Maryam Hatcher

Counsel

Office of the Chief Legal Officer

200 Massachusetts Avenue, NW
Washington, DC 20001
USA

Telephone: 202-682-8078
Email: HatcherM@api.org
www.api.org

April 6, 2020

Via Electronic Mail and First Class Mail

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

Anne Idsal
Principal Deputy Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 6101A
Washington, DC 20460
Idsal.anne@epa.gov

Julia MacAllister,
Office of Transportation and Air Quality,
Assessment and Standards Division,
2000 Traverwood Drive,
Ann Arbor, MI 48105
Macallister.julia@epa.gov

Re: Petition for Reconsideration of the RFS 2020 Rule, EPA–HQ–OAR–2019–0136

Dear Administrator Wheeler:

The American Petroleum Institute ("API") hereby petitions the U.S. Environmental Protection Agency ("EPA" or "Agency") to reconsider and revise the final rule entitled *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021* ("2020 RFS" or "2020 RFS Rule"), published at 85 Fed. Reg. 7,016 (Feb. 6, 2020). This petition is submitted pursuant to 42 U.S.C. § 7607(d)(7)(B) and 5 U.S.C. § 553(e).

API is a nationwide, not-for-profit association representing over 600 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and

gas products. Many API members are obligated parties under the Renewable Fuel Standard ("RFS") program, and thus are directly regulated by the 2020 RFS Rule. API participated in the RFS 2020 rulemaking process, and has participated in numerous other RFS rulemaking and litigation proceedings since the RFS program's inception in 2005.

This petition requests that EPA reconsider the RFS 2020 Rule's treatment of small-refinery-exempt volumes in light of the Tenth Circuit's unanimous decision in *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020) ("*RFA*"). Reconsideration is mandatory under section 307(d)(7)(B) of the Clean Air Act, because (1) the *RFA* decision was issued after EPA published the RFS 2020 Rule, and (2) the decision undermines multiple key aspects of the RFS 2020 Rule's treatment of small-refinery-exempt volumes EPA projected would exist in 2020.

EPA's 2020 RFS Rule altered the agency's long-standing approach to accounting for small-refinery exemptions ("SRE"). In October 2019, EPA issued a supplemental notice and proposed to amend the definitions of the GE_i and DE_i terms in § 80.1105, which provides the formula for calculation of the RFS percentage standards. According to the new definitions, which were finalized in the 2020 RFS rule, the standards now take into account the volumes of gasoline (GE_i) and diesel (DE_i) that are "projected to be exempt" during the upcoming compliance year, even if such exemptions had not been granted as of the date of the final annual RFS rule, effectively shifting RFS obligations from exempt small refineries to other obligated parties. 85 Fed. Reg. at 7,049. EPA also announced changes to the way in which it would evaluate small-refinery-exemption requests. EPA estimated that, under its new approach, it would grant small-refinery exemptions totaling 7.26 billion gallons of gasoline and diesel volumes for 2020. *Id.* at 7,052-53.

EPA's new approach to accounting for small-refinery exemptions significantly increased the Renewable Volume Obligations ("RVOs") for other, non-exempt obligated parties from 10.92% total renewable fuel in the original proposal to 11.56%.[1] *Compare* 84 Fed. Reg. 36,762, 36,798 (July 29, 2019) *with* 85 Fed. Reg. at 7,053. EPA's change in course effectively "reallocated" the renewable-fuel obligations associated with the projected small-refinery-exempt volumes to non-exempt obligated parties.

The Tenth Circuit's *RFA* decision demolishes the foundations of EPA's projections. The Tenth Circuit held that multiple aspects of EPA's small-refinery-exemption policy are not in accordance with law. Most significantly, the Court held that small refineries must receive an exemption "each year" to "continue[] to be eligible for extensions." *RFA*, 948 F.3d at 1214, 1246. Per *RFA*'s holding, the number of small-refinery exemptions should be drastically reduced. Although it is not possible based on public data to determine the exact number of small refineries which have continuously maintained their exemptions since the DOE study in 2011, EPA data indicate seven refineries at most, while a February 27, 2020 letter by 13 Senators to President Trump indicates only two eligible refineries.[2]

---

[1] EPA's reallocation of exempted small refinery volumes accounted for the majority of the increase, but there were other factors as well.

[2] Letter from 13 Senators to President Trump (Feb. 27, 2020), *available at* https://www.epw.senate.gov/public/_cache/files/8/0/80e09578-0453-4c53-b6d9-43b781dd39b5/CE848DC98F746956F69C4BCC95FBE099.2-27-20-letter-to-potus.pdf

The *RFA* decision further narrowed small-refinery exemptions by (1) making clear that any disproportionate economic hardship warranting an exemption must be due to the RFS *alone*, and (2) requiring EPA to adequately evaluate whether Renewable Identification Number ("RIN") costs were passed through as part of its small-refinery exemption analysis. *Id.* at 1257.

EPA itself has noted the game-changing nature of the Tenth Circuit's decision. Administrator Wheeler acknowledged in Congressional testimony that the *RFA* decision "goes to the heart of the small refinery exemption program."[3]

This petition satisfies the statutory requirements for mandatory reconsideration. EPA's treatment of small-refinery-exempt volumes, which in the RFS 2020 rule represent 7.26 billion gallons of exempted gasoline and diesel, are directly affected by the *RFA* decision. That decision is thus "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). This petition is also timely: the *RFA* decision was issued on January 28, 2020—"after the public comment period," "but within the time specified for judicial review," which expires on April 6, 2020. *Id.* Accordingly, EPA has a nondiscretionary duty to "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.* In the alternative, EPA should exercise its "inherent authority to revise or amend a rulemaking." 84 Fed. Reg. 57,677, 57,680 (Oct. 28, 2019).[4]

As the Tenth Circuit's decision demonstrates, EPA's small-refinery exemption policy is in far too much flux, and the projected exempted gasoline and diesel volumes for 2020 of 7.26 billion gallons are too high compared with EPA's 2013-2015 data, which are more in line with the number of small refinery exemptions that might be granted in light of the *RFA* decision. In a revised 2020 rule, EPA should decline to reallocate volumes for small-refinery exemptions not granted as of the date of the final rule. In the alternative, EPA should at a minimum reduce its projections for small-refinery-exempt volumes to account for the *RFA* decision. While API is not in a position to calculate the precise downward adjustment given the confidential nature of small-refinery-exemption data, it is clear that any revised projection should be a small fraction of that contained in the RFS 2020 Rule.

---

[3] Testimony of Administrator Wheeler, *Hearing on the Fiscal Year 2021 EPA Budget*, 1:35:00 (Feb. 27, 2020), *available at* https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-fiscal-year-2021-epa-budget

[4] API reserves its rights to raise these arguments in pending litigation challenging the RFS 2020 Rule, as API's comments on the proposed RFS 2020 rule raised arguments substantially identical to those adopted by *RFA*, and API's comments noted the pending Tenth Circuit litigation. API is filing this petition for reconsideration out of an abundance of caution and to provide EPA with an additional opportunity to correct the errors in its RFS 2020 Rule that are underscored by the *RFA* decision.

Background

I. EPA's 2020 RFS Rule Adopted a Novel Approach to Future Small-Refinery-Exempt Volumes.

A. EPA's Original Proposal Adhered to Its Longstanding Policy.

EPA's original RFS 2020 proposal adhered to its longstanding approach to small-refinery exemptions. The proposed rule explained that because "at this time no exemptions have been approved for 2020," "we have calculated the percentage standards for 2020 without any adjustment for exempted volumes." 84 Fed. Reg. at 36,797. That approach was consistent with EPA's stated policy dating back to the RFS2 rule issued in 2010,[5] and repeatedly reiterated thereafter.[6] EPA has acknowledged that this longstanding approach may be "required by the statute."[7]

B. EPA's Supplemental Notice Proposed a Novel Approach to Reallocate Small-Refinery-Exempt Volumes.

On October 28, 2019—just 33 days before the statutory deadline to publish the final RFS 2020 rule—EPA published a supplemental proposal. EPA proposed to change the definitions in the RFS percentage standards formula to address projected future small-refinery exempted volumes. EPA proposed to do so by making "a projection of the exempted volume of gasoline and diesel, regardless of whether we have adjudicated exemptions for that year by the time of the final rule establishing the percentage standards." 84 Fed. Reg. at 57,680. Based on that projection, EPA proposed to increase the RVOs for other, non-exempt obligated parties, and so reallocate those small-refinery-exempt volumes to non-exempt obligated parties. *Id*. at 57,682 ("This projection of exempted gasoline and diesel would effectively increase the percentage standards that apply to obligated parties to offset future SREs ....").

EPA then addressed "how to project the exempted volumes of these fuels in 2020." *Id*. at 57,680. EPA "acknowledge[d] that there is uncertainty," because 2020 small-refinery-exemption petitions had not even been submitted to EPA (much less decided). *Id.* EPA further explained that it planned to change its policy for granting small-refinery exemptions: going forward, EPA would "intend" to follow the Department of Energy's recommendations and grant *partial* small-refinery exemptions where DOE recommended a partial, rather than full, exemption. *Id.* This reflected another shift—less than three months earlier, EPA concluded that the "best interpretation" of the statute was that partial exemptions are not permitted. *Id*. at 57,680-81.

Despite these changes and the acknowledged uncertainties, EPA proposed that, to estimate *future* projected exempt volumes, it would use a historical average of volumes that would have been exempted in *prior* years had EPA followed DOE's recommendations, and proposed

---

[5] 75 Fed. Reg. 76,970, 76,804-05 (Dec. 10, 2010).

[6] *E.g.*, 76 Fed. Reg. 38,884, 38,859 (July 1, 2011); 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012); 78 Fed. Reg. 9,282, 9,303 (Feb. 7, 2013); 78 Fed. Reg. 49,794, 49,826 (Aug. 15, 2013).

[7] EPA Br., *AFPM v. EPA*, No. 17-1258, Doc. 1767773, at 73 (D.C. Cir. Jan. 10, 2019).

several variations of that approach. *Id.* at 57,682-83. EPA solicited comments on this supplemental proposal.

C. Commenters Critiqued EPA's Supplemental Proposal, Including EPA's Inability to Accurately Predict Future Small-Refinery-Exempt Volumes.

Many commenters, including API, submitted comments identifying legal and practical flaws in EPA's proposal to reverse its longstanding policy relating to small refinery exemptions. *See* API Comments & Legal Appendix, EPA-HQ-OAR-2019-0136-0721. Particularly relevant here, API explained that EPA's reallocation proposal was fatally flawed because it was based on an unstable and shifting small-refinery exemption policy. *Id.* at 12-18. Among other issues, API pointed out:

- The number of small-refinery exemptions, and their corresponding volumes, had fluctuated dramatically in recent years. *Id.* at 13.

- EPA's own supplemental proposal reversed course on whether the EPA had authority to issue partial exemptions. *Id.* at 14.

- EPA had also reversed course on whether it could issue an "extension" of a small-refinery exemption to a small refinery whose exemption lapsed in recent years. *Id.* at 14-15.

- EPA claimed broad discretion to apply different methodologies to individual small-refinery exemption petitions, further undermining any predictability. *Id.* at 15.

- EPA's supplemental proposal did not propose to bind EPA to any small-refinery exemption policy going forward, and indeed stated that if "for any reason we anticipate a different approach to evaluating SRE petitions by the time of the final rule, we may also consider adjusting our methodology." *Id.* at 15.

- Various challenges to EPA's prior small-refinery-exemption decisions were pending, including the *RFA* case. *Id.* at 21-22.

API also explained that there were serious legal flaws with EPA's underlying grants of widespread small-refinery exemptions, including that they were not proper "extensions" of existing exemptions, and that EPA's disproportionate economic harm analysis was flawed because obligated parties are generally able to recoup RIN costs in the price of the fuel they sell. *Id.* at 24-34. These arguments were essentially the same as the reasoning of the *RFA* decision. *See* Part II, *infra*.

API and others thus urged EPA not to move forward with reallocation of projected small-refinery-exempt volumes, for these and other reasons.

D. EPA's Final RFS 2020 Rule Adopted the Supplemental Proposal's Approach to Reallocation.

EPA instead finalized its proposed approach, using a three-year historic average of past small-refinery-exempt volumes to "project" future exempt volumes in 2020. 85 Fed. Reg. at 7,049-53. EPA admitted that its "SRE policies have changed over time," but nevertheless contended that its three-year average would account for "the variability in number of petitions, volumes of gasoline and diesel, changing circumstances for small refineries, changes in EPA's policies, and other factors that change from year to year." Response to Comments at 175; *see also* 85 Fed. Reg. at 7,052.

EPA also claimed that its underlying small-refinery-exemption policy was "beyond the scope" of the rulemaking, except for its new determination that it could grant partial exemptions. Response to Comments at 182-83. Nevertheless, EPA chose "to respond on the merits to some of these comments." *Id.* at 184. EPA argued at length that it *could* grant exemptions to small refineries that had not continuously maintained their exemptions. *Id.* at 185-87. EPA also argued that its disproportionate economic harm analysis was not flawed, because it could "broadly" consider disproportionate economic harm "other than RIN cost pass-through." *Id.* at 187.

II. The *RFA* Decision.

In *RFA*, the petitioners challenged three specific small refinery exemptions, two for the 2016 compliance year and one for the 2017 compliance year. 948 F.3d at 1227-30. The Court vacated all three exemptions, and agreed with three of petitioners' specific legal challenges.

First, the Court held that by authorizing an "extension" of small-refinery exemptions, the statute requires a small refinery to maintain its exemption each year to remain eligible for future extensions. *Id.* at 1244-51. The Court explained that the standard definitions of "extension" "dictate that the subject of an extension must be in existence before it can be extended." *Id.* at 1245. The Court also explained that this requirement was consistent with the structure of the RFS program, which was designed to funnel "small refineries toward compliance over time." *Id.* at 1246. Indeed, EPA itself had adopted this interpretation of "extension" in 2016. *Id.* at 1247. Accordingly, because "[n]one of the three small refineries here consistently received an exemption in the years preceding its petitions," "EPA exceeded its statutory authority in granting those petitions because there was nothing for the agency to 'extend.'" *Id.* at 1214.

Second, the Court held that EPA improperly interpreted the statutory "disproportionate economic hardship" requirement as allowing EPA to consider hardship arising from factors other than compliance with the RFS. *Id.* at 1253-54. The Court explained that "the plain language" of the statute "indicates that renewable fuels compliance must be the cause of any disproportionate hardship." *Id.* at 1253. The Court rejected EPA's attempt to base its exemptions, in part, on other factors such as "adverse structural conditions alone," "[a] difficult year for the refining industry," or other "hardships caused by overall economic conditions." *Id.* The Court concluded that EPA could not grant small-refinery exemptions, even "in part," based "on hardships not caused by RFS compliance." *Id.* at 1254.

Third, the Court found that EPA's small-refinery-exemption decisions at issue did not adequately address the pass-through of RIN costs. *Id.* at 1255-57. As the Court noted, EPA has

found repeatedly that refineries, even small refineries, "can recoup RFS compliance costs by passing them on to customers." *Id.* at 1255. However, in evaluating the small refinery exemption petitions at issue, "EPA did not analyze the possibility of RIN cost recoupment." *Id.* at 1256. Accordingly, the Court found that EPA had "failed to consider an important aspect of the problem." *Id.* at 1257 (citation omitted).

Argument

EPA should reconsider the RFS 2020 Rule in light of *RFA*. Under the Clean Air Act, reconsideration is mandatory if two criteria are met. *First*, the petition for reconsideration must be timely, meaning that "the grounds for such objection" raised in the petition "arose after the period for public comment (but within the time specified for judicial review)." 42 U.S.C. § 7607(d)(7)(B). This petition is timely because the *RFA* decision was issued after the close of the public comment period on the RFS 2020 Rule, and this petition was filed before the time specified for seeking judicial review of that rule expires on April 6, 2020.

Second, the objection raised by the petition must be "of central relevance to the outcome of the rule." *Id.* To satisfy that standard, a petitioner need only show that the objections "provide substantial support for the argument that the regulation should be revised." *Chesapeake Climate Action Network v. EPA*, No. 16-1349, 2020 WL 1222960, at *10 (D.C. Cir. Mar. 13, 2020); *see also Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 647 (D.C. Cir. 2019). EPA has adhered to this standard in the context of petitions for reconsideration under the RFS program.[8]

The *RFA* decision undermines multiple aspects of EPA's projection of small-refinery-exempt volumes for the 2020 compliance year, and so is of central relevance to the 2020 Rule. The *RFA* decision also has independent significance in demonstrating the shifting nature of small-refinery exemptions, and so provides further evidence that EPA cannot reliably predict small-refinery-exempt volumes.

I. This Petition Is Timely.

A Clean Air Act petition for reconsideration is timely "if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)." 42 U.S.C. § 7607(d)(7)(B); *see also Alon*, 936 F.3d at 647-48. This petition falls within that window.

The comment period on the 2019 Supplemental Proposal closed on November 27, 2019. 84 Fed. Reg. at 57,685. The *RFA* opinion was issued after that date, on January 28, 2020. Moreover, the time for seeking judicial review of the 2020 RFS Rule has not yet expired. That final rule was published in the Federal Register on February 6, 2020. Interested parties have 60 days—i.e. until 11:59 PM Eastern Time on April 6, 2020—to petition for review of that rule in the

[8] 79 Fed. Reg. 25,025, 25,207 (May 2, 2014) (reconsidering RFS 2013 cellulosic RVOs); EPA, Response to Petitions of the American Fuel & Petrochemical Manufacturers AFPM) and the American Petroleum Institute (API) for Reconsideration of the September 27, 2012 Final Rule Entitled Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume (Aug. 2013), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100GPHN.pdf.

D.C. Circuit. 42 U.S.C. § 7607(b)(1); *see also* FRAP 26(a)(4)(B); D.C. Cir. R. 26(a) ("filing must be completed before midnight Eastern Time to be considered timely filed that day"). As EPA has previously acknowledged, the deadline to file such a petition for reconsideration is "within 60 days after publication of the final rulemaking notice in the *Federal Register*."[9]

II. The *RFA* Decision Is of Central Relevance to the Outcome of the RFS 2020 Rule's Reallocation of Small-Refinery-Exempt Volumes.

A. The *RFA* Decision Eliminates Multiple Underpinnings of EPA's Projection of Small-Refinery-Exempt Volumes for 2020.

RFA undermines EPA's projections of small-refinery-exempt volumes for 2020, rendering the projections in the final rule far too high, in three main ways.

First, the Court made clear that a small refinery must have "submitted meritorious hardship petitions each year" to remain eligible for an exemption. 948 F.3d at 1246. The Court's lengthy analysis rejects the arguments EPA advanced in its RFS 2020 Response to Comments document on this issue. *Compare* RFA, 948 F.3d at 1244-51, *with* Response to Comments at 185-86. This change alone will drastically reduce small refinery exempt volumes for 2020, as at *most* the seven small refineries that received exemptions in 2015 (the low point of granted exemptions) would even be *potentially* eligible to receive them in 2020, assuming they maintained their exemptions in all previous and future years. This is in sharp contrast to the three-year average EPA uses in the RFS 2020 Rule, which reflects 28.33 petition grants a year (19 in 2016, 35 in 2017, and 31 in 2018).[10]

Second, the Court rejected EPA's argument that the agency could grant small refinery exemptions based "in part on hardships not caused by RFS compliance." *Id*. at 1254. Instead, the Court explained that the plain text of the statute limits the hardships EPA may consider to those "caused by compliance with statutory renewable fuel obligations." *Id*. at 1253. This holding contradicts EPA's statement in the RFS 2020 Response to Comments document "that EPA may consider a broad range of economic factors other than RIN cost pass-through." Response to Comments at 187. Moreover, EPA acknowledges that it "has never granted a small refinery exemption because the refinery could not pass through the costs of RINs," and instead states it "found disproportionate economic hardship for other reasons." *Id*. Under the holding in *RFA*, those "other reasons" are not a lawful basis on which to grant an exemption, unless they are "caused by RFS compliance." *RFA*, 948 F.3d at 1253.

---

[9] EPA, Response to Petitions of the American Fuel & Petrochemical Manufacturers AFPM) and the American Petroleum Institute (API) for Reconsideration of the September 27, 2012 Final Rule Entitled Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume (Aug. 2013), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100GPHN.pdf

[10] As noted, some observers indicate that only two small refineries received continuous exemptions. *See* InsideEPA, *Coronavirus Prompts EPA to Retain RFS Waivers, Delay Summer Gasoline* (Mar. 27, 2020) (*RFA* decision "could limit the small refiner waivers to just two refineries"). *See also* Letter from 13 Senators to President Trump (Feb. 27, 2020) ("it is believed that only two small refineries would still be eligible").

Third, the Court also held that EPA failed to adequately evaluate whether RIN costs are passed through by small refineries, such that no disproportionate economic hardship exists. *RFA*, 948 F.3d at 1257. EPA may have improperly evaluated other SRE petitions, and granted them impermissibly, by failing to adequately consider this issue.

Because of the confidential nature of small-refinery exemptions, it is not possible for third parties to determine how many small-refinery exemptions in EPA's three-year historic average suffer from these same failings, or how many 2020 petitions may have to be denied due to these flaws. Given the *RFA* decision, however, it seems likely that at least some EPA exemption decisions suffer from these same failings, and that application of *RFA* will thus further reduce EPA's 2020 projections.

In short, EPA's 2020 projections of small-refinery-exempt volumes are wildly off-base under the *RFA* decision. At most, a small fraction of the projected small-refinery-exempt volume should actually receive exemptions under the *RFA* decision. Accordingly, the *RFA* decision is "of central relevance to the outcome of the rule," and warrants granting reconsideration. 42 U.S.C. § 7607(d)(7)(B).

EPA itself has effectively acknowledged that the *RFA* decision meets the standard for reconsideration, with Administrator Wheeler stating that the *RFA* decision "of course goes to the heart of the small refinery exemption program,"[11] and acknowledging that EPA must "take a look at what that means for all the small refineries."[12] Similarly, in requesting an extension of time to consider a petition for rehearing before the Tenth Circuit, EPA noted that the Court's opinion "could also have significant practical impacts on the RFS program going forward." EPA Mot., Doc. 010110315751, No. 18-9533 (10th Cir. filed Mar. 6, 2020).

B. The *RFA* Decision Has Independent Significance Justifying Reconsideration.

The *RFA* decision also has independent significance: it demonstrates that EPA's small-refinery exemption policy is in flux and the projected exempted gasoline and diesel volumes of 7.26 billion gallons for 2020 are unreasonably high compared with the 2013-2015 EPA data.

Moreover, other such judicial challenges are pending. At least one other pending challenge to EPA's grant of small-refinery exemptions contests *all* of EPA's 2018 exemptions. *Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir.). Likewise, challenges brought by small refineries whose exemption requests were denied are pending. *See, e.g.*, *Suncor Energy, Inc. v. EPA*, No. 19-9612 (D.C. Cir.); *Ergon-West Virginia, Inc. v. EPA*, No. 19-2152 (4th Cir.); *Big West Oil LLC v. EPA*, No. 19-1197 (D.C. Cir.); *Sinclair Wyoming Refining Co. v. EPA*, No. 19-1196 (D.C. Cir.). The outcome of any or all of these cases could prompt yet further shifts to EPA's small-refinery-exemption policy. *See also Advanced Biofuels Ass'n v. EPA*, No. 18-1115, 2019 WL

---

[11] Testimony of Administrator Wheeler, *Hearing on the Fiscal Year 2021 EPA Budget*, 1:35:00 (Feb. 27, 2020), *available at* https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-fiscal-year-2021-epa-budget

[12] Energy.Agwired, *Wheeler: Court Decision Could Change Small Refinery Program* (Feb. 8, 2020), http://energy.agwired.com/2020/02/08/wheeler-court-decision-could-change-small-refinery-program/

6217965, at *4 (D.C. Cir. Nov. 12, 2019) (per curiam) (noting with respect to small-refinery exemptions that "EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review," but also observing that further challenges could be brought, including to EPA's August 2019 grant of small refinery exemptions for the 2018 compliance year).

Accordingly, reconsideration of EPA's ability to make *any* reasonably accurate projection of small-refinery-exempt volumes for 2020 is warranted in light of the Tenth Circuit's decision.

C. Granting Reconsideration Is Appropriate Notwithstanding Private Parties' Pending Requests for Rehearing of the *RFA* Decision.

Reconsideration is warranted even though the small-refinery intervenors in the *RFA* case have sought rehearing and rehearing *en banc* before the Tenth Circuit, and the deadline to file a petition for a writ of certiorari has not yet expired. Reconsideration is mandatory where the statutory criteria are satisfied, and the statute contains no exception based on the possibility of discretionary judicial review. That consideration is dispositive on its own, but other considerations lend additional support to the conclusion that the pending rehearing petitions should not prevent EPA from granting reconsideration.

First¸ EPA itself has not filed a rehearing petition, and its time to do so has expired. As the D.C. Circuit has explained, "[i]f EPA disagrees with this court's interpretation of the Clean Air Act, *it* should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court." *Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) (emphasis added). Moreover, Administrator Wheeler has indicated that EPA will "comply with the Tenth Circuit opinion."[13]

Second, the *RFA* panel's decision was unanimous and conflicts with no other judicial decision. *See* EPA Mot., Doc. 010110315751, No. 18-9533 (10th Cir. filed Mar. 6, 2020) (noting that the Court's interpretation "is one of first impression"). It is thus unlikely that further review will be granted. For example, the 10th Circuit heard only one case *en banc* in 2019 and 2017,[14] and no cases at all in 2018 and 2016.[15] The odds of a hypothetical petition for writ of certiorari being granted are also low. Indeed, no RFS decision to date has been subject to *en banc* or Supreme Court review.

---

[13] Testimony of Administrator Wheeler, *Hearing on the Fiscal Year 2021 EPA Budget*, 1:35:20 (Feb. 27, 2020), *available at* https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-fiscal-year-2021-epa-budget

[14] https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2019.pdf
https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2017.pdf

[15] https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2018.pdf
https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2016.pdf

Third, regardless of the outcome of the Tenth Circuit case, the fact that a unanimous panel found EPA's small-refinery exemption policy unlawful in multiple respects is of itself highly significant and warrants EPA reconsidering, among other issues, whether it has the ability to make sufficiently accurate projections of small-refinery exemptions. *RFA* also bears directly on the likelihood that EPA's past, present, and future small-refinery exemptions will survive judicial review, which again is directly relevant to EPA's attempts to accurately project small-refinery-exempt volumes.

Fourth, the reconsideration process will take time, yet the 2020 compliance year is already well underway. For example, petitions relating to reconsideration of the point of obligation were filed in February 2016 but were not resolved until November 2017.[16] *See also* EPA Mot., Doc. 010110315751, No. 18-9533 (10th Cir. filed Mar. 6, 2020) (stating that "EPA will require significant time to consider any potential actions in response" to the *RFA* opinion).

Fifth, EPA may have discretion to adopt some or all of the changes described by the Tenth Circuit, regardless of the ultimate outcome of that litigation, and there may be policy or other reasons for EPA to do so (e.g., reducing future litigation risk, providing increased RIN-market certainty and stability). Indeed, EPA's own 2019 Supplemental Proposal and RFS 2020 Rule demonstrate that the agency believes it has significant discretion on these issues, and the agency in fact altered aspects of its small-refinery-exemption policy in the RFS 2020 Rule.

Finally, EPA asserts discretion to move forward with reconsideration even if the Clean Air Act's requirements for mandatory reconsideration are not satisfied. *See* Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-420-R-17-008, at 7 (Nov. 2017) (undertaking reconsideration rulemaking process even where it "appears that the petitions for reconsideration ... do not meet the statutory criteria for such petitions set forth in CAA 307(d)(7)(B)"); *see also*, *e.g.*, EPA Br., *Mexichem Specialty Resins, Inc. v. EPA*, 2014 WL 4793854, at *30 (D.C. Cir. filed Sept. 26, 2014) ("The Act says nothing, however, that even suggests that EPA is somehow forbidden from granting reconsideration on any lesser showing ...."). Accordingly, even if EPA believes that the Clean Air Act's statutory requirements for mandatory reconsideration are not met, EPA should still exercise its discretion to begin a reconsideration process.

Conclusion

The *RFA* decision dramatically narrows EPA's small refinery exemption program, and thus bears directly on EPA's decision in the RFS 2020 Rule to reallocate projected small-refinery-exempt volumes to other obligated parties. Accordingly, EPA should grant this petition for reconsideration and institute a rulemaking proceeding to reconsider the reallocation-related portions of the RFS 2020 Rule. In a revised 2020 rule, EPA should decline to reallocate volumes for small-refinery exemptions not granted as of the date of the final rule. Alternatively, EPA should significantly reduce the projected small-refinery-exempt volume for 2020 in light of the *RFA* decision.

---

[16] 81 Fed. Reg. 83,776 (Nov. 2016) (noting dates of petitions); Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-420-R-17-008 (Nov. 2017) (denying petitions).

* * *

Thank you for your consideration of these important issues. We look forward to working with you and your staff to resolve them. Please feel free to contact me if you have questions or need more information.

Sincerely,

/s/ Maryam Hatcher

Maryam Hatcher
Counsel
American Petroleum Institute