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March 25, 2019

Via Electronic Mail

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
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RE: Supplement to Petition for Reconsideration and Rulemaking and Request for
Administrative Stay regarding Small Refinery Exemptions

Dear Administrator Wheeler:

On July 31, 2018, Producers of Renewables United for Integrity Truth and Transparency (Petitioner)¹ submitted a Petition for Reconsideration and Rulemaking and Request for Administrative Stay. The petition related to EPA's handling of small refinery exemptions under the Renewable Fuel Standard (RFS) program. Although we believe that by re-asserting that it has authority to grant retroactive exemptions in the final 2019 Renewable Fuel Standard EPA has effectively denied aspects of the July 31, 2018 petition for reconsideration,² Petitioner also raised concerns with EPA's lack of transparency and refusal to provide information regarding its implementation of the statute's small refinery exemption provisions and 40 C.F.R. §80.1441. As such, the petition included a request for rulemaking to improve the transparency of EPA's small refinery exemption program. Information that has recently come to light provides further support for the request for greater transparency with respect to EPA's handling of small refinery exemptions. Thus, Petitioner submits this supplemental petition to request that EPA promptly disclose basic information regarding extensions of small refinery exemptions, including the information outlined in its proposed Renewable Enhancement and Growth Support ("REGS") Rule, 81 Fed. Reg. 80,828, 80,934 (Nov. 16, 2016).

¹ Petitioner includes biomass-based diesel and ethanol producers that participate in the RFS program.

² Petitioner submitted a Petition for Review on the 2019 final RFS on February 9, 2019 (Case No. 19-1036).

Petitioner also reasserts its request for an administrative stay on taking any further action with respect to small refinery exemptions until EPA provides the public with transparency on EPA's handling of the small refinery exemptions, including an explanation of its claimed authority in granting such exemptions, its criteria for considering and granting such exemptions, and other information needed for the market to understand how EPA is complying with its regulations and the statute in granting "extensions" well after small refineries have lost their exemption or have shown that they can comply with the volume requirements. Petitioner believes that EPA is required to provide notice and comment on structural and process changes made to its handling of small refinery exemptions, rather than amend its regulations through closed-door informal adjudications as EPA has been doing. Moreover, it is an abuse of discretion not to provide the public with notice and opportunity to comment on EPA's handling of these exemptions, given the significant impacts EPA's expansion of these exemptions has had on the program and the biofuels industry.

Since the petition for reconsideration/rulemaking was submitted, EPA has provided data showing a substantial increase in requests for "extensions" of the small refinery exemption. EPA now shows 39 pending requests for small refinery exemptions for compliance year 2018, which is the largest number of requests submitted to EPA, according to the data provided so far. On March 20, 2019, it was reported that EPA is likely to grant "partial" exemptions to some of these refineries.³ Use of partial exemptions is yet another change in EPA's handling of small refinery exemptions from what is in its regulations and does not appear grounded in the statute.⁴ *See also* Br. for the Pet'r at 35-38, 47-54, *Advanced Biofuels Ass'n v. EPA*, No. 18-1115 (D.C. Cir. filed Mar. 6, 2019). Even if EPA granted one partial exemption previously,⁵ EPA has basically been granting each and every request in recent years.⁶ EPA continues to take these actions behind closed doors, while at the same time acknowledging that the RIN-market and RFS participants need greater transparency. *See* 84 Fed. Reg. 10,584 (Mar. 21, 2019). EPA recognizes improved market transparency "helps obligated parties and other market participants make informed decisions" and "can reduce information asymmetry among market participants increasing confidence in the market." *Id.* at 10,608.

EPA's lack of transparency is purportedly based on claims of confidential business information (CBI) by small refineries. In its proposed REGS Rule, however, EPA proposed to codify a determination that basic information regarding the exemptions is not considered CBI and that such information should be provided to the public on regular basis. 81 Fed. Reg. at 80,934.⁷

³ *See* Jarrett Renshaw, *EPA likely to grant partial waivers from U.S. biofuel laws for 2018: sources*, Reuters, Mar. 20, 2019, <https://www.reuters.com/article/us-usa-epa-biofuel/epa-likely-to-grant-partial-waivers-from-u-s-biofuel-laws-for-2018-sources-idUSKCN1R12LN>.

⁴ Even though there is some report language for appropriations that may touch on small refinery exemptions, Congress has not amended the statute, and the public has had to file litigation to get a glimpse into how EPA handles these requests in response.

⁵ *See, supra* n.3.

⁶ EPA has denied zero requests for compliance years 2016 and 2017.

⁷ The proposed regulation would provide: "The following information related to petitions submitted under this section that have been accepted by EPA for evaluation is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner's name. (2)

There, EPA determined correctly “that basic information related to EPA actions on petitions for RFS small refinery and small refiner exemptions may not be claimed as confidential business information.” *Id.* at 80,909. To date, EPA has declined to finalize its 2016 proposal, leaving interested parties to glean from congressional testimony and leaked reports to the press bits and pieces of information as to how it interprets its authority and regulations. Indeed, because EPA is acting outside its regulations, the public has been forced to initiate litigation to try to identify EPA’s claimed authority in its expansion of the small refinery exemptions and credits under the RFS (42 U.S.C. §7545(o)) and its rationale for taking such impermissible actions. This is directly contrary to EPA’s statutory obligations to ensure the RFS volumes are being met (and to do so through regulations), to the promises EPA made to Congress, and to good governance.

The requested information regarding exemption extensions is critical to assessing EPA’s implementation of the small refinery exemptions and the proper functioning of the RIN market. The aggregated data that EPA currently discloses on the number of requests submitted and granted provides the public with little information on how EPA actually interprets its authority and evaluates extension requests. In particular, this aggregated information provides no information on the impact of any individual exemption since it does not provide any information about the specific volumes being exempted and when, and whether the refinery retired RINs and is seeking “unretired” or “new” RINs to replace those RINs, which would indicate whether, when and how many RINs may be (illegally) re-entering the market. This allows small refineries to gain a competitive advantage over the rest of the market, by having access to information no one else can obtain, and to manipulate the RFS regulations and market, by picking and choosing what regulations it must follow as an obligated party or when it can dump RINs into the market as an exempt refinery.⁸ Apparently recognizing the inconsistencies between its current regulations and EPA’s “practice” in allowing retroactive exemptions, EPA’s recent proposal on RIN reforms proposes different treatment for small refineries. *See, e.g.*, 84 Fed. Reg. at 10,618. This proposal does not address the concerns raised regarding potential impacts to the market or EPA’s failure to ensure the required volumes (or EPA’s failure to provide notice and comment on EPA’s interpretation of the small refinery exemption provisions).

EPA has, in fact, provided no basis for withholding as CBI such basic information as a small refinery’s request for an extension of the small refinery exemption under the RFS program, EPA’s determination as to that request (and the rationale in support), and the impact of those

The name and location of the facility for which relief is requested. (3) The general nature of the relief requested. (4) The time period for which relief is requested. (B) The following information related to EPA determinations on petitions submitted under this section is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner’s name. (2) The name and location of the facility for which relief was requested. (3) The general nature of the relief requested. (4) The time period for which relief was requested. (5) The extent to which EPA either granted or denied the requested relief. (C) The EPA will disclose the information specified in paragraphs (e)(2)(iv)(A) and (B) of this section on its Web site, or will otherwise make it available to interested parties, notwithstanding any claims that the information is entitled to confidential treatment under 40 CFR part 2, subpart B.”

⁸ EPA imposes limitations on a small refinery’s ability to separate RINs, which are not applicable to refiners that are obligated parties. 40 C.F.R. §80.1429(b).

exemptions on the program.⁹ As EPA explained in the REGS proposal, the fact of seeking an extension and EPA's decision on that exemption is not CBI. In fact, some companies have publicly disclosed that they have received exemptions under the RFS program, even assigning a value to the RIN "savings" from those exemptions that can provide insight into the scope of the exempted volumes associated with their individual exemption (particularly where the U.S. Energy Information Administration provides information on refinery capacities).¹⁰ Other refineries have admitted they have received or sought exemptions in litigation. In other words, these businesses have not taken action to ensure against public disclosure, even disclosing the information themselves, and there is no risk that they will not continue to seek extensions (if eligible) were EPA to provide more specifics on who is requesting and receiving exemptions.

Recently, EPA posted a notice of intent to sue letter from Kern Oil & Refining Co., dated February 7, 2019,¹¹ which provides the same information that EPA had proposed to provide for all exemptions. That is, through this letter, EPA has posted information related to the name and location of the refinery seeking the exemption and the nature and extent of the relief requested (*e.g.*, relieving an obligation of 23 million RINs for compliance year 2017). This is further evidence that EPA does not believe that this type of information is CBI and, thus, it is unclear how EPA could continue to refuse to provide information regarding its decisions with respect to requests for extensions of the small refinery exemptions to the public. There are numerous Freedom of Information Act and Congressional requests to make this information publicly available. Given the strong, and widespread, interest in this information, EPA should make any

⁹ In testimony before the Senate Environment and Public Works Committee, you acknowledged that granting of small refinery exemptions "takes barrels away" from the RFS requirements. Hearing on the Nomination of Andrew Wheeler to be Administrator of the Environmental Protection Agency before the U.S. Senate Committee on Environment and Public Works, Jan. 16, 2019, Tr. at 54, *available at* <https://www.epw.senate.gov/public/cache/files/6/c/6ca552e9-7080-46b2-9aba-50f858dbfb31/EFD9580A8C9CFC98C19BFF1248249EC7.spw-011619.pdf>.

¹⁰ The Small Refiners Coalition, which included ten companies, submitted comments opposing EPA's REGS Rule proposal, asserting that the proposal would "necessarily reveal information about the company's financial position." EPA-HQ-OAR-2016-0041-0317 (Feb. 16, 2017) at 1 n.1, 7. But the proposal would not release any financial information of the company, and, significantly, the Coalition revealed that its members have sought and received exemptions, showing that the fact that these companies have sought or received an exemption is not the type of information that the company normally treats as confidential. *See, e.g.*, EPA Letter to Perkins Coie, Sept. 7, 2016, at 2; *see also id.* at 1 (quoting Coalition's assertion that some of its members "are in very weak financial positions"); Delek US Holdings, Inc., Form 10-K for fiscal year ending Dec. 31, 2018, at 63, 82, F-49, *available at* <https://delekus.gcs-web.com/node/15566/html>. Moreover, there is no explanation provided as to how releasing general information as to the scope and reasons for EPA's decision would harm the small refinery, which is seeking relief from regulatory obligations.

¹¹ Available at https://www.epa.gov/sites/production/files/2019-02/documents/kor_noi_2_7_2019.pdf.

information it provides on small refinery exemptions to individual requestors available to the public as a whole.

Additionally, as EPA explained, basic information on who is requesting and receiving exemptions and the timing and extent of those exemptions is necessary to identify the “nature and scope of work that the EPA has decided to undertake.” 81 Fed. Reg. at 80,910. Of particular concern to Petitioner is that the Kern Oil letter requests the same treatment as HollyFrontier and Sinclair Oil to issue current-year RINs to account for RINs it already has retired. Although Petitioner believes EPA lacks such authority, this request further illustrates why EPA’s practice of taking these actions behind closed doors is against good governance. To the extent EPA believes it has authority to allow unretiring of RINs, including creation of new RINs, it was required to undergo notice-and-comment rulemaking. Part and parcel of this obligation is to provide the public with the information needed to understand the scope and potential impacts of EPA’s actions. In its recent proposal on RIN reforms, EPA noted some of its “practice” in how it handles small refinery exemption requests, which have not been subject to notice and comment. This is insufficient to meet EPA’s substantive and procedural obligations under administrative law and the RFS statute.

For the foregoing reasons and as outlined in its July 31, 2018 petition, Petitioner requests that EPA finalize its determination that basic information regarding small refinery exemptions be publicly disclosed. Several economists have tied volatility in RIN markets to the uncertainty created by EPA’s actions done behind closed doors.¹² EPA itself has acknowledged the need for greater transparency in the RIN market, and, significantly, EPA committed to “provide more transparency on how [EPA] make[s] these [small refinery exemption] decisions.”¹³ Indeed, this information can be provided without finalizing the regulation, in which EPA was simply codifying its determination to facilitate disclosure. This information could be provided on the same website EPA already initiated for small refinery exemptions. Thus, Petitioner urges EPA to begin providing the basic information on who is seeking and receiving exemptions and the timing and extent of those requests and exemptions, as soon as possible.¹⁴

In any event, given that EPA has already made Kern Oil’s letter public, there is no valid reason to keep secret any action done in response to that letter, including granting or denying the request for an exemption and request to allow generation of current-year RINs. At a minimum,

¹² Hearing before Subcommittee on Environment, U.S. House Committee on Energy and Commerce, July 25, 2018, Preliminary Tr. at 619-623, 649-650, 1120-1124, *available at* <https://docs.house.gov/meetings/IF/IF18/20180725/108610/HHRG-115-IF18-Transcript-20180725.pdf>.

¹³ Hearing Before U.S. Senate Committee on Environment and Public Works, Aug. 1, 2018, Tr. at 75, *available at* https://www.epw.senate.gov/public/_cache/files/a/f/afffe2f0-6008-4c2a-af13-87d1cb26d6be/7564C79E99E118F3853D747150119932.spw-080118.pdf; *see also id.* at 30, 47, 55-58, 84-85; 83 Fed. Reg. 63,704, 63,707 (Dec. 11, 2018).

¹⁴ On March 14, EPA indicated it had granted five more exemptions for compliance year 2017. As of March 23, 2019, EPA has indicated there are 42 requests for small refinery exemptions still pending (1 for compliance year 2016, 2 for compliance year 2017, and 39 for compliance year 2018).

Kern Oil has waived any rights to treat the decision as confidential and, therefore, EPA must provide its determination with respect to the Kern Oil letter to the public.

Request for Administrative Stay

EPA continues to make significant and drastic changes to its handling of small refinery exemptions without undertaking public notice and comment or even providing any guidance to the public to understand its actions and ensure EPA is complying with its statutory obligations under the RFS program. These changes exceed the statutory authority granted by Congress. Challenges to these violations of Congress's directives are likely to succeed on the merits of any litigation. In addition, this lack of transparency has continued to have effects on the market despite EPA's meager attempts to provide more information.

Biofuel producers, such as members of Petitioner, will be harmed absent a stay. The purpose of the RFS program was to promote biofuel production and incentivize investment. Biofuel producers have taken action in reliance on the volume requirements and Congressional intent. EPA's actions have reduced demand, causing biofuel producers to lose sales and customers. The volatility in the market caused by EPA's actions have caused producers to lose their investments and have impacted their profitability. Those that own RINs have lost the value of those RINs, which, in turn, restrict their ability to continue to invest and grow the program. These are harms that, while economic, are not recoverable and put biofuel producers at very real financial risk if they continue to operate in a market where EPA's actions are artificially devaluing RIN prices. On the other hand, small refineries will not be harmed. They delayed in seeking an extension, and EPA has confirmed, again and again, that small refineries can recover their costs of RINs. Moreover, the statute allows small refineries to claim a deficit as they await action on any request. Indeed, it is not clear whether small refineries have taken any actions to come into compliance in future years, as Congress (and EPA) intended.

A stay is also in the public interest. By expanding the small refinery exemption and failing to adjust for the lost volumes, EPA is reducing the displacement of petroleum-based fuels with renewable fuels. As Congress has recognized, renewable fuels, particularly advanced biofuels, provides environmental benefits. EPA's actions, thus, allow for increases in greenhouse gas emissions, air toxics, and other pollutants that are harmful to the public health. RINs have also provided rural economic benefits, and the reduced demand has had a negative impact on farmers. It also can affect the benefits to consumers, where EPA has consistently found that the RFS program has contributed to lower prices at the pump. This is particularly concerning today given the recent increases in fuel prices. It is also in the public benefit that EPA follows good governance. The closed-door actions by EPA undermine the regulatory process and the public's faith in the government.

Thus, an administrative stay is appropriate and necessary while the Agency considers and addresses the numerous flaws in its handling of the small refinery exemptions. Under 42 U.S.C. § 7607(d), EPA may grant a 90-day stay pending reconsideration, and we respectfully request that

it do so. We also believe that justice requires a stay under 5 U.S.C. § 705.¹⁵ Because of the substantial expansion of exemptions EPA has recently granted, which are clearly not “extensions” under the statute, Petitioner also does not believe EPA is limited by the statutory requirement to respond within 90 days of receiving a request (and many of these petitions have already been pending at EPA for more than 90 days).

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

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¹⁵ We believe the ongoing harms caused by EPA’s actions and the clear violations of the statute require the stay be granted immediately. As such, this request should not be deemed as restricting the ability to assert that seeking a stay with the agency would be impracticable.

¹⁶ Mr. Muys was formerly with Sullivan & Worcester LLP.