

January 24, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., 1101A
Washington, DC 20460

Re: Small Refiner Exemptions

Dear Administrator Pruitt:

I am writing to express the Renewable Fuels Association's concern regarding a lack of transparency surrounding the Environmental Protection Agency's ("EPA's") implementation of the small refinery exemption in the Renewable Fuels Standard ("RFS") program. This lack of transparency is particularly disconcerting given that an ill-conceived and unauthorized expansion of this exemption could destabilize the market for renewable fuels and undermine Congress's goals for the RFS program. I would also like to express our concern with the market destabilizing impacts of EPA's failure to require non-exempt obligated parties to make up the volume of fuel that the exempt small refiners would have otherwise provided in a given year.

EPA Criteria for Small Refiner Applications

As you know, when Congress enacted this program as part of the Energy Policy Act of 2005, it provided a temporary exemption from RFS requirements to refineries if they had a crude throughput of no more than 75,000 barrels of crude per day and could that participation in the RFS program would lead to a "disproportionate economic hardship."¹ EPA evaluates these petitions on a case-by case basis, after consulting with the Department of Energy, and allows small refiners to petition for an extension of their exemption based on essentially the same showing. 40 CFR 80.1441(e)(2). Although EPA has indicated that it has evaluated a dozen petitions for exemption for 2016, we are not aware of any instance in which EPA has been willing to disclose any data about the total number of petitions it received and granted for subsequent years, including 2018.²

EPA recently indicated that a Congressional directive to follow the Department of Energy's recommendations for exemptions "could impact how EPA evaluates small refinery hardship petitions *and the number and magnitude of exemptions granted.*"³ It would be disappointing, to say the least, if EPA now began to increase the number and magnitude of exemptions granted, a decade after the program began. As the American

¹ 42 U.S.C. §§ 7545(o)(1)(K), (o)(9)(B).

² 82 Fed. Reg. 34,206, 34,244 (July 21, 2017).

³ 82 Fed. Reg. 34,242 (July 21, 2017) (emphasis added).

Petroleum Institute echoed in its recent comments, “refiners have had ample time to adjust their businesses to operate under the burden of the RFS.”⁴

Although we understand that the number of small refinery petitions may increase in light of the Tenth Circuit’s decision in *Sinclair Wyoming Refining Co. v. EPA*,⁵ EPA has yet to give an indication of how it will adjust its perspective on reviewing and processing such petitions. As EPA reevaluates its position of what constitutes a “disproportionate economic hardship” to a small refinery, we hope that EPA will remain true to its previous determination in the 2017 Final Rule that “obligated parties, including small entities, are generally recovering the cost of acquiring the credits... necessary for compliance with the RFS standards through higher sales prices of the petroleum products they sell.”⁶

EPA’s finding also accords with statements from the American Petroleum Institute, which cautioned that exempt small refiners could unfairly reap windfall profits from the selling of RINs they no longer need.⁷

EPA also stated that it found that the RFS “standards will not have a significant economic impact on a substantial number of small entities” – in fact, even when EPA considered “the extreme scenario where a refiner obtained the RINs necessary for compliance by purchasing separated RINs and did not recover any of the RIN costs through higher prices for the petroleum products sold, the cost to sales ratio was 0.32%.”⁸

Although EPA has confirmed in its Response to Comments to the 2018 RVO Final Rule that the Agency “is required to ensure that transportation fuel... contains the applicable volumes of renewable fuel,” EPA remains silent on the criteria it will use to evaluate small refinery hardship petitions and any appropriate changes to the renewable volume obligations of non-exempt obligated parties.⁹ RFA requests a productive dialogue on this issue between EPA and the renewable fuels industry. The specific topics we would propose include the following:

- Whether and how the criteria to approve an exemption request that EPA described in its Dec. 6, 2016 memorandum will be amended in light of the *Sinclair Refining* decision;

⁴ American Petroleum Institute, *Comments Re: EPA–HQ–OAR–2017–0091 Proposed Rule: Renewable Fuel Standard Program: Standards for 2018 and Biomass-based Diesel Volume for 2019* (Aug. 31, 2017) 2.

⁵ See 874 F.3d 1159, 1169-72 (Oct. 30, 2017) (amending opinion issued on August 15, 2017).

⁶ EPA, *Renewable Fuel Standard Program – Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments* (Dec. 2016) 470.

⁷ American Petroleum Institute, *supra* note 5 (“To the extent that the costs of complying with the RFS program are included in the market value of products sold then an exempt party not subject to the same costs as their competitors is not avoiding a hardship, but rather is being provided with a windfall.”).

⁸ *Id.*

⁹ EPA, *Renewable Fuel Standard Program – Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, (Dec. 2017) 216.

- Whether and to what circumstances EPA would consider departing from the Department of Energy’s recommendation on a particular exemption request;
- Whether the Agency will confirm that any economic hardship asserted must be a *direct result* of RFS obligations and not general business factors that may impede a refinery’s profitability;
- Whether EPA’s Dec. 6, 2016 memorandum outlining financial and other information to be submitted as part of a small refinery exemption request will be updated in light of the recent developments described above;¹⁰
- When EPA will publicly disclose, on an ongoing basis, the number of small refinery exemptions granted in 2016, 2017 and subsequent years, and whether each of those small refinery volume reductions were accounted for in that year’s or the subsequent year’s applicable percentages;
- The number of pending small refinery hardship exemptions that are pending before EPA for 2018;
- The total capacity represented by small refineries with pending hardship exemption requests in 2018; and
- When and how EPA intends to communicate any changes in policy to small refiners, the renewable fuels industry, or other regulated parties.

Timing of Small Refiner Exemption Determinations

In the absence of clear guidance from EPA on whether or how it will now reinterpret “disproportionate economic hardship” and how it will factor in DOE recommendations, RFA is concerned that virtually any refiner with crude throughput of less than 75,000 barrels of crude per day could be granted the small refiner exemption -- roughly 10 percent of all domestic refining capacity.¹¹ To avoid such a market destabilizing scenario, EPA has to ensure that its review of exemption petitions remains discerning and that non-exempt obligated parties make up for any lost volumes of renewable fuels the exempt small refiners would have otherwise provided. Yet EPA has indicated in its 2018 RVO Final Rule that it will *not* adjust percentage standards for 2018 to account for any small refinery exemptions that are approved after the Final Rule,

¹⁰ Memorandum from Byron Bunker, U.S. EPA, Office of Air and Radiation, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests* (Dec. 6, 2016).

¹¹ See 40 C.F.R. § 80.1405(c) (amount of fuel projected to be produced by exempt small refineries and small refiners is 11.9 percent (gasoline) and 15.2 percent (diesel); *see also* U.S. Energy Information Administration, *Annual Refinery Report*, figure 1 (June 21, 2017) (implying total capacity of small refineries is 9.9 percent).

meaning that any volumes attributable to exempt small refineries will effectively disappear from the RFS program in 2018.¹²

The net effect of the Agency's position, if numerous exemptions are granted, would be to reduce the volumetric RFS mandates outside of the public rulemaking process for establishing renewable volume obligations (RVOs). Refiners would still be complying with the fixed percentages in the Final Rule, but because fewer refiners would be complying, the total volumes of renewable fuels actually blended would drop below required levels. The renewable fuels industry is concerned that EPA's decision to not adjust percentage standards to account for any small refinery exemptions that are approved after an RVO Final Rule hinders its obligation to ensure that transportation fuel contains the required volumes of renewable fuel. As EPA acknowledged in its Response to Comments to the 2018 Final Rule, "CAA section 211(o)(3)(B)(i) requires that the percentage standards established by EPA ensure that the volume requirements are met."¹³

RFA has identified two possible solutions that would enable EPA to provide the certainty of a single annual percentage standard while also responding to its obligation to consider exemption requests. First, EPA could establish an annual cut-off date for the processing of any small refinery exemption petition to ensure that the agency has adequate time to take such exemptions into account in setting the annual percentage standards. If EPA is going to require non-exempt obligated parties to make up the volume of fuel that exempt small refineries would have otherwise provided in a given year only where the agency has sufficient time to reflect that exemption in the annual percentage standards, a small refiner should submit its exemption petition for the following calendar year no fewer than 90 days before EPA promulgates its Final Rule in November of each year (i.e., before July 1st of each year). Small refiner hardship petitions that EPA does not receive by July 1st should be considered eligible for an exemption only for the RVOs of the calendar year after the following year. Although exemption "petitions may be filed at any time ... EPA has discretion to determine the length of any exemption that may be granted in response."¹⁴ The statute requires EPA to act on the petition within 90 days of receipt, but the statute is silent on when the hardship exemption, if granted, must begin or end.¹⁵ This change in the processing of exemption petitions would allow EPA to account for gasoline and diesel from exempt small refineries when the exemption petition is submitted well after the RVOs and percentage standards for a given year have been finalized.

Second, as an alternative, EPA could continue granting hardship exemptions in the year that they are received but "true up" the percentage standards in the subsequent calendar year. This would require adjusting a given year's calculation to subtract the gasoline and diesel volumes produced by exempted small refineries in the prior year, if the small refiner submitted a hardship petition after EPA finalized previous year's RVO rule and those exempt small refiner volumes were thus not reflected in EPA's formula

¹² 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017).

¹³ EPA, *supra* note 9.

¹⁴ 75 Fed. Reg. 14,670, 14,736 (Mar. 26, 2010).

¹⁵ 42 U.S.C. § 7545(o)(9)(B).

calculating the previous year's percentage standards. EPA has sufficient statutory authority to make this change because the statute does not dictate the formula EPA must use to determine the applicable percentage. Doing so would also help ensure the RFS's volume obligations are being met and would therefore comply with Congressional intent.¹⁶

The renewable fuels industry and obligated parties deserve greater clarity on the criteria EPA will apply to small refinery petitions going forward. We appreciate your previous statements in support of the continued success of the RFS program, and we look forward to working with you to address this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Dinneen", with a stylized flourish at the end.

Bob Dinneen
President & CEO

¹⁶ 42 U.S.C. § 7545(o)(3)(B)(i) (stating that the Administrator shall determine an applicable percentage for the following calendar year that “ensures that the requirements [of the volume obligations in the Act] are met.”).