

Message

From: Derrick Morgan [DMorgan@afpm.org]
Sent: 3/25/2020 6:50:07 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
Subject: FW: 500 million gallon remand
Attachments: remand d1.docx

The 500 million gallon remand issue is really (at most) a 120 million gallon remand issue. (EPA could apply all the amount of the cellulosic waiver to the total category.)

Attached is AFPM's submission to EPA last summer and the most pertinent part is pasted below. We do not believe EPA has to reallocate the 500 million gallons, but there is zero reason to reallocate 380 million of those gallons. (It could also address the remaining 120 million gallons as we explain in the attached.)

Most pertinent part on 500 million gallon remand issue:

In the 2014-2016 RFS rule, there was a need to waive X gallons of total renewable fuel. EPA chose to use a combination of its cellulosic and general waiver. To ensure that EPA's decision to waive X is given its maximum effect, EPA should apply the full amount of the cellulosic waiver to the total renewable fuel category, which would account for 380 million of the 500 million RINs implicated by the DC Circuit remand. The court upheld EPA's use of the cellulosic waiver authority to reduce the total renewable fuel requirement.^[1] But had EPA understood the limitations that would later be placed on its use of the general waiver for inadequate domestic supply by the D.C. Circuit, it could have considered extending the *full amount* of the cellulosic waiver volume to the total renewable fuel category. This would have accounted for 380 million additional RINs. On remand, EPA may reconsider this policy decision based on its new understanding of the limits of its general waiver authority and waive an additional 380 million RIN-gallons of the total renewable fuel requirement for 2016.^[2]

^[1] 80 Fed. Reg. at 77,439.

^[2] It is worth noting that in *ACE*, the D.C. Circuit explicitly upheld EPA's broad discretion over the factors it may consider in utilizing its cellulosic waiver authority. Citing *Monroe Energy*, the court reiterated that "[t]he cellulosic waiver provision grants EPA 'broad discretion' to consider a variety of factors – including constraints on the demand for advanced biofuel – when determining 'whether and in what circumstances' to reduce the advanced biofuel requirement." *ACE*, 864 F.3d at 733. "That same reasoning controls here: EPA had discretion to consider a 'range of factors' in determining whether to exercise its cellulosic waiver authority, including demand side constraints that affect 'the ability' of advanced biofuels 'to be consumed.'" *Id.* at 734.