



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

May 2, 2023

OFFICE OF THE
CHIEF FINANCIAL OFFICER

The Honorable Gary C. Peters
Chairman, Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

The Honorable Rand Paul
Ranking Member, Committee on Homeland
Security and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Ranking Member:

I am transmitting the response by the U.S. Environmental Protection Agency (EPA) to the U.S. Government Accountability Office's (GAO's) November 2022 Final Report entitled, *Renewable Fuel Standard: Actions Needed to Improve Decision-Making in the Small Refinery Exemption Program* (GAO-23-104273 & GAO-23-105801).¹ EPA prepared this response pursuant to section 720 of title 31, United States Code.

EPA has reviewed the Final GAO Report and strongly disagrees with its primary analysis, conclusions, and recommendations with respect to EPA's Small Refinery Exemption (SRE) program. EPA partially agrees with several other recommendations.

Regarding its primary recommendation, the Final GAO Report analysis retains several of the fundamental flaws EPA previously addressed in its Response to the Draft Report. For example, GAO did not actually analyze "small refineries" as defined by the Clean Air Act (CAA) in its analysis. GAO again reached the same flawed conclusions when the results of its Renewable Identification Numbers (RIN) price analysis changed from small refineries allegedly paying 39 percent more to only allegedly paying 2.4 percent more for RINs. EPA's own analysis corrected these errors and suggests the resulting price differential could simply be only 0.5 percent (0.6 cent), and that difference is likely the result of noise in the data. Further, GAO misunderstands and does not address the fact that historically small refineries have not claimed they paid more than the market price for RINs, and in the limited instances when individual small refineries made those claims, EPA fully evaluated and responded. Lastly, GAO does not properly account for the process that EPA undertakes to evaluate SRE petitions, which often includes the very market data GAO suggests is missing.

In the Final GAO Report, GAO asserts that EPA does not have "quality information" to evaluate SRE petitions.² The Final GAO Report also asserts that EPA's conclusion regarding RIN cost passthrough relied on "two assumptions that the agency has not fully assessed" when making SRE decisions: (1) "EPA assumed that all parties pay and receive one price for RINs" and (2) "EPA assumed that the

¹ "Renewable Fuel Standard: Actions Needed to Improve Decision-Making in the Small Refinery Exemption Program," GAO-23-104273 and GAO 23-105801, November 2022 ("Final GAO Report"), <https://www.gao.gov/products/gao-23-104273> and <https://www.gao.gov/products/gao-23-105801>.

² Final GAO Report, pg. 9.

studies it reviewed regarding RIN pass-through could be relied on to draw conclusions about additional markets that were not examined in those studies” (e.g., EPA must “fully examin[e] and document[]...RIN [cost] pass-through in all relevant fuel markets”).³ GAO concludes that “EPA will continue to make decisions on small refinery exemptions without quality information” and “risks inappropriately denying valid exemption petitions” if it does not reassess these assumptions.⁴

EPA rejects these and other statements in the Final GAO Report as EPA considered extensive data and other information and explained the basis for its actions denying SRE petitions in April 2022⁵ and June 2022⁶ (collectively the “2022 SRE Denial Actions”). Moreover, EPA attempted several times to explain the discrepancies between EPA’s and GAO’s respective analyses during the Agency’s engagement with GAO on this audit, but those explanations were not taken into account in the Final GAO Report. When GAO provided EPA a Draft Report in September 2022 containing many of the same erroneous conclusions as are now found in the Final GAO Report, EPA expressed its disagreement and began its own analysis to remedy the flaws with the Draft Report. EPA further explained its reasons for its disagreement in its response to GAO’s Draft Report in October 2022, which included preliminary results of EPA’s own RIN price analysis.⁷ Since publication of the Final GAO Report, EPA concluded and published its final analysis.⁸

In the following sections of this letter, EPA responds to the five recommendations directed to EPA in the Final GAO Report. In its response to Recommendation 1, EPA describes in more detail the EPA Comment Letter and how GAO failed to act on or incorporate those comments into the Final GAO Report. EPA also responds to additional flaws in the Final GAO Report, as further explained in the EPA RIN Price Analysis.

GAO Recommendation 1

The Administrator of EPA should reassess EPA’s conclusion that all small refineries recover their RFS compliance costs in the price of the gasoline and diesel they sell, including by fully examining and documenting RIN market performance and RIN pass-through in all relevant fuel markets. (Recommendation 1)

³ *Id.* at 10, 13.

⁴ *Id.* at 13.

⁵ “April 2022 Denial of Petitions for RFS Small Refinery Exemptions,” EPA-420-R-22-006, April 2022 (“April 2022 SRE Denial Action”), <https://www.epa.gov/renewable-fuel-standard-program/april-2022-denial-petitions-rfs-small-refinery-exemptions>.

⁶ “June 2022 Denial of Petitions for RFS Small Refinery Exemptions,” EPA-HQ-OAR-2021-0556, June 2022 (“June 2022 SRE Denial Action”), <https://www.epa.gov/renewable-fuel-standard-program/june-2022-denial-petitions-rfs-small-refinery-exemptions>.

⁷ Letter from Joseph Goffman, USEPA, to Frank Rusco, GAO, October 13, 2022 (“EPA Comment Letter”). The EPA Comment Letter is included as Appendix IV in the Final GAO Report.

⁸ “An Analysis of the Price of Renewable Identification Numbers (RINs) and Small Refineries,” EPA-420-R-22-038, December 2022 (“EPA RIN Price Analysis”).

EPA Response

In the EPA Comment Letter, EPA strongly disagreed with this recommendation. However, GAO did not make any significant modifications to its analysis or this recommendation in the Final GAO Report, and GAO failed to address EPA's concerns.⁹

The Final GAO Report Analysis Retains Fundamental Flaws

GAO's analysis in the Final GAO Report retains several fundamental flaws and ultimately does not support GAO's conclusion that small refineries pay more for RINs than large refineries. Further, GAO's assertion that EPA's decisions are not based on valid information reflects a fundamental misunderstanding of small refineries' arguments regarding disproportionate economic hardship (DEH) in their SRE petitions and of EPA's basis for its 2022 SRE Denial Actions.¹⁰

EPA has several significant concerns with the analysis in the Final GAO Report. First, GAO evaluated RIN prices as a function of the ratio of the size of the buyer to the seller. However, the "size of the buyer to the seller" bears no relationship to small refineries as defined in CAA section 211(o)(1)(K).¹¹ Rather, GAO assumed "sizes" based on the quantity of RINs bought by the buyer over the previous 182 days and the quantity of RINs sold by the seller over the previous 182 days.¹² GAO did not consider whether the buyers or sellers were "small refineries" as defined in the CAA. Buyers and sellers of smaller RIN amounts may not be small refineries that are eligible to petition for an SRE exemption under the RFS program. Small batch RIN trades may occur for many other reasons (e.g., to match obligations), and may be conducted by importers and blender-refiners, and even large refiners.¹³ As a result, GAO's assumption that such transactions are solely due to small refineries is faulty, and there is therefore real reason to question the relevance of GAO's analysis. Despite that, GAO used this analysis to conclude that "the *small party* paid or received prices 2.4% higher or lower for RINs, on average" (emphasis added).¹⁴ Additionally, GAO states that "[t]his effect is statistically significant but it is unclear the extent to which this difference materially affects individual *small refineries*" (emphasis added),¹⁵ which

⁹ Final GAO Report, pp. 28–30.

¹⁰ Section 211(o)(9)(B)(i) of the Clean Air Act (CAA) authorizes the EPA Administrator to temporarily exempt small refineries from their RFS obligations "for the reason of disproportionate economic hardship." The statute directs EPA, in consultation with DOE, to consider the DOE Study and other economic factors in evaluating SRE petitions. The statute does not define the phrase "disproportionate economic hardship" and identifies no particular "economic factors" to be considered, giving EPA "substantial discretion" for purposes of implementing these exemption provisions. *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

¹¹ A small refinery is defined as "a refinery for which the average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels." CAA section 211(o)(1)(K). Thus, a "small refinery" is determined based on the annual volume of crude oil processed at the refinery, not on the size of the company that owns the refinery. Indeed, many "small refineries" are owned by large multi-national companies.

¹² Final GAO Report, pg. 39.

¹³ Blender-refiners blend relatively small amounts of gasoline blendstock (e.g., butane) into previously certified gasoline, or purchase gasoline blending components and blend them together to produce finished gasoline.

¹⁴ The Final GAO Report includes the following footnote on pg. 10: "We used a measure of relative market size based on market participation during the previous 182 days—namely, the ratio of RINs traded by the buyer to RINs traded by the seller. This estimate is based on the 10 percent of transactions with the largest differences between buyer and seller size in which the buyer is larger, and the 10 percent of transactions with the largest differences between buyer and seller size in which the seller is larger. This estimate is based on transactions by all types of companies. When we looked only at transactions between refineries, we found that the smaller party paid or received prices 2.9 percent higher or lower for RINs on average, as described in app. II. This estimate is for the ethanol (D6) RIN. We found a 0.8 percent difference for the biomass-based diesel (D4) RIN."

¹⁵ Final GAO Report, pg. 10.

conflicts with its own statement that “GAO’s analysis shows that small refineries have paid more on average for compliance credits than large refineries.”¹⁶ Since GAO’s analysis did not specifically evaluate small refineries, but instead looked at the quantity of RINs bought and sold, there is no way to tell from GAO’s analysis whether small refineries pay more or less for RINs.

Second, GAO’s conclusion on RIN cost passthrough in the Final GAO Report is essentially the same as in the Draft Report.¹⁷ However, GAO made a significant change in the Final GAO Report in its estimate of the difference in prices paid for RINs by small parties compared to average prices. GAO reduced its estimated difference from 39 percent to 2.4 percent due to the correction of an error in the Draft Report but did not modify its first recommendation to EPA about reassessing RIN cost passthrough.¹⁸ EPA noted these concerns in the EPA Comment Letter after it received the Draft Report in September 2022, and EPA began a preliminary analysis of prices paid and received for RINs by small refineries.¹⁹ This analysis was prompted by EPA’s questions about the Draft Report’s statement regarding what GAO viewed as a significant disparity in RIN prices paid and received by small buyers/sellers of RINs compared to average RIN prices.²⁰ EPA included in its comments a preliminary analysis that found that small refineries paid 1.6 percent more for D4 RINs and 1.2 percent more for D6 RINs²¹ compared to the market average prices, based on data for 24 companies that submitted RIN transaction reports for small refineries.²² EPA further noted that these very small differences could simply reflect noise in the data rather than an actual characteristic of the RIN market.²³ And even if the small differences did reflect actual market characteristics, such differences were not significant enough to impact an evaluation of potential DEH by a small refinery.²⁴ Finally, EPA noted that, without additional explanation, GAO’s findings are not credible. EPA agrees that if a *small refinery* paid 39 percent more for its RINs compared to average prices, that would be a significant difference to consider when evaluating its SRE petition. However, the corrected difference (even under GAO’s flawed analysis) is 2.4 percent—not 39 percent—for *small parties* (using GAO’s terminology). EPA does not believe this constitutes a disproportionate cost of compliance for *small refineries*, especially when it is unclear how this 2.4 percent difference relates to the difference in RIN prices actually paid or received by *small refineries*.

Third, in the EPA RIN Price Analysis, EPA conducted additional analyses of the same RIN transaction data that GAO analyzed using an updated approach that addresses the various methodological problems EPA identified in the EPA Comment Letter. EPA’s additional analyses further support EPA’s conclusion that small refineries do not face a higher cost to acquire RINs when compared to other refineries. Specifically, EPA conducted a more complete and detailed analysis of RIN transaction prices by comparing the prices paid by small refineries to buy separated RINs to the prices paid by the 20 largest refiners to buy separated RINs. EPA found the difference to be even smaller than the one it considered in evaluating small refineries’ arguments in the 2022 SRE Denial Actions and smaller than the 2.4 percent difference in the Final GAO Report. Specifically, based on reported RIN transaction

¹⁶ *Id.* at GAO Highlights.

¹⁷ In the EPA Comment Letter, EPA requested that GAO reconsider its statement that “EPA’s conclusion that refineries recover their compliance costs in the prices received for transportation fuels relies on a potentially faulty assumption about whether RIN costs are being passed through to purchasers.” EPA Comment Letter, pg. 2.

¹⁸ EPA Comment Letter, pg. 5.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 5, 8.

²¹ D4 and D6 RINs are different types of RINs based on the type of renewable fuel. *See* 40 CFR 80.1401 and 40 CFR 80.1425(g).

²² *Id.* at Appendix 2.

²³ *Id.* at 8, 10.

²⁴ *Id.*

data, EPA estimated that small refineries paid 0.5 percent (0.6 cent) more per RIN on average when buying separated RINs when compared to the largest 20 refiners, including 2.6 percent (2.3 cent) more per D4 RIN and 0.2 percent (0.1 cent) **less** per D6 RIN.²⁵ Again, as EPA noted in the EPA Comment Letter, there is a strong possibility that such a small variation suggests that these results may simply reflect noise in the data EPA evaluated and do not reflect any real difference in the prices parties pay in acquiring RINs.²⁶ It is particularly important to note that the analysis suggests that small refineries have an advantage in acquiring D6 RINs (approximately 70 percent of a company's obligation) and a disadvantage in acquiring D4 RINs when buying separated RINs. There is no clear explanation for why small refineries may sometimes have an advantage when buying a fungible credit from a third party, and why other times large refineries would have an advantage. The most likely explanation is that all market participants can acquire RINs nominally at the market price on average, and any particular transaction viewed in isolation may be ever so slightly above or below that price. This is clearly not the type of situation where small refineries suffer DEH from compliance with the RFS program.

Fourth, EPA notes the following additional errors and uncertainties in the Final GAO Report analysis:

- A significant part of GAO's analysis in Appendix II of the Final GAO Report is based on an incorrect data set. The data shown in the first column of Tables 1, 2, and 3 (titled "Includes assignment code and regulatory category dummies") and all of Table 4 is based on an incorrect data set that includes both assigned and separated RINs.²⁷ Any analysis of RIN market prices using EMTS data should only include separated RINs, because those prices are for the RIN alone; assigned RINs should not be included because the price for an assigned RIN is actually the price for the renewable fuel (e.g., ethanol and biodiesel) with the RIN attached, not the price for the RIN itself. The data shown in the second and third columns of Tables 1, 2, and 3 are based on a correct data set that only included separated RINs. GAO added these second and third columns during development of the Draft Report after EPA pointed out the distinction between assigned and separated RINs in the EPA Comment Letter. However, GAO chose to keep the results from its initial analysis of both assigned and separated RINs in the Final GAO Report, without clearly explaining that these results are based on an incorrect data set.
- It is unclear which model GAO is referencing in its estimated 2.4 percent price difference, as the Final GAO Report indicates that the estimated 2.4 percent price difference is based on transactions by all types of companies, which could be either the first or the second columns of Tables 1, 2, and 3.²⁸ The second column ("Includes only separated RINs and regulatory category dummies") appears to be the best model to use given that it only analyzes separated RINs traded by all parties.²⁹

²⁵ RIN transaction data is reported to the EPA Moderated Trading System (EMTS), which is EPA's web application and database for transacting Fuels Programs credits, including RIN transactions under the RFS program.

²⁶ EPA Comment Letter, pg. 8.

²⁷ RINs are "assigned" to batches of renewable fuel by the producers and importers of renewable fuel. RINs may be "separated" from those batches by a party that blends the renewable fuel into gasoline or fossil-based diesel fuel to produce a transportation fuel, heating oil, or jet fuel. June 2022 SRE Denial Action, pg. 9.

²⁸ Final GAO Report, pg. 10.

²⁹ The second column includes estimated price differences of 0.5% for D4 RINs and 2.6% for D6 RINs, using the percent change in RIN price between 10th and 90th percentile of relative buyer/seller size.

- The Final GAO Report did not incorporate any of EPA’s recommended changes.³⁰ Specifically, the Final GAO Report: (1) Did not evaluate the cost for small refineries to acquire RINs when compared to the average daily market price; (2) Did not change its analysis to use volume-weighted prices; and (3) Did not change its analysis to allow an asymmetric market response for the same entity that sells and buys RINs.³¹

GAO’s Analysis Does Not Address Small Refineries’ Historic Claims

GAO fundamentally misunderstands and fails to address several of the claims regarding DEH that the majority of small refineries made in their SRE petitions, and which EPA addressed in the 2022 SRE Denial Actions.³² First, the small refineries asserted in their petitions that they faced a higher cost of RFS compliance when they purchased RINs at prevailing market prices to demonstrate compliance, compared to other refineries that acquired RINs as a result of blending renewable fuels and selling the resulting products (e.g., buying ethanol with an attached D6 RIN, blending the ethanol with gasoline, and then selling the resulting E10 gasoline fuel blend and keeping the separated D6 RIN). The small refineries assert that the RINs received from blending were essentially free because blenders recovered their costs in selling the blended fuel and therefore could keep the RIN at no cost. However, EPA’s extensive review of fuel contracts and market data in the 2022 SRE Denial Actions showed that, in fact, parties that receive RINs by blending renewable fuels discount the price of the resulting fuel blends by the market price of the RIN.³³ In other words, parties that acquire RINs by blending effectively purchase the RIN at the prevailing market price through the discount they must offer for the renewable fuel blends they sell—a key point GAO fails to acknowledge. These findings support EPA’s conclusion that the cost to acquire RINs is the same (i.e., the prevailing market price) whether parties acquire the RINs directly by purchasing the RIN in the RIN market or by blending renewable fuels.

The Final GAO Report fails to even address EPA’s conclusion, much less offer any explanation to dispute it. GAO ignored EPA’s explanation, described above, in the 2022 SRE Denial Actions responding to the small refineries’ claims about acquiring RINs through blending versus direct RIN purchases. The Final GAO Report does not in any way address EPA’s analysis showing discounting of fuel blends sold by other parties, and instead narrowly focuses its evaluation on comparing the transaction prices parties paid when directly buying separated RINs from other parties, a claim not even raised by small refineries in their petitions. Thus, GAO’s analysis of only RIN transaction prices has no bearing on EPA’s evaluation of acquiring RINs through blending versus buying RINs directly, or on claims by small refineries that obligated parties that blend renewable fuel are at a significant advantage compared to obligated parties that buy separated RINs for compliance.

Second, the Final GAO Report fails to acknowledge or consider EPA’s responses to small refineries regarding their allegedly higher cost of acquiring RINs. For example, in comments on the Proposed Denial,³⁴ certain small refineries argued they would face a higher price to purchase RINs in the market because they would prefer to buy potentially more expensive Q-RINs given their concerns about RIN

³⁰ EPA Comment Letter, Section 2.

³¹ EPA included these modifications in its analysis of RIN prices paid and received by small refineries, including its estimated 0.5% difference in RIN prices paid by small refineries compared to the 20 largest refiners. EPA’s analysis also included RINs traded in years subsequent to the RIN generation year, unlike GAO’s analysis, which only included RINs that were traded in the same year they were generated.

³² 2022 SRE Denial Actions, Section IV.C.

³³ 2022 SRE Denial Actions, Section IV.D.2.

³⁴ “Proposed RFS Small Refinery Exemption Decision,” EPA-420-D-21-001, December 2021 (“Proposed Denial”).

fraud.³⁵ These small refineries claimed that larger refineries could afford to risk buying RINs that were not Q-RINs, but smaller refineries could not, and would therefore pay a higher price to buy RINs. EPA evaluated this claim in the 2022 SRE Denial Actions and found that: (1) The cost of Q-RINs are passed through in the same way as any other RIN; (2) Small refineries have no greater reason to purchase Q-RINs than do other refineries; and (3) Contrary to the small refineries' assertions, the price differences for Q-RINs compared to unverified RINs are small and that a decision to reduce the risk of RIN fraud was not a basis to conclude that a refinery faced a higher cost of compliance.³⁶ Rather, the decision whether to purchase Q-RINs is a business decision that any obligated party faces in weighing how to comply with the RFS program.

Third, the Final GAO Report fails to address EPA's conclusion that the quantity of RINs acquired does not impact the RIN price. In the 2022 SRE Denial Actions, EPA addressed claims by small refineries that they buy RINs in such low volumes that RIN sellers demand a higher price for the RINs since the transaction costs of the sale would be spread over fewer RINs. EPA found that the differences in the total cost to acquire a lower versus higher number of RINs is small and reflects only the different ways of accounting for the actual administrative costs of acquiring the RINs. For example, a large refinery might have staff dedicated to negotiating and purchasing RINs if it needs to purchase higher volumes of RINs and thus would not need to use a broker to acquire RINs, potentially realizing a slightly lower RIN price due to the absence of a broker's fee. However, the large refinery in this example bears the cost of the staff necessary to conduct this business and those costs would not be directly reflected in the price it paid for RINs. Conversely, a small refinery purchasing fewer RINs might decide to depend entirely on a broker to purchase RINs on its behalf, thus outsourcing the labor of acquiring RINs to the broker rather than hiring its own staff. A small refinery choosing to follow this approach would potentially see a slightly higher price to buy RINs reflecting the value the broker adds but would also reduce the small refinery's own internal costs. In other words, the purchase price of RINs does not reflect the entire cost of acquiring RINs in every instance, and an analysis that looks only at RIN costs is necessarily incomplete. In the 2022 SRE Denial Actions, EPA therefore concluded that these differences would not be significant enough to constitute DEH.

Since issuing the 2022 SRE Denial Actions, EPA and the Department of Energy (DOE) technical experts continue to consider these arguments on RIN price differences. DOE provided to EPA a copy of a contract for ratably purchasing RINs. The contract terms provide RINs to an obligated party using the average of daily prices on a publicly available posted market price for RINs minus \$0.005 per RIN (resulting in the price paid by the obligated party to be less than the market price). DOE believes these contract terms are generally available to any refinery seeking to acquire RINs to meet its RFS obligations, regardless of the volume of RINs being purchased. This provides additional evidence that a small refinery—even a very small one—can contract to acquire RINs at or perhaps even very slightly below the prevailing market price. Hence, EPA does not find compelling the argument that small refineries face a significantly higher cost to acquire RINs when compared to the industry average.

GAO Discredits Market Information Submitted by Program Participants

The Final GAO Report does not properly account for the process EPA undertakes in evaluating SRE petitions as outlined in the 2022 SRE Denial Actions. First, GAO's concern that EPA did not assess RIN cost passthrough in all relevant fuel markets is misplaced and represents a fundamental

³⁵ Q-RINs are RINs that have been verified by an independent third-party auditor operating under an EPA-approved quality assurance plan, or QAP. See 40 CFR 80.1401.

³⁶ 2022 SRE Denial Actions, Appendices, pp. B-52 and B-53.

misunderstanding of the statutory exemption provision as well as of EPA's analysis.³⁷ The CAA authorizes EPA to grant an SRE petition based on a demonstration by the small refinery that it experiences DEH caused by its RFS compliance—not based on an evaluation of RIN cost passthrough in all relevant fuel markets.³⁸ Moreover, small refineries did in fact submit the very information GAO suggests is needed,³⁹ and EPA considered that information its evaluation of the SRE petitions.⁴⁰ Therefore, GAO's conclusion fails to acknowledge the statutory provision governing EPA's evaluation and decision-making in the 2022 SRE Denial Actions and the fact that EPA had—and evaluated—the necessary information.

Second, the Final GAO Report mistakenly concludes that EPA should have examined all relevant markets, such as those in which small refineries participate, and faults EPA for analyzing larger markets but not systematically analyzing smaller markets. As EPA explained in the EPA Comment Letter and in its 2022 SRE Denial Actions, the refining industry is extremely competitive, with prices in small markets linked to prices in larger markets, plus transportation costs from large markets to small markets.⁴¹ The EPA Comment Letter also explains how EPA took the additional step of soliciting comments from small refineries on EPA's Proposed Denial, inviting small refineries to provide data on their specific markets.⁴² Any data provided by small refineries on their specific markets were carefully reviewed by EPA (in consultation with DOE) as part of the 2022 SRE Denial Actions. EPA therefore disagrees that it lacks information needed to analyze relevant markets.

For all of the reasons above, and as stated in the EPA Comment Letter, EPA does not intend to revisit the 2022 SRE Denial Actions. The decisions have been challenged by multiple parties in the U.S. Court of Appeals for the District of Columbia Circuit, as well as in multiple other circuit courts of appeal, and EPA intends to defend the decisions, which are consistent with the CAA and with relevant case law, and which are supported by the administrative record.

GAO Recommendation 2 (directed to DOE)

GAO Recommendation 3:

The Administrator of EPA should identify and communicate what information refineries would need to submit to demonstrate disproportionate economic hardship. (Recommendation 3)

EPA Response:

EPA partially agrees with this recommendation. EPA has previously issued guidance about the types of information small refineries should include in their petitions.⁴³ Then, in December 2021, EPA issued the Proposed Denial that not only served this purpose for the SRE petitions EPA had pending in front of it at

³⁷ Final GAO Report, pg. 26.

³⁸ April 2022 SRE Denial Action, pp. 26–28.

³⁹ Particular examples of this information were in the refinery-specific CBI appendices to the 2022 SRE Denial Actions, which EPA provided to GAO.

⁴⁰ Final GAO Report, pp. 29–30. The Draft Report made a similar criticism, stating that EPA's analysis was flawed because it did not assess all fuel markets. EPA responded to the claim in the EPA Comment Letter, and GAO changed its criticism to apply to all relevant fuel markets.

⁴¹ EPA Comment Letter, pp. 3–4; June 2022 SRE Denial Action, pp. 33–35.

⁴² EPA Comment Letter, pp. 3–4.

⁴³ EPA, Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests, (December 6, 2016).

that time, but also for future SRE petitions, since the Proposed Denial provided a robust description of EPA’s proposed conclusions and invited small refineries to provide supplemental information to directly address evidence of DEH to individual small refineries due to compliance with the RFS program.⁴⁴ As evidenced by their submittals—both for those pending petitions and for new petitions submitted after the Proposed Denial—small refineries understood this to include data and contract information to show the relative cost of compliance for refineries that acquire RINs by blending renewable fuels when compared to those that bought separated RINs, data to show whether the small refinery received prices for its refined products that were below the market prices received by other program participants, and analysis to show that the markets in which they operate do, or do not, pass through RFS compliance costs.

While EPA believes the petitions it has received from small refineries indicate that they do understand the information relevant to EPA’s new approach for evaluating SRE petitions, EPA nevertheless intends to issue new guidance before the end of calendar year 2023. EPA’s new guidance will help make clear that those same kinds of information, updated to reflect the time period covered by the future petitions, are appropriate for future SRE petition evaluations as well. EPA intends to continue to update the guidance it provides for future SRE petitions.

GAO Recommendation 4 (directed to DOE)

GAO Recommendations 5 and 6:

The Administrator of EPA should develop policies and procedures for making small refinery exemption decisions. (Recommendation 5)

The Administrator of EPA should develop policies and procedures to ensure that EPA meets statutory deadlines to issue decisions, including tracking when petitions are considered complete. (Recommendation 6)

EPA Response:

EPA partially agrees with these recommendations. EPA has policies and procedures in place for making SRE decisions and for tracking petitions from receipt through completeness determinations, as well as through the consultation process with DOE. However, in response to this recommendation, EPA will better document its internal processes for receiving petitions and determining their completeness, and for more completely tracking the internal decision-making and evaluation steps, including EPA’s coordination with DOE. This improved documentation will also include means to help ensure more timely review. Since publication of the Final GAO Report, EPA is internally tracking the initial submission date of new SRE petition information as well as the dates supplemental information is received.

⁴⁴ “Proposed RFS Small Refinery Exemption Decision,” EPA-420-D-21-001, December 2021 (“Proposed Denial”); *see also* Notice of Opportunity to Comment on Proposed Denial of Petitions for Small Refinery Exemptions, 86 FR 70999 (December 14, 2021).

GAO Recommendation 7:

The Administrator of EPA should assess the effect of small refinery exemption decision timing on the benefit provided to small refineries, as well as the effect on fuel markets, and reconsider petition requirements, such as that of three quarters of current year financial information. (Recommendation 7)

EPA Response:

EPA partially agrees with this recommendation. EPA acknowledges that SRE decisions—particularly for the 2016–2018 compliance years—contributed to volatility in RIN prices and uncertainty for all program participants. To address this, EPA finalized new RFS regulations that project SRE volumes and reallocate those volumes to other program participants beginning with the 2020 compliance year, helping to ensure a consistent demand for RINs (and the associated renewable fuels) and, through that consistent demand, more consistent and predictable RIN prices. EPA believes this regulatory change addresses the primary effect on fuel markets and considers this recommendation fully resolved.

As noted above, GAO made a number of process-oriented conclusions and recommendations for how EPA can improve the implementation of the SRE program. EPA takes seriously GAO’s critique of our historic implementation of the program especially regarding the inconsistent nature of past decisions and the need to properly document our workflow and communications with the Department of Energy. It is EPA’s intent to make further improvements to those elements of the program in response to this report.

The agency appreciates the opportunity to review and respond to the final GAO report. If you have any further questions, please contact me or your staff may contact Amir Ingram, in the EPA’s Office of Congressional and Intergovernmental Relations, by email at Ingram.Amir@epa.gov or by phone at (202) 564-0150.

Sincerely,

Faisal Amin
Chief Financial Officer