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CONFIDENTIAL BUSINESS INFORMATION

December 30, 2020

VIA CERTIFIED MAIL

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Re: [redacted] - Petition for Waiver Under Clean Air Act Section 211(o)(7)(A)(i) of the Renewable Fuel Standard ("RFS")

Dear Administrator Wheeler:

[redacted] ([redacted] or the "Company") [redacted] ("Refinery") [redacted] As demonstrated in [redacted] *See* Tabs A and B, attached.

In the alternative, [redacted] requests that EPA consider the Company's [redacted] as a request that EPA use its statutory waiver authority to waive [redacted] renewable volume obligations ("RVOs") for the 2019 and 2020 compliance years based on severe economic harm to [redacted] and its surrounding region. Clean Air Act ("CAA" or "Act") § 211(o)(7)(A)(i); 42 U.S.C. § 7545(o)(7)(A)(i). A waiver is appropriate when the Administrator determines that implementation of the RVOs would severely harm the economy or environment of a State, a region, or the United States.

Here, the economic crisis that has accompanied the COVID-19 pandemic is affecting [redacted] in dramatic fashion. Demand for transportation fuel has plummeted and with it, any chance that [redacted] will experience meaningful economic improvement in the near future. The impact of COVID-19 combined with the exorbitant cost of RINs have already forced the Company to defer certain projects and lay off a portion of its workforce. Failure to provide relief from the Company's RVOs for 2019 and 2020 could result in further project deferral or cancellation, and additional layoffs of both direct employees and contractors, in turn causing

severe economic harm in [redacted] and the [redacted] region in which [redacted] operates. This puts the Refinery's future and the well-being of its employees and community at great risk, irreparably harming the Company, its contractors, and its larger regional community.

This emergency situation is precisely the type of event Congress envisioned when it established EPA's waiver authority under the CAA. As explained in further detail below, EPA is authorized to use its waiver authority to provide targeted relief, and it should do so here. EPA must now use this authority to prevent the burdens of the RFS program from imposing severe economic harm upon the state of [redacted] and the [redacted] region in which [redacted] operates.

I. EPA's Failure to Grant Relief Will Severely Harm the Economy of [redacted] and the Surrounding Region.

On Friday, March 13, 2020, President Trump declared a national emergency related to the control of COVID-19. Nine months later, in early December 2020, the global number of daily cases of COVID-19 increased to a record high.[1] The macroeconomic impacts of the pandemic have resulted in suppressed international demand for refined products including gasoline and diesel. EIA forecasts global liquid fuels consumption in 2020 will average 8.8 million bpd lower than in 2019.[2] Further, global crude oil price wars have only compounded the disastrous market conditions, straining crude oil and refined product storage and transportation infrastructure, particularly in [redacted].

These macroeconomic impacts have created the most challenging environment since the Company's formation, and the Company's financial health continues to deteriorate as the year progresses. [redacted]'s gasoline crack spread, a measure which approximates a refinery's profitability, [redacted] in March, and remains below pre-COVID-19 levels today, forcing the Refinery to decrease crude oil throughput, often running near crude oil throughput minimums. Lower throughput makes the Refinery even less competitive, as it is unable to spread its costs across larger production volume. [redacted] has also been forced to either cancel or defer all major capital projects except those critical to the environment, health, safety or reliability. For example [redacted] These extraordinary [redacted] *See* Tabs A and B for more detail.

Adding to the effects of the pandemic, the burden of RFS compliance is unsurmountable for the Refinery, which due to its location, configuration and other factors beyond its control,

[1] Covid-19 Live Updates: Nearly 200,000 New Cases Reported in the U.S., WALL STREET JOURNAL (Dec. 16, 2020), https://www.wsj.com/livecoverage/covid-2020-12-16#:~:text=The%20U.S.%20reported%20more%20than,daily %20tally%20has%20topped%20200%2C000.

[2] Short-Term Energy Outlook, EIA at 12 (Dec. 8, 2020), available at https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf (last accessed Dec. 16, 2020).

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must purchase RINs to satisfy its compliance obligation. As of September 30, the cost of RFS compliance for the 2020 compliance year alone was estimated at over [redacted] million, and is significantly higher than this today, as RIN costs have increased roughly 50% since September, and roughly 300% since January, likely in response to the ruling by the United States Court of Appeals for the Tenth Circuit in *Renewable Fuels Association v. EPA*.[3] Because [redacted] is a RIN buyer, it cannot avoid the harm of the exorbitant RIN prices by blending and separating RINs. The Company is doing everything it can to preserve its viability, taking drastic steps to reduce its operating expense per barrel ***by almost*** [redacted] during the second half of 2020 compared to the same period last year. But, none of these efforts can offset the increasingly crushing impact of the RFS on the Refinery, which now represents ***roughly*** [redacted] ***of the Refinery's total cost per barrel***, which costs are completely outside the Refinery's control. At current RIN prices, the cost of compliance with the RFS, by itself, threatens the future of the Refinery on which so many [redacted] rely. EPA must grant the Company relief from the RFS to avoid the severe economic harm closure of the Refinery would inflict upon [redacted] and the region the Refinery serves.

Although small by refining standards, the Refinery is an important part of the local and regional economy. The Refinery has the capability to process blends of a variety of crude oil [redacted] and most of the Refinery's [redacted] In the [redacted] community where [redacted] operates, the Company accounts for disproportionately large positive contributions to high paying skilled jobs for [redacted], municipal tax revenues, spinoff employment to myriad other small local businesses, and a source of fuels that would otherwise be provided at higher cost by major producers. The negative economic consequences of refinery plant curtailment or closure would be felt not only at the refinery level, but also along the oil and gas industry's value chain.

Congress created the RFS program, in part, to reduce the country's reliance on foreign oil and increase energy independence and security. Absent relief, the RFS would do just the opposite. It would force small refineries like [redacted] out of the market, reduce domestic production of refined petroleum products, and leave parts of the country like [redacted] with reduced fuel supply—all of which *reduce* US energy independence and security. Any disruption in domestic supply will necessarily increase imports of foreign transportation fuel to fill the void. The pandemic has made foreign fuel prices even more volatile and has made uncertain the availability of foreign imports in light of border closures and impeded transport. Increased reliance on foreign imports of transportation fuel will increase price volatility and cause further uncertainty in the economic future of states like [redacted].

Viewing the above outlined economic and national security factors against the backdrop of the United States' current economic environment should encourage EPA to do everything in its power to help [redacted] remain in business. By waiving [redacted]'s 2019 and 2020 RVOs, EPA would ensure the Company is able to continue to operate at this crucial time.

[3] 948 F.3d 1206, 1247 (10th Cir. 2020).

II. EPA Has Authority to Grant Relief to [redacted].

Congress provided EPA with the authority to issue tailored relief, including to a small refinery like [redacted]. The CAA authorizes the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, to waive in whole or in part the requirements of the RFS program to avoid severe economic harm to a state or region. The Administrator "may" do so, by reducing the "national quantity of renewable fuel." The text of section 211(o)(7)(A) of the Act reads:

> The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, **may waive the requirements of paragraph (2) in whole or in part** on petition by one or more States, **by any** person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the **national quantity** of renewable fuel required under paragraph (2)—
>
> (i) based on a determination by the Administrator, after public notice and opportunity for comment, that **implementation of the requirement** would severely harm the economy or environment **of a State, a region**, or the United States; or
>
> (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.[4]

The statute does not limit the agency's waiver authority to "nationwide" reductions or adjustments in the context of the annual rulemaking setting the nationwide standards. The choice of the words "national quantity" does not speak to how or where the national quantity must be reduced. For example, the "national quantity" of orange juice might be reduced by a freeze in Florida, even if California had a bumper crop. The use of the statutory language of discretion, "may," rather than "shall," and the flexibility to waive RFS program requirements "in whole or in part," cannot be reconciled with an exclusively nationwide approach. The statute is intended to give EPA flexibility to respond quickly (within 90 days) to emergencies (such as potential refinery closings) that threaten severe economic harm to a state or a region. Indeed, EPA has regularly used exactly this logic in providing targeted relief of seasonal RVP requirements in historical supply disruption events. If "national quantity" were meant to be read as "nationwide quantity," then the findings of harm to a state or region would have been omitted from section 211(o)(7)(A)(i) of the Act. The only determination of harm that would be necessary to justify a uniform, nationwide reduction of volume would be the third finding of harm, that is, harm to the United States as a whole.

A. A Holistic Reading of the Statute Confirms That the Administrator May Provide Tailored Relief.

The Administrator may waive, in whole or in part, the "requirements" in paragraph (2) (titled "Renewable fuel program"). Subparagraph 2(A) requires that gasoline and diesel fuel sold in the United States contain the "applicable volumes" of renewable fuel in subparagraph 2(B). The requirement to ensure that the "applicable volumes" are blended is delegated to individual

[4] 42 U.S.C. § 7545(o)(7)(A) (emphasis added).

refineries and importers through paragraph 2(A)(iii), which directs the Administrator to promulgate regulations with compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that "the requirements" of paragraph 2 are met. In promulgating its regulations, EPA chose to require that refiners and importers, but not blenders and distributors, ensure that the applicable volumes are blended by making them "obligated parties."

The clause "in whole or in part" indicates that the Administrator may tailor the antidote to "severe economic harm" to the source of the ailment. This point is buttressed when the grant of waiver authority is read as a whole: "The Administrator may waive … the requirements of paragraph (2) in whole or in part on petition by one or more States [or] by any person subject to the requirements of this subsection[.]" Read as a whole, the grant of authority to the Administrator—"may waive . . . in whole or in part"—gives the Administrator power to relieve a "person" of any of the "requirements" of paragraph (2) that are found to cause state, regional, or national harm. This reading is further supported by the fact that there are different and severable duties in paragraph (2). Thus, the structure of paragraph (2) itself supports the view that the Administrator may tailor the remedy to the problem, including the waiver of a refiner's renewable volume obligations to avoid state or regional harm where that refiner operates.

The use of the word "requirement(s)" in the waiver provision makes clear that individual obligations may be waived. Since EPA makes adjustments to the "applicable volume" on a nationwide basis by rulemaking every year, limiting the waiver to nationwide reductions would be untenable. The waiver becomes redundant of the annual adjustment if limited to a uniform reduction of nationwide volume. This reading of the use of the word "requirement(s)" in the waiver provision is further supported by EPA's implementing regulations. Those regulations effectuate the statute's "renewable fuel obligation" by imposing specific requirements on an "obligated party." In the section titled "To whom does the Renewable Volume Obligation apply?", an "obligated party" is defined as "a refiner that produces gasoline within the 48 contiguous states, or an importer that imports gasoline into the 48 contiguous states." The regulations then go on to state that "an obligated party must comply with the requirements." There can be no doubt that the waiver provision concerns the individual requirements of an "obligated party" because "paragraph (2)" incorporates the regulations by reference.

That the Administrator may provide tailored relief is also confirmed by the addition in 2007 of the right of "any person subject to the requirements of this subsection" to petition for a waiver. The use of the words "person" and "requirement" in describing both the petition of a regulated party and the scope of the waiver itself is strong textual evidence that the Administrator must have authority to tailor the waiver to a specific refinery in the state or region threatened with severe economic harm.

Indeed, the CAA defines "person" as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Because this definition was on the books in 2007, Congress is charged with knowledge of, and intent to adopt, the preexisting definition of "person" in the statute being amended. If relief is only available on a nationwide basis, then the right of "any person" to petition for a waiver becomes meaningless. Why add "any person" to those who have the right to request a waiver if these same "persons"

cannot get any meaningful relief under the statute? Constructions that render any term—or here an entire amendment of the statute—superfluous are always to be avoided.

Although the use of the waiver is conditioned on a showing of severe economic or environmental harm to a state or region, the harm to a state or region must, by definition, be derivative of harm to a particular refiner within the state. Loss of jobs, increases in fuel costs, shortages, increased reliance on foreign sources, etc., can only be remedied by giving relief to the owner of a specific refinery in the state or the region, rather than "nationwide" relief. This approach is perfectly logical. Congress chose not to base the waiver on a showing of economic harm to a particular "person" (meaning refinery owner) but instead tied relief only to harm to a larger geographical area. The design is to address public, not private, harms. But harm to the state or region from the RFS requirements can only be derivative of harm to the obligated parties within that state or region. The loss of major private refining assets is one obvious source of the kind of state and regional harm the statute is meant to address.

In order to harmonize the authorized petitioners, the state or regional harm determinations required by the statute's relief section must be read to allow a waiver to address specific requirements imposed by paragraph (2). Thus, a waiver of any one of these "requirements" to avoid individual economic harms is the means to avoid state or regional harm. As the EPA has itself observed, limiting the waiver authority to "nationwide" reductions would render the waiver provision useless and ineffective in addressing discrete harm to a state or region.

A reading where "national quantity" is construed to authorize only a uniform reduction on a nationwide basis is simply not the statute that was enacted into law. Attempting to use uniform nationwide reductions to avoid severe economic harm to "states" or "regions" is like using a canon to kill a fly. The tool is inefficient and unnecessarily destructive. Use of the waiver, if limited to nationwide relief, would require such an enormous nationwide downward adjustment of volume that a single waiver sufficient to avoid the shut-down of critical refining infrastructure in a particular state would cripple the entire program. No statute should be construed to contain useless or absurd provisions or to disserve the overall goal of the statutory program itself.

While [redacted] acknowledges that a few EPA waiver decisions contain dictum suggesting that a waiver can only be nationwide, those statements were only made in the context of denying relief on other grounds. Those decisions do not undertake a detailed statutory analysis of the waiver provision and its relationship to the rest of the CAA. Moreover, those decisions did not consider the effect of the addition in 2007 of the right of "any person" to petition for relief. Thus, there is no meaningful past precedent. Accordingly, the Administrator should treat the issue as one of first impression and apply the same canons of statutory construction as would a federal court.

B. Supreme Court Precedent Counsels in Favor of Targeted Relief.

Recent Supreme Court precedent confirms that the statutory scheme and the overall purpose of the statutory provision have a central role in the interpretation of any statute. This is because "the 'meaning—or ambiguity—of certain words or phrases may only become evident

when placed in context." Thus, to determine whether "national quantity" encompasses targeted as well as nationwide relief, a court must "read the words in their context and with a view to their place in the overall statutory scheme." Considering this phrase in light of the broader statutory context confirms that it must permit less than nationwide relief to be effective.

As the Supreme Court explained in *King v. Burwell*, it is misguided to construe a statutory phrase to categorically preclude action that the rest of the statute clearly contemplates. There, the Court found that giving "the phrase 'the State that established the Exchange' its most natural meaning," would result in there being no "'qualified individuals' on Federal Exchanges." This result was incongruous with the broader statutory scheme, which set requirements for both Federal and State Exchanges based on the participation of qualified individuals. The Federal Exchanges could not meet those requirements "if qualified individuals did not exist." This result suggested that "the meaning of that phrase may not be as clear as it appears when read out of context."

Finally, if there were any doubt about the Administrator's authority to grant a waiver tailored to the specific danger faced by a state or region, that doubt is removed by the introduction of the waiver authority by the word "may." This point finds further support in the fact that other provisions within paragraph (2) limit the Administrator's discretion by use of the word "shall." Given the very conscious use of "shall" and "may" in the same statute, "may" has to be read to confer on the Administrator the flexibility to address the situations that justify a waiver on the state itself.

C. Even If Reducing the "National Quantity" Requires a Uniform Nationwide Reduction, This Interpretation Can Apply Only to Waivers on the Administrator's Own Motion.

The only other plausible reading of paragraph 7 of the CAA would also authorize the Administrator to grant a waiver of a small refinery's 2019 and 2020 RVOs. Under this reading—which we do not believe is the best reading—the modifying phrase "by reducing the national quantity" would only limit the Administrator's waiver authority "on his own motion," and would not apply to waivers "on petition" by a State or refinery.

When the Supreme Court "has interpreted statutes that include a list of terms or phrases followed by a limiting clause," it has "typically applied an interpretive strategy called the "rule of the last antecedent." Under this rule, "a limiting clause or phrase…should ordinarily be read as modifying only the noun or phrase that it immediately follows." As the Court has explained, "[t]he rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." Conversely, "[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."

Applied here, the last antecedent principle suggests that the phrase "by reducing national quantity" modifies only the phrase that it immediately follows: "or by the Administrator on his own motion." This is because the qualifying phrase, "by reducing the national quantity," is not separated from the antecedent phrases by a comma. The doctrine of the last antecedent would thus provide that the phrases "on petition by one or more states" and "by any person subject to

the requirements of this subsection" are not constrained by the limitation of waivers to "national quantity."

Nor is the interpretation urged by the rule of the last antecedent overcome by "other indicia of meaning." To the contrary, the waiver provision's context fortifies the meaning that the syntactical rule commands. For example, under this construction the state and region may get relief "on petition" by waiver "in whole or in part" of specific requirements of paragraph (2). The Administrator, on the other hand—who is unable to petition him or herself—can act "on his own motion" to reduce the "national quantity" and would likely only do so, as it has in the past, when market constraints prevent the statutory volumes from being met.

But reading "national quantity" as a flexible tool, one that the Administrator can use to target waivers to determinations of state and regional harm, is the best reading of the statute. This reading comports with the text and purpose of the statute. It allows for the effective exercise of the waiver while it also maintains the limitations on the waiver authority intended by Congress. The key point is that the Administrator has the authority to grant this petition under any plausible interpretation of paragraph 7. Put another way, there is no plausible interpretation of paragraph 7 that would deny the Administrator the authority to waive specific volume requirements imposed on a refinery in a State or region threatened with severe economic harm.

III. Conclusion

For the forgoing reasons, [redacted] respectfully requests that EPA waive its 2019 and 2020 RVOs to avoid harm to the state of [redacted] and the [redacted] region in which [redacted] operates.

Thank you very much.

Very truly yours,

[redacted]

[redacted]

Attachments (containing Confidential Business Information)

cc: Mandy Gunasekara, EPA Chief of Staff (via electronic mail)
Anne Austin, Principal Deputy Assistant Administrator of EPA's Office of Air and Radiation (via electronic mail)
David Harlow, Senior Counsel to the Assistant Administrator of EPA's Office of Air and Radiation (via electronic mail)

Attachments contain information claimed as CBI and are not included in this document.