

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

WYNNEWOOD REFINING COMPANY, LLC,

Plaintiff,

v.

MICHAEL S. REGAN, in his official capacity as
Administrator of the United States Environmental
Protection Agency,

Defendant.

Civil Action No.

4:24-CV-01009

COMPLAINT

Plaintiff Wynnewood Refining Company, LLC (“Wynnewood”), for its Complaint against Defendant Michael S. Regan in his official capacity as the Administrator of the United States Environmental Protection Agency (“Administrator”), alleges, on knowledge as to its own actions, and otherwise upon information and belief, as follows:

PRELIMINARY STATEMENT

1. The Administrator has failed to perform a non-discretionary duty to act on Wynnewood’s petition for small refinery hardship relief under Clean Air Act (“CAA”), 42 U.S.C. § 7545(o)(9)(B)(iii).

2. Although more than 60 days have passed since Wynnewood provided the Administrator with notice of its intent to initiate this lawsuit, the Administrator still has not acted on Wynnewood’s pending hardship petition. *See* 42 U.S.C. § 7604(b)(2).

3. Wynnewood seeks a declaration that the Administrator is in violation of the CAA, an order compelling the Administrator to decide Wynnewood’s hardship petition by an expeditious

date certain, and Wynnewood's fees and costs for this action.

PARTIES

4. Plaintiff Wynnewood Refining Company, LLC, is a small refinery with its headquarters in Sugar Land, Texas.

5. Wynnewood is a "person" within the meaning of 42 U.S.C. § 7602(e).

6. Defendant Michael S. Regan is the Administrator of the United States Environmental Protection Agency ("EPA"). The Administrator is responsible for implementing the CAA. The Administrator's responsibilities under the CAA include the statutory obligation to decide every petition for small refinery hardship relief within 90 days of receipt of that petition. Administrator Regan is sued in his official capacity.

JURISDICTION

7. This action arises under the Clean Air Act, 42 U.S.C. § 7545(o). This Court has jurisdiction over Wynnewood's claims under 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 1331 (federal question) and 1361 (mandamus). This Court has authority to order declaratory and injunctive relief under 42 U.S.C. § 7604 and 28 U.S.C. §§ 1361, 2201, and 2202, and to award reasonable attorneys' fees and costs under 42 U.S.C. § 7604(d).

8. By letter dated January 18, 2024, Wynnewood provided the Administrator by electronic mail and certified mail with written notice of Wynnewood's claim and its intent to bring suit to remedy this CAA violation pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. §§ 54.2–54.3. A true and correct copy of this notice is attached as Exhibit A.

9. This action is brought more than 60 days after the Administrator's January 18, 2024 receipt of the notice of intent to sue. *See* 42 U.S.C. § 7604(b)(2).

VENUE

10. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1). The Administrator is an officer or employee of the United States or an agency thereof and is sued in his official capacity. Wynnewood resides—i.e., has its principal place of business, 28 U.S.C. § 1391(c)(2)—in this judicial district, and no real property is involved in this action.

FACTS

11. The CAA requires that transportation fuel sold or introduced into commerce in the United States contain specified volumes of renewable fuel. The EPA and the Administrator set the volumes and oversee this requirement through their administration of the Renewable Fuel Standard (“RFS”) program. *See* 42 U.S.C. § 7545(o).

12. As a petroleum refiner, Wynnewood is subject to the RFS requirements under the CAA. *See* 42 U.S.C. § 7545(o)(2)(A)(iii)(I), (3)(B)(ii)(I).

13. Wynnewood is a “small refinery” under the CAA, because its average daily aggregate crude oil throughput does not exceed 75,000 barrels. *See* 42 U.S.C. § 7545(o)(1)(K).

14. The CAA allows small refineries to petition “at any time” for relief from annual RFS compliance obligations based on disproportionate economic hardship, and EPA must grant that relief if the small refinery demonstrates it will suffer disproportionate economic hardship. 42 U.S.C. § 7545(o)(9).

15. The CAA imposes a mandatory deadline for the Administrator to decide each petition for small refinery hardship relief: “The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.” 42 U.S.C. § 7545(o)(9)(B)(iii).

16. Wynnewood submitted a petition for small refinery hardship relief from compliance with its 2023 RFS obligation. In its petition, Wynnewood documented the reasons why RFS compliance for the 2023 compliance year would cause disproportionate economic hardship.

17. EPA received Wynnewood's 2023 small refinery hardship petition on December 15, 2023.

18. The Administrator had a non-discretionary duty under the CAA to act on Wynnewood's petition within 90 days after receipt. 42 U.S.C. § 7545(o)(9)(B)(iii). The Administrator failed to perform this non-discretionary duty when he did not act on Wynnewood's petition by March 14, 2024.

19. On January 18, 2024, Wynnewood gave written notice of its intent to sue the Administrator in accordance with 42 U.S.C. § 7604(b)(2) and 40 C.F.R. §§ 54.2–54.3. In the notice, Wynnewood “urge[d] the Administrator to issue the 2023 hardship decision as soon as possible, so it will be unnecessary to file suit.”

20. More than 60 days have passed since Wynnewood gave the Administrator written notice of its intent to sue. *See* 42 U.S.C. § 7604(b)(2).

21. Despite receiving notice of the CAA violation, the Administrator still has not acted on Wynnewood's 2023 small refinery hardship petition.

22. The Administrator's disregard for the 90-day statutory deadline to act on small refinery hardship petitions is unfortunately not unique. In a recent report, the United States Government Accountability Office (“GAO”) found that EPA resolved small refinery hardship

petitions for the 2019 compliance year “on average, more than 700 days” after receiving them, or 610 days after the statutory deadline.¹

23. Wynnewood had consistently received hardship exemptions for prior compliance years for which it applied. In April 2022, however, EPA retroactively reversed and denied all 31 of the exemptions that the Administrator had previously granted to small refineries for the 2018 compliance year, including Wynnewood’s 2018 exemption. EPA had initially granted those exemptions more than two-and-a-half years earlier in August 2019. Then in June 2022, EPA denied Wynnewood’s hardship petitions for the 2019, 2020 and 2021 compliance years, which had been pending before the Administrator for 897, 452 and 163 days, respectively.

24. Wynnewood petitioned for review of EPA’s denials of its 2018–2021 hardship petitions to the United States Court of Appeals for the Fifth Circuit. On March 16, 2023, the Fifth Circuit granted a stay of Wynnewood’s RFS compliance obligations pending review, finding that Wynnewood had “demonstrated a likelihood of success on the merits” and would face “irreparable economic harm absent a stay.” Order, *Calumet Shreveport Refining, LLC v. EPA*, No. 22-60266 (and consolidated cases), Doc. 304-2 (5th Cir. Mar. 16, 2023); *see also* Order, *id.*, Doc. 209-1 (5th Cir. Jan. 27, 2023).

25. Notwithstanding the Fifth Circuit’s order finding that EPA’s actions were likely unlawful, EPA repeated those actions. With review of the 2018–2021 denials still pending, EPA applied its same reasoning to deny Wynnewood’s 2022 hardship petition. When that petition was decided, it had been pending for 196 days.

¹ GAO, Renewable Fuel Standard: Actions Needed to Improve Decision-Making in the Small Refinery Exemption Program, GAO-23-104273, at 48 (Nov. 3, 2022), <https://www.gao.gov/products/gao-23-104273>.

26. In November 2023, the Fifth Circuit vacated EPA's 2018–2021 denial decisions. *Calumet Shreveport Refining, LLC v. EPA*, 86 F.4th 1121 (5th Cir. 2023). It held that the denials were “(1) impermissibly retroactive; (2) contrary to law; and (3) counter to the record evidence.” *Id.* at 1127. So the Court vacated the denials and remanded them to EPA. *Id.* Those hardship petitions are still pending on remand.

27. The Fifth Circuit's decision makes it even more apparent that Wynnewood's interests have been, are being, and will continue to be, damaged by the Administrator's failure to comply with the statutory deadline to act on Wynnewood's pending 2023 small refinery hardship petition. The CAA guarantees Wynnewood a prompt decision on its hardship petition. By nevertheless refusing to act on that petition, the Administrator is damaging Wynnewood's ability to do business and plan for statutory compliance. The Administrator's failure to act further deprives Wynnewood of procedural rights and protections to which it is entitled.

28. The relief requested herein would redress these injuries.

CLAIM FOR RELIEF

29. Wynnewood realleges and incorporates by reference paragraphs 1 through 28 of this Complaint, as if fully set forth herein.

30. The Administrator has a non-discretionary duty to decide Wynnewood's 2023 petition for small refinery hardship relief within 90 days after receipt. *See* 42 U.S.C. § 7545(o)(9)(B)(iii).

31. The CAA allows any person to bring suit to compel the Administrator to perform a non-discretionary duty. *See* 42 U.S.C. § 7604(a).

32. It has been more than 90 days since the Administrator received Wynnewood's 2023 small refinery hardship petition. The Administrator has not acted on the petition.

33. It has been more than 60 days since Wynnewood gave written notice to the Administrator of its intent to initiate this lawsuit. Wynnewood therefore satisfied the CAA's notice requirement before commencing this action. *See* 42 U.S.C. § 7604(b)(2).

34. The Administrator's failure to act has violated, and continues to violate, the CAA and constitutes a "failure of the Administrator to perform any act or duty ... which is not discretionary with the Administrator," 42 U.S.C. § 7604(a)(2).

35. The Administrator's violation is ongoing and will continue to harm Wynnewood unless remedied by the Court.

REQUEST FOR RELIEF

WHEREFORE, Wynnewood requests that this Court enter judgment against the Administrator providing the following relief:

A. A declaration that the Administrator has violated the CAA by failing to grant or deny Wynnewood's 2023 petition for small refinery hardship relief within 90 days after receipt; and

B. An order compelling the Administrator to perform his non-discretionary duty to decide Wynnewood's 2023 small refinery hardship petition by an expeditious date certain; and

C. An order retaining jurisdiction over this matter until such time as the Administrator complies with his non-discretionary duty under the CAA; and

D. An order awarding Wynnewood its costs of litigation, including reasonable attorneys' fees, under 42 U.S.C. § 7604(d); and

E. All other and further relief as the Court deems just and equitable.

Dated: March 19, 2024

Respectfully submitted:

By: /s/ Katherine E. May
Katherine E. May (*attorney-in-charge*)
TX State Bar No. 24116732
S.D. TX Bar Id. 3669046
PERKINS COIE LLP
500 N. Akard Street, Suite 3300
Dallas, TX 75201
Telephone: 214.965.7700
Facsimile: 214.965.7799
KMay@perkinscoie.com

Michael R. Huston (*of counsel*)
(*pro hac vice pending*)
AZ Bar No. 038763
Karl J. Worsham (*of counsel*)
(*pro hac vice pending*)
AZ Bar No. 035713
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
MHuston@perkinscoie.com
KWorsham@perkinscoie.com

*Attorneys for Plaintiff Wynnewood Refining
Company, LLC*