UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions

THE ADMINISTRATOR

FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency

TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(*o*)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program "for the reason of disproportionate economic hardship." Congress created three classes of exemptions from the RFS program for "small refiner[ies]," which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.[1] First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.[2] Second, Congress directed the Department of Energy (DOE) to conduct a study[3] "to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries."[4] For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to "extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years."[5] Third, Congress provided that a small refinery "may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship."[6] In considering such a petition, "the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors."[7]

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.[8] The 2010 regulations implemented all three classes of exemptions and defined "small refinery" the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

[1] CAA section 211(*o*)(9), (*o*)(1)(K); 40 C.F.R. 80.1401.
[2] CAA section 211(*o*)(9)(A)(i).
[3] "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).
[4] CAA section 211(*o*)(9)(A)(ii)(I).
[5] CAA section 211(*o*)(9)(A)(ii)(II).
[6] CAA section 211(*o*)(9)(B)(i).
[7] CAA section 211(*o*)(9)(B)(ii); 40 C.F.R. 80.1441.
[8] 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.[9] In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.[10] EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed 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."[11] Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.[12]

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[9] CAA section 211(*o*)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

[10] CAA section 211(*o*)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

[11] 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.

[12] 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. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association* (*RFA*) case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.[13] The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.[14] According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."[15]

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.[16] In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(*o*)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

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Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

[13] *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

[14] *Id.* at 1244-1249.

[15] *Id.* at 1249.

[16] DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.[17] EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

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[17] EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.[18] This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

[18] *Sinclair Wyoming Refining Co. v. EPA,* 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA,* 792 F.3d 978, 982-983 (8th Cir. 2015).