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Administrator Andrew R. Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

Via e-mail: ***wheeler.andrew@epa.gov***

Re: Petition for Administrative Reconsideration of *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7,016 (Feb. 6, 2020)

Dear Administrator Wheeler:

Pursuant to Clean Air Act (CAA) Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), the American Fuel & Petrochemical Manufacturers (AFPM) submits this petition requesting the United States Environmental Protection Agency (EPA or the Agency) to convene a proceeding for reconsideration of the above-captioned final agency action (the 2020 Renewable Fuel Standard (RFS) rule). The grounds for the instant petition arose in connection with the recent Tenth Circuit opinion in *Renewable Fuels Association v. EPA*,[1] which threatens to reduce eligibility for small refinery exemptions (SREs) for relief from annual percentage standard obligations under the renewable fuel standard (RFS) program. This is facially incompatible with the basis for EPA's departure from prior policy in the 2020 RFS rule, under which the Agency increased the percentage standard obligations for that compliance year based on its anticipation of the aggregate volumes that it would subsequently exempt from compliance through the SRE program. Because this opinion was issued after the time for public comment on the rule closed, because the instant petition is submitted prior to the close of the time for judicial review, and because the grounds raised herein are of central relevance to the underlying rule, reconsideration is mandatory. AFPM respectfully requests that EPA move quickly to convene a proceeding for reconsideration of the 2020 RFS rule percentage standards, as its members must comply with their 2020 renewable volume obligations (RVO) by March 2021. AFPM reserves its right to bring an action for unreasonable delay should EPA fail to promptly act on this petition.

I. AFPM's Interest in This Matter

AFPM represents high-tech American manufacturers, fueling and building America's future. Our members produce most of the refined petroleum products and petrochemicals manufactured in the United States and are obligated parties under EPA's RFS. AFPM's refining members are adversely impacted by the Tenth Circuit's decision and its effects on the 2020 RFS obligations. In addition to impacting EPA's calculation of the RVO percentages, the decision affects the available supply of Renewable Identification Numbers (RINs) and dramatically changes the cost of compliance, which

[1] *Renewable Fuels Association v. EPA*, No. 18-9533, 948 F.3d 1206 (10th Cir. Jan. 24, 2020).

necessitates reconsideration of EPA's RVO percentages and its decision not to use its general waiver authority.

II. Background

A. Regulation

EPA administers the RFS program by establishing, through yearly notice-and-comment rulemakings, annual renewable fuel volumes and accompanying percentage standard obligations. *See generally* CAA Section 211(*o*), 42 U.S.C. § 7545(*o*). EPA has authority to grant exemptions from compliance with the percentage standards obligations to small refineries that demonstrate disproportionate economic hardship, *see id.* § 211(*o*)(9)(B).

To implement the RFS program, EPA has promulgated regulations, including 40 C.F.R. § 80.1405. This regulation contains a set of mathematical formulae that EPA uses to calculate the annual renewable fuel percentage standards. *Id.* § 80.1405(c). These formulae contain two variables denominated GE_i and DE_i. Prior to the effectiveness of the 2020 RFS rule, these variables are defined as the "[a]mount of gasoline [or diesel] projected to be produced by exempt small refineries . . ., in year i, in gallons in any year they are exempt . . . ."[2]

EPA had long taken the position that these provisions should only be employed to project the amount of fuel to be produced by exempt small refineries where the Agency had already granted exemptions to refineries prior to its finalizing the final RFS rule for a given year. *See* 85 Fed. Reg. at 7,049/2 n.147 (final rule) ("We adopted this interpretation of our regulations in the 2011 final rule. We reaffirmed it in annual rulemakings since then, including most recently in the 2019 final rule"). And the Agency initially kept to this course when it proposed the 2020 RFS rule. 84 Fed. Reg. at 36,797/3 ("We are maintaining our approach that any exemptions for 2020 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2020."). Indeed, in the initial proposal, EPA went so far as to declare that it was "not reopening this policy or any other aspect of the formula at 40 CFR 80.1405(c). Any comments received on such issues will be deemed beyond the scope of this rulemaking." 84 Fed. Reg. at 36,797/3 n.165.

EPA then abruptly changed course. In October 2019 it issued a supplemental proposal in which it announced an intent to abandon this longstanding position, to amend the text of the definitions of the GE_i and DE_i variables in the regulatory formula for setting the percentage standards to focus on the "amount of gasoline [or diesel] projected *to be exempt* in year i" (rather than that projected to be *produced by already exempt* small refineries), and to impose an upward adjustment on the proposed percentage standards based on an average of all Department of Energy (DOE) recommendations on SRE applications over the last three years that are available (2016-2018, representing a volume of 4,240 million gallons of gasoline and 3,020 million gallons of diesel fuel, equivalent to approximately 770 million RINs). 84 Fed. Reg. 57,677 (Oct. 28, 2019) (emphasis added).

[2] The omitted language contains a reference to certain regulatory exemptions for small *refiners* (as opposed to small refineries) pursuant to 40 C.F.R. § 80.1442. Small refiner exemptions are not relevant to this petition.

EPA finalized the 2020 RFS rule on December 19, 2019. 85 Fed. Reg. 7,016 (Feb. 6, 2020). The rule, which was signed less than three weeks after the submission of public comments on the supplemental proposal, adopted and finalized substantially the same reasoning and actions as set forth in the October 2019 supplemental proposal, *see, e.g.*, *id.* at 7,049/3, 7,053/1-2. The rule was published in the *Federal Register* on February 6, 2020—shortly after a major intervening event that forms the grounds for this petition.

The 2020 RFS final rule contained an adjustment to the formula that increases the renewable fuel percentage standards in an attempt to reallocate the exempt small refineries' obligations to non-exempt parties. Reallocation increases the stringency of the RFS. The table below demonstrates the effect of the formula adjustment, and its application in this rulemaking, which resulted in higher finalized fuel percentage standards.

	July Proposal[3]	October Supplemental Proposal (adjusted to reflect DOE's recommended SREs, 2016-2018)[4]	October Supplemental Proposal (adjusted to reflect DOE's recommended SREs, 2015-2017)[5]	Final Rule[6]
Cellulosic biofuel	0.29%	0.31%	0.31%	0.34%
Biomass-based diesel	1.99%	2.08%	2.06%	2.10%
Advanced biofuel	2.75%	2.88%	2.85%	2.93%
Total renewable fuel	10.92%	11.46%	11.35%	11.56%

B. Litigation

On January 24, 2020, before the 2020 RFS rule had been published in the *Federal Register*, the Tenth Circuit issued its opinion in *Renewable Fuels Association*.[7] In this case, biofuels organizations and other agricultural interests challenged three EPA orders granting small refinery exemptions. *Id.* at 1214. Among other things, the court held that EPA can only exempt a small refinery that has "consistently received an exemption in the years preceding its petition," *id. See also id.* at 1245 ("[A] small refinery which did not seek or receive an exemption in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add to."); *id.* at 1246 ("This reading of 'extension' means that once a small refinery figures out how to put itself in a position of annual compliance, that refinery is no longer a candidate for extending (really 'renewing' or 'restarting') its exemption."); *id.* at 1249 ("[A]n 'extension' requires a small refinery exemption in prior years to prolong, enlarge, or add to. . . .").

[3] 84 Fed. Reg. at 36,765, Table I.B.6-1.
[4] 84 Fed. Reg. at 57,683, Table II.C-2.
[5] *Id.*
[6] 85 Fed. Reg. at 7,019, Table I.F-1.
[7] AFPM participated in this case as *amicus curiae*.

Small refinery exemption petitions are routinely claimed as confidential business information by the petitioner. EPA generally does not divulge information about particular petitions or its decisions thereon, nor is AFPM in a position to do so in this petition. AFPM will therefore limit its observations on the impact of the court's decision to the following remarks: At most a handful of facilities in the country would be eligible for an exemption under the court's interpretation—*i.e.*, only a few facilities have continuously received exemptions in every year of the program's existence. Even if EPA chooses to treat the court's opinion as binding only within the boundaries of the Tenth Circuit, that Circuit contains a large proportion of otherwise eligible facilities. Unless and until any relief is obtained from the Tenth Circuit's decision, therefore, that decision will have a major impact on the SRE program and would undermine EPA's justification and assumptions for the 2020 RFS.

III. EPA must reconsider its 2020 RFS rule.

CAA Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), provides that the EPA "*shall* convene a proceeding for reconsideration of [a] rule" where a "person raising an objection [to the rule] [i] can demonstrate to the Administrator that . . . the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and [ii] if such objection is of central relevance to the outcome of the rule . . . ." (Emphasis added.) The D.C. Circuit has labeled situations where these prerequisites for reconsideration are met as "mandatory reconsideration." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017); *see also id.* at 4-5 (Section 307(d)(7)(B) "sets forth the circumstances under which EPA *must* reconsider a rule"). As set forth below, the prerequisites for reconsideration are met here. EPA therefore must reconsider its final 2020 RFS rule.

A. The grounds for AFPM's objection arose after the period for public comment on the 2020 RFS rule but within the time specified for judicial review of that rule.

The grounds for AFPM's objection raised in this petition is the impact of the Tenth Circuit's opinion in *Renewable Fuels Association* on the small refinery exemption program as that program interacts with the EPA's 2020 RFS rulemaking and the resulting final rule.[8] The comment period on EPA's October 2019 supplemental proposal ended on November 29, 2019. 84 Fed. Reg. at 57,677/2. The Tenth Circuit issued its opinion in *Renewable Fuels Association* on January 24, 2020. The final 2020 RFS rule was published in the *Federal Register* on February 6, 2020. 85 Fed. Reg. 7,016. Judicial challenges to the final rule may be brought until April 6, 2020. *See* CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1) (petitions for judicial review of final CAA actions shall be filed within 60 days of publication in the *Federal Register*). Accordingly, this first element of mandatory reconsideration is met.

B. AFPM's objection is of central relevance to the outcome of the 2020 RFS rule, specifically regarding that rule's upward adjustments to the percentage standards.

EPA's anticipation that it would, subsequent to finalizing the 2020 RFS rule, be exempting significant volumes from compliance obligations for the 2020 compliance year through the granting of small refinery exemptions was the central rationale for its decision to adjust upwards the percentage obligations in the 2020 RFS rule. *E.g.*, 84 Fed. Reg. at 57,677 (supplemental proposal) ("The amended

[8] Although the grounds set forth in this petition satisfy the requirements for mandatory reconsideration of the 2020 RFS final rule, AFPM reserves its right to seek judicial review of its other objections to that final rule.

definitions proposed in this rule would effectively increase the percentage standards that apply to non-exempt obligated parties *to offset future small refinery exemptions* and help ensure that the required volumes are met.") (emphasis added); *see also id.* at 57,680/1 (noting and implicitly adopting some commenters' position that "adjusting the percentage standards formula is more important now than in earlier years of the program as we have recently granted exemptions for more significant volumes"); 85 Fed. Reg. at 7,050/1-2 (final rule) (same).

In the rulemaking, EPA justified its upward adjustment as resulting in "our best estimate [of the actual exempted volumes for 2020] based on the record and our intended small refinery policy for 2020. . . . We do not anticipate that the percentage standards we are finalizing will result in exceeding the implied conventional renewable fuel standard." Response to Comments (RTC) at 165. EPA further stated that "even if greater volumes [than the ones established in the final rule] are ultimately required, we do not think this will result in unachievable standards." *Id.* at 174. None of EPA's reasons given for this assertion provide an adequate basis for EPA to decline to reconsider its rule now—particularly not EPA's assertion that carryover RINs will be available, because a reduction in SRE eligibility means that refineries that would otherwise have received exemptions will now be required to purchase RINs for the 2020 compliance cycle, resulting in a greater drawdown on the carryover RIN bank than the one EPA estimated.[9] All this discussion assumed a large amount of exempted volumes based on the SREs that EPA anticipated it would grant for the 2020 compliance year. But the Tenth Circuit opinion, even if limited in its effect to refineries located within the Tenth Circuit, threatens to drastically reduce SRE eligibility. There is simply no evidence in EPA's rulemaking that it contemplated such a possibility, nor was any notice of such a possibility given to AFPM or other stakeholders, and EPA cannot defensibly decline to reconsider its rule now.

In justifying the final rule's abandonment of longstanding EPA policy, EPA offered three high-level justifications: (1) that it was projecting aggregate exempted 2020 volumes rather than decisions on particular facilities; (2) that it had "additional experience administering the RFS program and knowledge of the relatively high levels of exempted volumes in recent years"; and (3) that while in the previous annual rulemakings it had not articulated a prospective policy for adjudicating SRE petitions, it was doing so here. 85 Fed. Reg. at 7,051/1-2.

The Tenth Circuit's opinion undermines all three of these justifications. *First*, regarding aggregate estimates, whatever the scope of that opinion's impact on SRE eligibility, at a minimum it severely restricts eligibility within a circuit that contains a significant number of small refineries, and hence has a material effect on the potential aggregate exempted volumes. *Second*, the Tenth Circuit's opinion is highly likely to reduce the historically "high level" of exempted volumes going forward. *Third*, while EPA in the final rule announced a policy of following DOE's recommendations, including where those recommendations indicate partial rather than full exemptions,[10] and asserted that EPA "generally

[9] AFPM provided in its comments on the October 2019 supplemental proposal, at 7 *et seq.*, its position that the upward adjustment, even *with* future SRE relief, would increase the renewable fuel mandate beyond what is achievable, and incorporates by reference those comments here.

[10] Whether EPA has the authority to issue partial exemptions is beyond the scope of this petition. AFPM's comments on the October 2019 supplemental proposal, at 11, took the position that AFPM was uncertain whether

ha[s] the statutory authority to issue a final decision [on an SRE petition] consistent with DOE's recommendation," *id.* at 7,051/3, the Tenth Circuit's opinion has radically constricted that statutory authority by imposing a factor beyond those contemplated by DOE in its recommendations or by EPA in its 2020 RFS rulemaking: whether a facility has continuously received an exemption.[11]

Tellingly, EPA expressly noted in both the October 2019 supplemental proposal and the final 2020 RFS rule that "judicial resolution of pending decisions . . . could also potentially affect EPA's SRE policy going forward." 84 Fed. Reg. at 57,683/1 n.29 (supplemental proposal); 85 Fed. Reg. at 7,051/3 n.168 (final). While this bare reference to pending judicial proceedings did not provide AFPM adequate notice or opportunity to comment regarding *which* pending court cases EPA had in mind, nor of *how* judicial resolution of those cases might change EPA's small refinery exemption policy,[12] this language nonetheless plainly demonstrates that EPA was aware that a court ruling could interfere with its own and the public's understanding and expectation of how the program would function in the future. EPA made this observation in a footnote to its assertion that "this approach to project[ing] exempted 2020 volumes] . . . provides a reasonable estimate of the aggregate exempted volume *at this time*." *Id.* at 56,782/3-56,783/1 (emphasis added). Even assuming that was true then, the Tenth Circuit's opinion rendered that estimate patently *un*reasonable. In short, the court has eviscerated the central premise on which EPA's projections, and its concomitant upward adjustment to the percentage standards, was based. There could not be a clearer example of an issue of "central relevance" to this aspect of the 2020 RFS rule. Reconsideration is therefore mandatory.

IV. EPA must act quickly.

Although the refinery-litigants have sought relief from the Tenth Circuit's decision in *Renewable Fuels Association*, any relief through further court proceedings is uncertain and will likely take months or years to obtain. *Cf.* Respondent's Brief at 8, *Producers of Renewables v. EPA*, No. 18-1202 (D.C. Cir. filed Mar. 4, 2019), Doc. No. 1775897 (EPA describes situation where "the delay caused by litigation" prompted it to take unprecedented action in RFS/SRE program due to mismatch between RFS compliance cycle and pace of litigation). Because the 2020 RFS rule imposes an increased percentage obligation, and because, in the absence of any change to the rule or other form of relief, AFPM's

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EPA had this authority and that, in any event, EPA had failed to provide a sufficient rationale for reversing its prior position and determining that it did. As noted at n.9 above, AFPM reserves the right to further address this issue in the appropriate judicial and administrative contexts.

[11] *See Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 604 & Table 10 (4th Cir. 2018) (discussing history and content of "scoring matrix" used by DOE to evaluate and make recommendations to EPA on SRE petitions; the matrix makes no reference to prior receipt of exemption). *Cf. Renewable Fuels Ass'n*, 948 F.3d at 1248 ("[E]ven if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*.").

[12] AFPM notes that EPA specifically addressed the interpretation of the statutory term "extension" that the Tenth Circuit would subsequently adopt—*i.e.*, that only small refineries that have continuously received the exemption are eligible to apply for it—in the RTC, at 185-87. EPA proclaimed this issue to be outside the scope of the rulemaking, but went on to provide a merits response, in which it *disagreed* with the "continuous" interpretation, but in which it did *not* reference the pending Tenth Circuit litigation or how potential outcomes in that litigation might affect the issues addressed in the final rule. For its part, the October 2019 supplemental proposal did not address this issue at all, *see* 84 Fed. Reg. at 57,681/2 (discussing "extension" in the context of EPA's authority *vel non* to issue partial exemptions but giving no mention of the "continuous" issue or the interpretation that the Tenth Circuit would subsequently adopt).

members will need to comply with that obligation by March 2021, EPA must act quickly to convene a proceeding for reconsideration by proposing changes to the rule. AFPM respectfully requests that EPA announce and propose changes, as soon as possible.

Specifically, AFPM requests that EPA propose to eliminate the upward adjustment to the percentage standards that it finalized in the 2020 RFS rule based on its anticipation that it would eventually exempt a significant volume of fuel from compliance obligations for the 2020 compliance year. EPA may also wish to take comment on a range of options for modifying the upward adjustment based on the anticipated scope of the impact of the Tenth Circuit's decision on SRE eligibility both within and outside the borders of the Tenth Circuit.

V. Conclusion

As demonstrated in this petition, the criteria for mandatory reconsideration are met and EPA must reconsider the rule in light of the Tenth Circuit's ruling.

Respectfully submitted,

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