) RINs may only be used to demonstrate compliance with the RVOs for the calendar year in which they were generated or the following calendar year. (ii) RINs used to demonstrate compliance in one year cannot be used to demonstrate compliance in any other year.

(7) Biomass-based diesel in 2010.

(i) Prior to determining compliance with the 2010 biomass-based diesel RVO, obligated parties may reduce the value of RVO_{BBD,2010} by an amount equal to the sum of all 2008 and 2009 RINs that they used for compliance purposes for calendar year 2009 which have a D code of 2 and an RR code of 15, 16, or 17.

(ii) For calendar year 2010 only, the following equation shall be used to determine compliance with the biomassbased diesel RVO instead of the equation in paragraph (a)(1)(ii) of this section

 $(\Sigma RINNUM)_{BBD,2010} + (\Sigma RINNUM)_{BBD,2009} + (\Sigma RINNUM)_{BBD,2008} = RVO_{BBD,2010}$

Where

- $(\Sigma RINNUM)_{BBD,2010}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2010, and are being applied towards the RVO_{BBD,2010}, in gallons.
- $(\Sigma RINNUM)_{BBD,2009} = Sum of all owned gallon-$ RINs that are valid for use in complyingwith the biomass-based diesel RVO, weregenerated in year 2009, have not previouslybeen used for compliance purposes, and arebeing applied towards the RVO_{BBD,2010}, ingallons.
- $(\Sigma RINNUM)_{BBD,2008}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2008, have not previously been used for compliance purposes, and are being applied towards the RVO_{BBD,2010}, in gallons.
- $RVO_{BBD,2010}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year 2010, in gallons, pursuant to §80.1407 or §80.1430, as adjusted by paragraph (a)(7)(i) of this section.

(iii) The values of $(\Sigma RINNUM)_{2008}$ and $(\Sigma RINNUM)_{2009}$ may not exceed values determined by both of the following inequalities

 $(\Sigma RINNUM)_{BBD,2008} \le 0.087 * RVO_{BBD,2010}$

 $\begin{array}{l} (\Sigma RINNUM)_{BBD,2008} \ + \ (\Sigma RINNUM)_{BBD,2009} \\ \leq 0.20 \ * \ RVO_{BBD,2010} \end{array}$

(8) A party may only use a RIN for purposes of meeting the requirements of paragraph (a)(1) or (a)(7) of this section if that RIN is a separated RIN with a K code of 2 obtained in accordance with §§ 80.1428 and 80.1429.

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(9) The number of gallon-RINs associated with a given batch-RIN that can be used for compliance with the RVOs shall be calculated from the following formula

RINNUM = EEEEEEE - SSSSSSSSS + 1

Where:

- RINNUM = Number of gallon-RINs associated with a batch-RIN, where each gallon-RIN represents one gallon of renewable fuel for compliance purposes.
- EEEEEEE = Batch-RIN component identifying the last gallon-RIN associated with the batch-RIN.
- SSSSSSSS = Batch-RIN component identifying the first gallon-RIN associated with the batch-RIN.

(b) Deficit carryovers. (1) An obligated party or an exporter of renewable fuel that fails to meet the requirements of paragraph (a)(1) or (a)(7) of this section for calendar year i is permitted to carry a deficit into year i+1 under the following conditions:

(i) The party did not carry a deficit into calendar year i from calendar year i-1 for the same RVO.

(ii) The party subsequently meets the requirements of paragraph (a)(1) of this section for calendar year i+1 and carries no deficit into year i+2 for the same RVO.

(iii) For compliance with the biomass-based diesel RVO in calendar year 2011, the deficit which is carried over from 2010 is no larger than 57% of the party's 2010 biomass-based diesel RVO as determined prior to any adjustment applied pursuant to paragraph (a)(7)(i) of this section.

(iv) The party uses the same compliance approach in year i+1 as it did in year i, as provided in \$80.1406(c)(2).

(2) A deficit is calculated according to the following formula:

Where:

- D_i = The deficit, in gallons, generated in calendar year i that must be carried over to year i+1 if allowed pursuant to paragraph (b)(1) of this section.
- RVO_i = The Renewable Volume Obligation for the obligated party or renewable fuel exporter for calendar year i, in gallons.
- $(\Sigma RINNUM)_i$ = Sum of all acquired gallon-RINs that were generated in year i and are being applied towards the RVO_i, in gallons.

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 $(\Sigma RINNUM)_{i\cdot 1}$ = Sum of all acquired gallon-RINs that were generated in year i-1 and are being applied towards the $\mathrm{RVO}_i,$ in gallons.

 $[75\ {\rm FR}$ 14863, Mar. 26, 2010, as amended at 75 ${\rm FR}$ 26042, May 10, 2010]



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§80.1441 Small refinery exemption.

(a)(1) Transportation fuel produced at a refinery by a refiner, or foreign refiner (as defined at \$80.1465(a)), is exempt from January 1, 2010 through December 31, 2010 from the renewable fuel standards of \$80.1405, and the owner or operator of the refinery, or foreign refinery, is exempt from the requirements that apply to obligated parties under this subpart M for fuel produced at the refinery if the refinery meets the definition of a small refinery under \$80.1401 for calendar year 2006.

(2) The exemption of paragraph (a)(1) of this section shall apply unless a refiner chooses to waive this exemption (as described in paragraph (f) of this section), or the exemption is extended (as described in paragraph (e) of this section).

(3) For the purposes of this section, the term "refiner" shall include foreign refiners.

(4) This exemption shall only apply to refineries that process crude oil through refinery processing units.

(5) The small refinery exemption is effective immediately, except as specified in paragraph (b)(3) of this section.

(6) Refiners who own refineries that qualified as small under 40 CFR 80.1141 do not need to resubmit a small refinery verification letter under this subpart M. This paragraph (a) does not supersede §80.1141.

(b)(1) A refiner owning a small refinery must submit a verification letter to EPA containing all of the following information:

(i) The annual average aggregate daily crude oil throughput for the period January 1, 2006 through December 31, 2006 (as determined by dividing the aggregate throughput for the calendar year by the number 365).

(ii) A letter signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the letter is true to the best of his/

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her knowledge, and that the refinery was small as of December 31, 2006.

(iii) Name, address, phone number, facsimile number, and e-mail address of a corporate contact person.

(2) Verification letters must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(3) For foreign refiners the small refinery exemption shall be effective upon approval, by EPA, of a small refinery application. The application must contain all of the elements required for small refinery verification letters (as specified in paragraph (b)(1) of this section), must satisfy the provisions of \$80.1465(f) through (i) and (o), and must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(4) Small refinery verification letters are not required for those refiners who have already submitted a complete verification letter under subpart K of this part 80. Verification letters submitted under subpart K prior to July 1, 2010 that satisfy the requirements of subpart K shall be deemed to satisfy the requirements for verification letters under this subpart M.

(c) If EPA finds that a refiner provided false or inaccurate information regarding a refinery's crude throughput (pursuant to paragraph (b)(1)(i) of this section) in its small refinery verification letter, the exemption will be void as of the effective date of these regulations.

(d) If a refiner is complying on an aggregate basis for multiple refineries, any such refiner may exclude from the calculation of its Renewable Volume Obligations (under §80.1407) transportation fuel from any refinery receiving the small refinery exemption under paragraph (a) of this section.

(e)(1) The exemption period in paragraph (a) of this section shall be extended by the Administrator for a period of not less than two additional years if a study by the Secretary of Energy determines that compliance with the requirements of this subpart would impose a disproportionate economic hardship on a small refinery.

(2) A refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any

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time. (i) A petition for an extension of the small refinery exemption must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of §80.1405 and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.

(ii) The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.

(f) At any time, a refiner with a small refinery exemption under paragraph (a) of this section may waive that exemption upon notification to EPA.

(1) A refiner's notice to EPA that it intends to waive its small refinery exemption must be received by November 1 to be effective in the next compliance year.

(2) The waiver will be effective beginning on January 1 of the following calendar year, at which point the transportation fuel produced at that refinery will be subject to the renewable fuels standard of \$80.1405 and the owner or operator of the refinery shall be subject to all other requirements that apply to obligated parties under this Subpart M.

(3) The waiver notice must be sent to EPA at one of the addresses listed in paragraph (h) of this section.

(g) A refiner that acquires a refinery from either an approved small refiner (as defined under §80.1442(a)) or another refiner with an approved small refinery exemption under paragraph (a) of this section shall notify EPA in writing no later than 20 days following the acquisition.

(h) Verification letters under paragraph (b) of this section, petitions for small refinery hardship extensions under paragraph (e) of this section, and small refinery exemption waiver notices under paragraph (f) of this section shall be sent to one of the following addresses:

(1) For US mail: U.S. EPA, Attn: RFS Program, 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(2) For overnight or courier services: U.S. EPA, Attn: RFS Program, 6406J, 1310 L Street, NW., 6th floor, Washington, DC 20005. (202) 343-9038. §80.1442