

July 31, 2018

Via Electronic Mail

The Honorable Andrew Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW  
Mail Code: 1101A  
Washington, DC 20460

RE: Petition for Reconsideration and Rulemaking and Request for Administrative Stay  
regarding Small Refinery Exemptions

Dear Acting Administrator Wheeler:

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), and the Administrative Procedure Act, Producers of Renewables United for Integrity Truth and Transparency (Petitioner)<sup>1</sup> respectfully submits this Petition for Reconsideration and Rulemaking and Request for Administrative Stay. This petition relates to EPA's recent handling of the small refinery exemption under the Renewable Fuel Standard (RFS) program. We request that EPA reconsider and revise the following final agency actions:

- 1) EPA's decision to allow obligated parties to issue 2018 Renewable Identification Numbers (RINs) related to production of biofuels that did not occur in 2018 ("Small Refinery Generated RINs");<sup>2</sup>
- 2) 40 C.F.R. § 80.1441; and
- 3) The volumes used to set the percentage standards by EPA for 2016, 2017 and 2018.<sup>3</sup>

---

<sup>1</sup> Petitioner includes biomass-based diesel producers that participate in the RFS program. These companies generate and/or hold RINs. As a result of EPA's actions, RIN values have substantially decreased. In addition, allowing these invalid RINs to enter the market reduces the actual gallon volumes that will be required in 2018, adversely affecting biofuel companies selling into that market.

<sup>2</sup> Jarrett Renshaw & Chris Prentice, *U.S. EPA Grants Refiners Biofuel Credits to Remedy Obama-Era Waiver Denials*, Reuters, May 31, 2018, <https://www.reuters.com/article/us-usa-biofuels-waivers-exclusive/exclusive-us-epa-grants-refiners-biofuel-credits-to-remedy-obama-era-waiver-denials-idUSKCN1IW1DW>.

<sup>3</sup> We are aware of a pending petition for reconsideration related to 40 C.F.R. §80.1405 submitted by the Renewable Fuels Association et al. We agree with the basic argument of this petition that EPA can, and must, make up for the lost volumes as a result of the recent grants of extensions of the small refinery exemption.

We believe EPA's recent handling of the small refinery exemptions violates the requirements under the Clean Air Act, requiring reconsideration of these final agency actions and invalidation of any RINs generated based on EPA's impermissible actions.

EPA's grant of retroactive extensions long after the compliance period and allowance of Small Refinery Generated RINs have had a significant impact on the market, requiring an immediate stay of any transfer or use of the 2018 Small Refinery Generated RINs and halting of any additional grants of small refinery exemptions or revival of prior year RINs in response to requests by small refineries. A July 12, 2018 letter to Senator Grassley from EPA indicates that EPA continues to grant exemptions for the 2016 and 2017 compliance years, and, thus, EPA may continue to do so months after the compliance period for those years has ended. EPA must come into compliance with the Clean Air Act before it takes any further action related to small refinery exemptions.

The adverse impacts of EPA's actions have only been exacerbated by EPA's lack of transparency on its handling of the small refinery exemptions. EPA's failure to provide notice and comment on allowing Small Refinery Generated RINs violates the Clean Air Act's procedural requirements. EPA's refusal to provide information regarding the small refinery exemptions is also contrary to EPA's own prior determinations. As such, we also request that EPA finalize proposed regulation 40 C.F.R. § 80.1441(e)(2)(iv), which was part of the proposed Renewables Enhancement and Growth Support Rule, 81 Fed. Reg. 80,828, 80,934 (Nov. 16, 2016). There, EPA explained that they had made a "determination 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. EPA was simply proposing to codify this determination.

## **BACKGROUND**

### **I. The RFS and the Small Refinery Exemption**

In 2007, the RFS was expanded to require that a *minimum* volume of transportation fuel sold or introduced into commerce in the United States include renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. 42 U.S.C. § 7545(o). Congress has made clear that EPA's regulations must "ensure" these minimum applicable volume requirements are met. *Id.* § 7545(o)(2)(A)(i). "Regardless of the date of promulgation, the regulations ... shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to *ensure*" the volumes are met. *Id.* § 7545(o)(2)(A)(iii) (emphasis added). Congress again stated that EPA must "ensure" the volumes are met through the setting of the applicable percentages, often referred to as the renewable volume obligations or RVOs. *Id.* § 7545(o)(3)(B)(i).

The RFS is a "technology-forcing" mandate, but Congress included an increasing volume requirement over time, recognizing that the market may need to take actions to adjust. Congress gave small refineries a "temporary exemption" from the RVO requirements until calendar year 2011. 42 U.S.C. § 7545(o)(9)(A). A small refinery is a refinery with an average crude oil throughput of no more than 75,000 barrels per day. *Id.* § 7545(o)(1)(K). This exemption may be "extend[ed]" if (1) a required study by the U.S. Department of Energy (DOE) found a small

refinery eligible for the temporary exemption would be subject to “disproportionate economic hardship” if required to comply with the RFS requirements, or (2) EPA determines, based on a request from the small refinery and in consultation with the Secretary of Energy, that the small refinery will suffer “disproportionate economic hardship.” *Id.* § 7545(o)(9)(A)(ii), (9)(B). Small refineries may request an “extension” “at any time,” and EPA must act on the petition within 90 days. *Id.* § 7545(o)(9)(B)(i), (iii). In evaluating the petitions, EPA must consider the DOE study “and other economic factors.” *Id.* § 7545(o)(9)(B)(ii). The statute also provides that small refineries that “waive[] the exemption” are eligible to generate credits. *Id.* § 7545(o)(9)(C), (o)(5)(A)(iii). Any credits generated have a limited life of 12 months. *Id.* § 7545(o)(5)(C).

In 2010, EPA promulgated regulations to implement the 2007 amendments to the RFS program. 75 Fed. Reg. 14,670 (Mar. 26, 2010).<sup>4</sup> EPA included a regulation outlining the process for small refineries to seek an extension of the temporary exemption. 40 C.F.R. § 80.1441. Under that regulation, a small refinery eligible for the temporary exemption was required to submit a verification to EPA by July 1, 2010. Those eligible refineries could obtain an extension based on the DOE study or based on a petition. For the latter, the petition “must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of § 80.1405 *and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.*” 40 C.F.R. § 80.1441(e)(2)(i) (emphasis added). To qualify for the extension, the refinery “must meet the definition of ‘small refinery’ in §80.1401 for the most recent full calendar year prior to seeking an extension *and must be projected to meet the definition of ‘small refinery’ in §80.1401 for the year or years for which an exemption is sought.*” *Id.* §80.1441(e)(2)(iii). “Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.” *Id.* The regulation speaks in prospective terms.

In 2010, EPA also assured the public that it will account for the volumes of gasoline and diesel “projected to be produced by exempt small refineries and small refiners” when setting the annual RVOs. 40 C.F.R. § 80.1405(c); 75 Fed. Reg. 76,790, 76,805 (Dec. 9, 2010); *see also* 75 Fed. Reg. at 14,716-14,717 (“Thus we have excluded their gasoline and diesel volumes from the overall nonrenewable gasoline and diesel volumes used to determine the applicable percentages until 2011.”); 77 Fed. Reg. 1319, 1324 (Jan. 9, 2012) (EPA “has also adjusted the final 2012 percentage standards to reflect the exemption of these small refineries from being RFS obligated parties in 2012.”).

Following the release of DOE’s small refinery study in 2009, Congress directed DOE to complete a reassessment and issue a revised report.<sup>5</sup> Based on DOE’s study, it was recommended to extend the exemption for thirteen small refineries based on a disproportionate

---

<sup>4</sup> 40 C.F.R. § 80.1441 was amended in 2014, 79 Fed. Reg. 42,128, 42,163 (July 18, 2014).

<sup>5</sup> The Senate Appropriations Committee “directed [DOE] to reopen and reassess the Small Refineries Exemption Study by June 30, 2010,” listing a number of factors that the Committee intended DOE to consider in the revised study. S. Rep. No. 111-45 at 109 (2009); *see also* H.R. Conf. Rep. No. 111-278 at 126 (2009).

hardship if required to participate in the program.<sup>6</sup> Those refineries were exempt from the 2011 and 2012 RVOs. EPA also indicated it adjusted the RVOs accordingly. 77 Fed. Reg. at 1323.

## II. EPA's Recent Actions Regarding the Small Refinery Exemption.

On July 12, 2018, EPA sent a letter to Senator Grassley indicating that it had granted 19 exemptions for compliance year 2016 and 29 exemptions for compliance year 2017, but four remain pending at EPA. On May 31, 2018, it was reported that EPA has allowed two companies – Sinclair Oil and Holly Frontier – to generate 2018 RINs in light of a reversal of EPA's prior denial of an extension based on a decision by the Tenth Circuit in *Sinclair Wyoming Refining v. EPA*, 874 F.3d 1159 (10th Cir. 2017).<sup>7</sup> In that case, the Tenth Circuit found that EPA could not require long-term "viability" to establish economic "hardship." Nothing in the Tenth Circuit's decision, however, required EPA to subsequently grant the extension requests where the compliance year has long been over. More important, nothing in the decision indicates that EPA had authority to allow these companies to generate 2018 RINs to account for RINs they submitted in 2015, which represents production in either 2014 or 2015.<sup>8</sup>

Each report regarding EPA's recent handling of the small refinery exemption has resulted in: (a) subsequent reports of additional refineries seeking exemptions and (b) a drop in RIN prices. Testimony before the Subcommittee on the Environment in the House Energy and Commerce Committee on July 25, 2018 verified that the retroactive nature of these exemptions has affected the RIN market.<sup>9</sup>

## III. Statutory Provisions Governing Reconsideration

Under Section 307(d)(7)(B) of the Clean Air Act, the Administrator is required to grant a petition for reconsideration upon a demonstration that it was impracticable to raise a particular objection during the period for public comment (but within the time specified for judicial review),<sup>10</sup> and the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). Reconsideration petitions are an appropriate forum to raise procedural violations. *Id.* § 7607(d)(9); *see also White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir.), *cert. granted in part*, 135 S. Ct. 702 (2014). The Administrator also has the

---

<sup>6</sup> Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship, U.S. Department of Energy, March 2011.

<sup>7</sup> Jarrett Renshaw & Chris Prentice, U.S. EPA Grants Refiners Biofuel Credits to Remedy Obama-Era Waiver Denials, Reuters, May 31, 2018.

<sup>8</sup> Two other courts found "EPA's interpretation of 'disproportionate economic hardship' is reasonable." *Lion Oil Co. v. EPA*, 792 F.3d 978, 984 (8th Cir. 2015); *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015). "[T]he relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the program. Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate hardship on a given refinery presents a different question." *Hermes*, 787 F.3d at 575.

<sup>9</sup> *See, e.g.*, Testimony of Gabriel E. Lade Center for Agricultural and Rural Development Iowa State University before the Subcommittee on Environment, House Energy and Commerce Committee, July 25, 2018, <https://docs.house.gov/meetings/IF/IF18/20180725/108610/HHRG-115-IF18-Wstate-LadeG-20180725.pdf>.

<sup>10</sup> The time for seeking judicial review of a final agency action under the Clean Air Act is 60 days from the date of promulgation, approval or action, "except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1).

authority to initiate reconsideration of an action even if he concludes that the standards of Section 307(d)(7)(B) have not been met. *See, e.g.*, 74 Fed. Reg. 66,470, 66,471 (Dec. 15, 2009) (granting reconsideration to clarify ambiguous definitions in regulation); 71 Fed. Reg. 14,665, 14,668 (Mar. 23, 2006) (granting petition for reconsideration due to confusion over EPA’s methodology). EPA also must allow for petitions to amend or withdraw agency action under the Administrative Procedure Act, 5 U.S.C. § 553(e). Although a petition for reconsideration does not postpone the effectiveness of a rule, EPA may stay the effectiveness of a rule pending reconsideration, 42 U.S.C. § 7607(d)(7)(B), or through rulemaking.

Reconsideration is required here because EPA did not provide for notice and comment on its decision to allow Small Refinery Generated RINs. In addition, there are numerous grounds for objections that have arisen after EPA promulgated its small refinery exemption regulations and the RVOs in question related to EPA’s handling of the small refinery exemption. These all require EPA to reconsider or revise its regulations and to true up the volume requirements for 2016, 2017 and 2018.

## **ARGUMENT**

### **I. EPA Must Grant Reconsideration of its Decision to Reissue Prior-Year RINs.**

#### **A. The public could not raise its objections because EPA did not undergo notice and comment rulemaking.**

Under EPA’s regulations, the RIN-system is the means to show compliance with the RFS requirements. RINs are also intended to implement the credit program under the statute. In both cases, the statute requires EPA to promulgate *regulations*. Section 211(o)(2)(A)(iii) requires EPA’s *regulations* to contain “compliance provisions” applicable to *refineries* to ensure the RVOs are met. 42 U.S.C. § 7545(o)(2)(A)(iii). Section 211(o)(5)(A) requires that EPA’s *regulations* include a credit program. *Id.* § 7545(o)(5)(A). Promulgation of regulations requires notice and comment rulemaking. *See* 42 U.S.C. § 7607(d); *see also id.* § 7607(h) (stating intent of Congress that EPA “in promulgating any regulation under this chapter, shall ensure a reasonable period for public participation of at least 30 days”). Here, EPA has provided the public with no notice or opportunity to comment. This is in violation of the procedural requirements of the Clean Air Act and the Administrative Procedure Act.<sup>11</sup>

EPA’s regulations do not provide any process for small refineries to generate RINs. 40 C.F.R. § 80.1426. While EPA provides for some generation of RINs to address certain invalid RIN circumstances, those instances are not present here. Nor can EPA assert it has enforcement discretion to allow RIN generation by the small refineries since there is no claimed violation of the Act by the small refineries and, thus, no enforcement case.

---

<sup>11</sup> Because the statute requires “regulations,” EPA cannot claim that it properly made this determination through an informal adjudication, which does not require public notice and comment. EPA has argued that “[i]nformal adjudications do not require notice and comment, *unless Congress directed an agency to provide such in a particular statute.*” EPA Br., NBB v. EPA, Case Nos. 15-1072 and 15-1073, at 28 (D.C. Cir.).

**B. The objections are of central relevance to EPA's decision.**

Reconsideration is warranted here because EPA's decision to allow Small Refinery Generated RINs violates numerous provisions of the Clean Air Act and EPA's own regulations. While reports only reference HollyFrontier and Sinclair Oil, EPA's July 12<sup>th</sup> letter indicates that EPA is willing to retroactively grant exemptions after the compliance deadline. Because of EPA's lack of transparency and its determination that it has authority to allow obligated parties to generate RINs without any associated production in that year, the risk of additional RINs being reinstated goes well beyond these two companies.

**a. EPA does not have authority to allow small refineries that have an exemption to generate RINs.**

The RINs at issue here do not meet the requirements for a "credit" under the statute. The statute provides limited instances when a "credit" can be generated. As EPA has implemented the credit provision, the only potentially applicable scenario is the provision allowing for "the generation of credits by small refineries in accordance with paragraph (9)(C)." 42 U.S.C. § 7545(o)(5)(A)(iii). But, paragraph 211(o)(9)(C) applies only when a small refinery *waives* the exemption. These RINs are purportedly being generated based on a retroactive grant of an *extension*. There is no indication that Sinclair Oil or Holly Frontier provided EPA with the necessary waivers to be able to generate RINs. Indeed, indications are that they received additional extensions for later years. *See, e.g.*, Holly Frontier Corporation 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, at 76 (Feb. 21, 2018) (noting EPA granted Holly Frontier retroactive small refinery exemptions for 2016 compliance year that saved the company about \$58 million in RIN compliance costs).

The statute also allows for generation of credits "by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2)." 42 U.S.C. § 7545(o)(5)(A)(i). These credits are being generated with no associated quantity of renewable fuel, and, as further explained below, allow a *reduction* of the quantity of renewable fuel needed to meet the RVOs. As such, they cannot represent a "quantity of renewable fuel that is greater than the quantity required under paragraph (2)."

While these Small Refinery Generated RINs purport to replace RINs submitted for compliance in 2015, such RINs represent production in 2015, and as early as 2014 to the extent they were valid carryover RINs. It is difficult to determine whether the RINs at issue actually represent over-compliance with the 2015 required volumes. But, even if true, EPA cannot assert that these 2018 RINs represent an exceedance of the 2015 volume requirements, because such credits can only have a 12-month life.<sup>12</sup> *Id.* § 7545(o)(5)(C). This 12-month limit makes sense since the applicable volumes were intended to be "minimums" and, thus, there is no indication

---

<sup>12</sup> EPA set the 2015 RVO based on available RIN supply. While EPA EMTS data shows that reported RVOs are higher than EPA's estimate for 2015, *see* <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>, EPA has not released the total number of RINs generated by Holly Frontier and Sinclair Oil to be able to determine if the minimum volume requirements were exceeded for 2015.

that Congress sought to give parties credit in later years for over-compliance in earlier years.<sup>13</sup> Any such credits would have long expired, and EPA's authorization to generate 2018 RINs to allow them to be used in 2018 circumvents this statutory limit.<sup>14</sup>

Finally, the statute allows for generation of credits "for biodiesel." 42 U.S.C. § 7545(o)(5)(A)(ii). These credits are not being generated based on actual production of biofuel and, thus, this provision cannot apply.

**b. EPA's actions violate the waiver provisions of the Act.**

Allowing for Small Refinery Generated RINs also violates the waiver provisions of the Clean Air Act. In allowing these retroactive grants of these extensions and, more important, allowing current-year RINs to be generated without representing actual supply, EPA is effectively further reducing the volume requirements for 2018 (and possibly for 2019 if EPA also allows these RINs to be used for compliance in the next year).

The Clean Air Act provides very limited authority for EPA to waive the minimum applicable volumes required. 42 U.S.C. § 7545(o)(7). EPA can waive the statutorily mandated volume requirements only if, after public notice and opportunity for comment, the Administrator finds that implementation of those requirements would "severely harm the economy or environment of a State, a region, or the United States" or that "there is an inadequate domestic supply." *Id.* EPA has not met the requirements to issue a further waiver of the 2018 RFS volumes. As an initial matter, again, EPA provided no public notice or opportunity to comment on the issuance of these RINs.<sup>15</sup> Moreover, the retroactive grant of an extension of the small refinery exemption in 2015 cannot constitute severe economic harm to justify a waiver. The waiver provisions are not intended to address purported individual company harms. *See also* EPA, Renewable Fuel Standard Program Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments ("2018 RFS Response to Comments") at 24 (2017) (stating that granting of small refinery exemption does not equate to economic harm under general waiver provision). Moreover, EPA has found that small refineries would not be negatively impacted by the RVOs it set. *See, e.g.*, 80 Fed. Reg. 77,420, 77,515 (Dec. 14, 2015).

**c. The 2018 RINs at issue here are invalid under EPA's regulations.**

EPA's actions here also violate its own regulations, and any party holding these Small Refinery Generated RINs are subject to enforcement. Under EPA's regulations, RINs are intended to represent production of biofuel. But, there is no biofuel production represented by these RINs. As such, the Small Refinery Generated RINs at issue here are invalid under EPA's regulations on several grounds.

---

<sup>13</sup> Indeed, stakeholders have long raised concerns with the validity of EPA's regulations allowing for carryover RINs based on this limit on the life of a credit. Nonetheless, even under EPA's regulations, EPA only allows RINs to be used for compliance in the year they were generated (*i.e.*, the year the biofuel was produced) or the subsequent year. 2018 is several years removed from when the biofuel would have been produced.

<sup>14</sup> Because EPA has not provided any information regarding the basis for its determination, the public cannot determine whether there are other appropriate remedies available to Sinclair Oil or Holly Frontier. Regardless, this potential problem provides evidence that EPA must reconsider its regulations allowing requests for extensions to occur "at any time."

<sup>15</sup> The statute also required consultation with DOE and USDA.

First, these RINs are intended to represent RINs previously submitted for compliance and, thus, are a duplicate of a previously generated RIN. As such, they are invalid RINs under 40 C.F.R. § 80.1431(a)(1)(i).

Second, as noted above, these RINs would have expired, but for EPA allowing them to be reissued. A RIN is generated with *production* of renewable fuel. *See* 40 C.F.R. § 80.1425 (listing elements of a RIN based on, among other things, the volume of renewable fuel to which it is assigned, the registration number assigned to the producer or importer of the batch of renewable fuel, the registration number assigned to the facility at which the batch of renewable fuel was produced or imported; the type of renewable fuel the RIN represents, the amount of renewable fuel gallons). If EPA has now purported to grant the exemption, then the RIN is no longer being used for compliance in the calendar year in which it was generated or the following year, thus, it is “considered an expired RIN.” *Id.* § 80.1428(c). An expired RIN is considered an invalid RIN and cannot be used for compliance purposes. *Id.*

Third, since the RINs do not reflect biofuel produced in 2018, the RINs cannot represent renewable fuel as defined in § 80.1401. 40 C.F.R. § 80.1431(a)(1)(vi). Because there was no renewable fuel produced in 2018, it also cannot be that the RINs accurately reflect the proper temperature adjustment for the volume produced, a proper equivalence value, or the correct “D” code “for the associated volume of fuel. *Id.* § 80.1431(a)(1)(ii), (iv) and (vii).

Finally, because there is no regulation authorizing generation of RINs in this context, they were “otherwise improperly generated.” 40 C.F.R. § 80.1431(a)(1)(viii).

Thus, EPA has violated its own regulations in allowing these invalid RINs to be generated and it must put a lock on those RINs in the EMTS to prevent further transfer or use of such invalid RINs.

## **II. EPA’s Regulations Require Reconsideration and Revision.**

In light of EPA’s recent actions regarding the small refinery exemptions, it is clear that EPA’s regulations do not “ensure” the minimum applicable volumes are being met. *See* 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i). As such, they require reconsideration and revision.

### **A. Reconsideration and revision of 40 C.F.R. § 80.1441 is required because EPA’s application of the regulation has resulted in violations of the Clean Air Act.**

Because the public could not predict EPA’s retroactive grants of “extensions” well beyond the time for compliance or EPA’s allowance of small refineries to reissue long-expired RINs, the public could not meaningfully assess how EPA’s regulations for handling the small refinery exemptions might actually operate. *See Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (noting ripeness depends on “whether consideration of the issue would benefit from a more concrete setting”) (citations omitted). Thus, it was impracticable for the public to comment on the efficacy and potential implications of the provisions in 40 C.F.R. § 80.1441. *See PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1249-50 (D.C. Cir. 1981) (finding EPA failed to comply with notice requirements under Administrative



Procedure Act where regulation could not be understood without subsequent guidance issued by EPA).

While initially EPA made adjustments to account for the small refinery exemptions, it subsequently determined that it could grant extensions after the RVOs were finalized and make no adjustments to the required volumes. The public questioned EPA's authority to do so, noting, while the statute provides for petitions at "any time," EPA's authority to reduce the volumes is limited, and it was still subject to its overarching obligation to "ensure" the required volumes are met. *See, e.g.,* EPA-HQ-OAR-2010-0133-0159 at 8-10. The public also noted to EPA that Congress did not intend for small refineries to enter in and out of the program, even in the face of subsequent economic distress, and, even if it did, there were alternative ways to handle the petitions that would not result in improper reductions of the volumes. *Id.* More important, the public had reason to believe that a small universe of small refineries remained eligible for additional extensions.

Indeed, in response to these comments, EPA indicated that it had adjusted the volume to account for additional small refinery exemption extensions granted. 77 Fed. Reg. at 1340. EPA further responded, however, that it continued to stand by its position that adjusting the RVOs would bring uncertainty, and that "Congress allowed for some imprecision to exist in the actual volumes of renewable fuel that are consumed as a result of the percentage standards that we set each November."<sup>16</sup> *Id.* EPA did not, however, explain why it could not revise its regulations to set a time frame by when such requests must be granted. *See also* 2018 RFS Response to Comments at 216 (finding comments on process to be outside the scope).

EPA's actions also illustrate how EPA's current regulations allow small refineries to speculate and manipulate the RIN market. EPA has recently raised concerns regarding potential RIN market manipulation, and testimony before a House Subcommittee reiterated this potential concern, noting possible issues with the handling of the small refinery exemptions. Understanding the rules upfront provides more certainty and stability and removes this potential.

Further, the public could not have anticipated that EPA would act in a manner that is inconsistent with its own regulations. *See Nat'l Env'tl. Dev. Ass'n's Clean Air Project ("NEDA") v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("It is 'axiomatic,' however, 'that an agency is bound by its own regulations. ... 'Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.'" (citations omitted)). The regulations require that the petitioning small refinery indicate when it can come into compliance. Instead, EPA has allowed refineries to wait until the end of the year to determine if they exceed the volume threshold, regardless of whether they can comply with the RFS program.<sup>17</sup>

EPA's determination that it should allow Sinclair Oil and Holly Frontier to issue 2018 RINs based on a retroactive grant of an exemption illustrates that EPA's regulations are inadequate. Reports of EPA's granting of exemptions and continued receipt of requests related to 2016 and 2017 compliance years raise the concern that EPA will determine it can continue to

---

<sup>16</sup> We disagree with this notion, and refer EPA to the petition for reconsideration filed by the Renewable Fuels Association, et al., which explains why challenges to this determination were not ripe at the time and why EPA's expansion has altered the stakes for judicial review.

allow RINs to be generated when small refineries may have already submitted RINs for compliance. EPA's regulations must require the small refineries to meet the requirements of the regulations or submit these requests prior to the year in which the exemption is to apply.

Although the statute says the petition may be submitted at "any time," the statute also references "extensions." Moreover, EPA's own regulations require that the small refinery identify when it can come into compliance, indicating that the extension cannot end and then the small refinery ask for an extension. As described above, such a reading violates other provisions of the statute or allows EPA to circumvent these obligations. Rules of statutory construction require that the provisions be read in context. Indeed, EPA declined to find that the phrase "at any time" prevented it from requiring the extensions be requested prior to finalizing the standards, disagreeing "with commenters that stated that it is impractical to grant small refinery exemptions before the annual standards are established. 2018 RFS Response to Comments at 216. EPA simply stated that it believed its current approach remained appropriate.

Through its actions, EPA has fundamentally changed the regulatory program outlined in 40 C.F.R. § 80.1441, requiring notice and comment and significantly altering the stakes of judicial review. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008), *cert. denied*, 559 U.S. 991 (2010). It could not have been anticipated that EPA would not provide the public with an opportunity to comment on these changes, and it is not incumbent upon the public to remind EPA to follow the required procedures under the Act. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (finding EPA cannot "ignore the procedural requirements of §307(d)," even if the agency "gives a decent reason for doing so"). For all these reasons, the objections raised herein could not have been raised in the context of the 2010 RFS rulemaking.

## **B. EPA has Expressed the Need to Increase Transparency in the RIN market.**

EPA has also acknowledged the need for greater transparency in the RIN market. Despite these acknowledgements, EPA has refused to provide details regarding its handling of the small refinery exemption. EPA has denied Freedom of Information Act requests, asking for basic information on the exemptions and has even failed to respond to requests for information from Congress.

But, EPA has already made a determination that basic information regarding the small refinery exemptions are not subject to confidential business information (CBI) and should be revealed to the public. EPA proposed to codify this determination in 2016,<sup>18</sup> explaining that it

---

<sup>17</sup> For example, CVR Energy indicated that it "no longer qualifie[d] as a small refinery" in 2016. *See CVR Energy Amicus Br.* at 12, *Am. For Clean Energy v. EPA*, No. 16-1005 (D.C. Cir.). EPA had not indicated that it would grant "new" exemptions to small refineries that are no longer eligible or have entered into the program and simply wait and see if they meet the 75,000 barrel per day threshold.

<sup>18</sup> 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) 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

sought to “clarify in the regulations that a clearly delineated set of basic information related to our decisions on small refinery/refiner exemption petitions is not entitled to treatment as CBI, since it is inherently part of the EPA’s decision and is not ‘obtained from a person’ outside of government.” 81 Fed. Reg. at 80,909. As EPA explained, this basic information is necessary to identify the nature and scope of work that the EPA has decided to undertake.” *Id.* at 80,910. EPA has provided no indication to the public whether or why it has changed this determination.

**C. New information also calls into question whether EPA’s regulations adequately “ensure” the RVOs are being met with respect to the small refinery exemptions, requiring EPA to reconsider and revise its regulations.**

EPA also must reconsider and revise its regulations based on new information that calls into question whether EPA is adequately ensuring the RVOs are being met, as required by the statute. Since EPA finalized the 2018 RVOs in December of 2017, there has been a steady stream of reports that EPA is exceeding its authority in its handling of the small refinery exemptions.

In its recent 2019 RFS proposal, EPA stated that approximately 1,460 million RINs were not required to be retired by small refineries that were granted hardship exemptions for 2017 and approximately 790 million RINs were not required to be retired by small refineries that were granted hardship exemptions for 2016, along with the RINs that Philadelphia Energy Solutions Refining and Marketing, LLC (“PESRM”) was not required to retire as part of its bankruptcy settlement agreement. These are not de minimis amounts. And, because EPA had not accounted for small refinery exemptions in setting the RVOs, the actual volumes required fell below the 2016 and 2017 minimum applicable volumes. This was not the case in other years of the program.

Although EPA has indicated it may grant extensions after the RVOs are finalized, EPA provided no indication that it would grant requests for “extensions” well after the compliance deadline has passed. It is unclear how a small refinery can show disproportionate economic hardship due to the RFS when it has already complied with the program. On June 22, 2018, EPA updated its EMTS data based on data through June 10, 2018. Based on EPA’s updated information, the overall RVO for 2017 was reduced by 258 million RINs compared to data from April. The overall advanced biofuel volume for 2017 was reduced by 57 million RINs compared to data from April. The biomass-based diesel RVO for 2017 was reduced by another 40 million RINs compared to data from May. Since the compliance deadline has passed, this illustrates that EPA continues to grant extensions retroactively. *See* EMTS Annual Compliance Data, as of June 10, 2018; EMTS Annual Compliance Data, as of April 17, 2018.<sup>19</sup> This presumably allows

---

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.”

<sup>19</sup> The compliance deadline for 2017 was March 31, 2018. There is also evidence that EPA has granted exemptions for 2016 after the compliance deadline, which was March 31, 2017. Comparing EMTS data from June 10, 2018 to data from June 9, 2017 shows a reduction in the reported RVOs by 70 million RINs for the biomass-based diesel volume, by 87 million RINs for advanced biofuels, and by 439 million RINs. *See* EMTS Annual Compliance Data, as of June 10, 2018; EMTS Annual Compliance Data, as of April 17, 2018. This resulted in the

those parties who submitted RINs for compliance or who held onto RINs hoping for the exemption to flood the market with those RINs and claim an additional *profit*.

EPA is required to consult with DOE on any petitions. DOE has scored applications on a two-part test that considers whether compliance would lead to disproportionate impact or threaten a refinery's viability. On June 26, 2018, it was reported that EPA has ignored DOE's recommendations.<sup>20</sup> The report, based on two sources, indicated that "EPA has consistently granted full waivers in cases where the energy department recommended only partial exemptions, and, at least once, granted a full approval when the energy department advised an outright rejection." This is in stark contrast to the prior administration, "which had often either adopted energy department recommendations or, when it didn't, ruled against exempting oil refiners."<sup>21</sup> The EPA's increase in these "extensions" has sent the price of RINs to five-year lows.

### **III. EPA Must "Lock" the Invalid RINs Generated by HollyFrontier and Sinclair Oil, and Should Stay any Further Action on the Small Refinery Exemptions Pending Reconsideration.**

Petitioner has demonstrated that reconsideration is warranted in this case. To mitigate against the harms caused by EPA's failure to comply with the notice and comment requirements of the Clean Air Act and by the approval of generation of invalid RINs, Petitioner requests that EPA immediately "lock" the 2018 RINs generated by Holly Frontier and Sinclair Oil so that they cannot be transferred or used for compliance. Because of the significant questions raised by EPA's current handling of the small refinery exemption, Petitioner also requests that EPA stay any further action under 40 C.F.R. § 80.1441 during the reconsideration process pursuant to 42 U.S.C. § 7607(d)(7)(B) or the rulemaking process to revise its regulations.

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 justice also requires a stay under 5 U.S.C. § 705. Although we are requesting the stay, 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 seeking a stay with the agency would be impracticable. Indeed, numerous request have been submitted to EPA asking it to stop issuing invalid small refinery exemptions, yet reports continue that EPA is accepting and even granting such requests.<sup>22</sup>

---

minimum volume requirements not being met for 2016. It is possible that some of this reduction was a result of the Philadelphia Energy Solutions bankruptcy.

<sup>20</sup> Jarrett Renshaw and Chris Prentice, *Trump's EPA ignored Energy Department calls to limit biofuel waivers*, Reuters, June 26, 2018, <https://www.reuters.com/article/us-usa-epa-biofuels-exclusive/exclusive-trumps-epa-ignored-energy-department-calls-to-limit-biofuel-waivers-idUSKBN1JM17T>.

<sup>21</sup> EPA has denied public records requests seeking information on these extensions.

<sup>22</sup> This stands in contrast to the grants of administrative stays this Administration has granted at the request of the petroleum industry. 82 Fed. Reg. 25,730 (June 2, 2017); 82 Fed. Reg. 27,133 (June 14, 2017).

**A. EPA has violated several provisions of the Clean Air Act and, thus, Petitioner is likely to succeed on the merits.**

As described above, EPA's actions are in clear violation of the Clean Air Act and its own regulations. These violations include:

- 1) Failing to provide notice and comment on the generation of 2018 RINs by obligated parties that are not producing biofuel;
- 2) Exceeding its authority under the Clean Air Act to allow generation of RINs by small refineries that have received an extension of the exemption under the Act;
- 3) Circumventing the limitation on the life of credits under the RFS program;
- 4) Allowing generation of 2018 RINs for which no "renewable fuel" was produced in 2018;
- 5) Allowing generation of invalid 2018 RINs that could be transferred or used for compliance in violation of EPA's regulations;
- 6) Improperly reducing the 2016, 2017 and 2018 volumes by retroactively granting small refinery exemptions, even after the compliance deadlines, and allowing generation of 2018 RINs; and
- 7) Failing to promulgate regulations that "ensure" the minimum required volumes are being met.

EPA's actions have undermined the purpose of the RFS program to provide a certain market for the promotion of biofuels, particularly advanced biofuels. The statute is clear, and, in any event, there is no reasonable interpretation of the statute that allows EPA to take these actions.

**B. An administrative stay will prevent irreparable harm and is in the public interest.**

Without an administrative stay, EPA's actions will continue to have a negative impact on the market and on biofuel producers, including those that are members of the Petitioner. They also will undermine the RFS program, which Congress found to be in the national interest.

The purpose of the RFS program was to incentivize investment in biofuel production. Biofuel producers have done just that. The volatility in the market caused by EPA's actions have caused producers to lose their investments. 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.

By expanding the small refinery exemption, failing to adjust for the lost volumes, and allowing RINs to be generated without a corresponding production of biofuels, 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.

**C. An administrative stay will not cause harm to other parties.**

The requested stay will not cause harm to other parties. Certain obligated parties and small refineries appear to be using the exemption to game the system and obtain profits, rather than take actions to come into compliance.

In *Americans for Clean Energy v. EPA*, the D.C. Circuit rejected a request for a stay from small refineries seeking to avoid their RFS obligations. Indeed, under EPA's regulations, those parties that are truly small refineries facing disproportionate economic harms should already have their extensions in place.

**IV. SUMMARY AND CONCLUSION**

For the foregoing reasons, we request that EPA reconsider its decision to allow obligated parties to generate RINs for prior years as a result of a change in status of the small refinery exemption. We further ask EPA to reconsider its process for granting these exemptions and its determination that it can and should continue to grant those exemptions after the volumes are set and after compliance. EPA has authority to initiate a rulemaking on these issues and should stay any further action regarding these "new" exemptions or reinstatement of RINs until it has provided the public with a clear and open process for doing so.

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.  
Sullivan & Worcester LLP  
1666 K Street, NW  
Washington, DC 20006  
T 202 370 3920  
F 202 293 2275  
jmuys@sandw.com

*Counsel for Producers of Renewables United for  
Integrity Truth and Transparency*