

May 22, 2020

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Dear Administrator Wheeler:

Your testimony before the Senate Environment and Public Works Committee on May 20, 2020, indicated that the U.S. Environmental Protection Agency (EPA) has recently received petitions from small refineries requesting exemptions from the Renewable Fuel Standard (RFS) under 42 U.S.C. § 7545(o)(9)(B) for past compliance years. On the same day, U.S. Department of Energy (DOE) Under Secretary Mark Menezes stated in testimony before the Senate Energy and Natural Resources Committee that EPA is “send[ing] over” past-year petitions for DOE review. I am writing on behalf of Renewable Fuels Association (RFA) to strongly urge EPA to deny these petitions, which, if granted, would be inconsistent with Congressional intent, judicial precedent, EPA’s own policies and regulations, and any sense of fairness to America’s farmers and ethanol producers.

These petitions for past compliance years are no more than a thinly veiled attempt to circumvent the Tenth Circuit’s decision in *Renewable Fuels Association v. EPA*.¹ This end-run strategy was explicitly acknowledged by Under Secretary Menezes who described the prior-year exemption petitions as “gap filings” intended to establish, without regard to merit, a continuous string of exemptions “to be consistent with the Tenth Circuit decision.” In *Renewable Fuels Association*, the Tenth Circuit made clear that the number of small refineries receiving exemptions “should have tapered down from 2013 forward, because the only small refineries . . . which continued to be eligible for extensions were *ones that submitted meritorious hardship petitions each year*.” 938 F.3d at 1246 (emphasis added). If EPA accepts the nationwide applicability of the Tenth Circuit decision, as RFA urges it to, this holding would foreclose refineries’ attempts to backfill lapses in extensions of exemptions, as any lapse would evidence a year in which the refinery did not “submit[a] meritorious hardship petition.” Declining to review petitions from small refiners that have already complied with the RFS in prior years would also be consistent with the fact that Congress designed the exemptions to be “temporary” – a “bridge to compliance” for small refineries, rather than a permanent road to non-compliance. *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 572-73 (D.C. Cir. 2015); 42 U.S.C. § 7545(o)(9)(A).

Section 211(o) of the Clean Air Act allows a small refinery to petition EPA “at any time” for an “extension of the exemption.”² In *Renewable Fuels Association*, the Tenth Circuit held that while the phrase “at any time” relieves small refineries from EPA’s November 30th deadline for setting the

¹ 948 F.3d 1206 (10th Cir. 2020).

² 42 U.S.C. § 7545(o)(9)(B)(i); 40 C.F.R. § 80.1441(e)(2).

annual percentages, it does not open the door for EPA to grant a petition regardless of when it is received. *See* 948 F.3d at 1248 (“[E]ven if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*.”) (emphasis added). The Tenth Circuit noted the absurdity of a broader interpretation of “at any time,” explaining that “[b]y that logic, the EPA could grant a 2019 petition seeking a small refinery exemption for calendar year 2009 – more than a decade after the fact.” *Id.* But this is precisely what certain refineries are asking EPA to do here – to pretend there could have been a hardship years ago that could justify the granting of an exemption today, *years* after the compliance deadline had passed for the year the exemption is sought. It is utterly preposterous that EPA would even consider requests for prior-year exemptions from refineries who readily complied with that year’s RFS obligations and who did not originally seek exemptions during the year of purported “hardship.” Now, these refiners are attempting to rewrite history in a cynical attempt to maintain an illegally exploited compliance loophole.

Such retrospective requests also would undermine EPA’s regulations, which require each small refinery with uninterrupted exemptions limits to identify the prospective hardship it “would face” and “the date the refiner anticipates that compliance with the requirements can reasonably be achieved.” 40 C.F.R. § 80.1441(e)(2)(i). RFA is also aware of refineries resubmitting petitions for compliance years in which they submitted a timely petition that was ultimately denied. The Tenth Circuit likewise addressed this possibility, noting that it would not support a reading of “at any time” under which “EPA would also be empowered to grant a re-submitted extension petition for an earlier year even though the agency had previously denied that very petition.” *Id.*

Moreover, granting petitions for past compliance years would contradict EPA’s longstanding practice of issuing decisions on petitions for small refinery exemptions for a given compliance year prior to the compliance deadline.³ *See* Letter from Byron Bunker dated Dec. 6, 2016 (“The EPA recommends complete petitions be submitted as soon as possible to enable the EPA to conduct its evaluation and issue a decision prior to the 2016 compliance deadline of March 31, 2017.”).⁴ EPA has recognized the importance of processing exemption petitions prior to the compliance deadline to ensure that parties have adequate time either to comply with the program or, if they receive an exemption, to sell their RINs to other parties. Even in arguments defending its authority to receive and consider exemption petitions “at any time,” EPA has only contemplated that petitions will be received within the compliance year for which an exemption is sought, or shortly thereafter. *See, e.g., EPA Br. 32, Producers of Renewables United for Integrity Truth and Transparency v. EPA*, Case No. 18-1202 (D.C. Cir. 2019) (“[T]oward the end of the 2016 compliance year, EPA anticipated receiving small refinery exemption petitions for that year and encouraged refineries to submit information that could only be obtained later in the compliance year . . .”).

More generally, granting petitions for past compliance years flatly contradicts EPA’s position that, once annual volume standards have been set and compliance has occurred, modifying those standards

³ We are aware that EPA has, on occasion, issued decisions on small refinery exemption petitions after the compliance deadline has passed for the year for which the exemption is sought. However, in these instances, EPA has acknowledged that this is not typical procedure. *See, e.g., EPA Br. 31, Producers of Renewables United for Integrity Truth and Transparency v. EPA*, Case No. 18-1202 (D.C. Cir. 2019) (“EPA has been considering and issuing decisions on exemption requested received after EPA sets the standards for the upcoming year, and *occasionally* after the compliance deadline . . .”) (emphasis added). This further supports the notion that to now open the door to petitions for any compliance year in which the RFS has been in existence would be a clear departure from EPA’s practice of issuing the decisions prior to the compliance deadline for the applicable year.

⁴ <https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf>.

“would inappropriately render the standards a moving target.” See EPA Br. 59, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. filed Feb. 4, 2019); EPA Br. 68, *American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019). This has been EPA’s reasoning for not taking action to restore past RFS blending obligations lost to illegally granted small refinery exemptions, as requested by RFA and many other stakeholders. Granting exemptions for past compliance years while refusing to restore illegally waived volumes from past years would establish an obvious double standard that favors small refineries and penalizes ethanol producers and farmers.

Finally, we note that EPA has failed to publicly disclose receipt of these past-year petitions on its small refinery exemption “dashboard” web site (i.e., the number of “petitions received” for 2013-2018 exemptions has not changed to reflect these additional petitions, even though the dashboard was just updated on May 21, 2020).⁵ The lack of transparency surrounding these “gap filings” goes against your statement that “we are working to provide more transparency around the small refinery program”⁶ and EPA’s stated intention to ensure “refineries...and other interested parties receive the same RIN market information at the same time.”⁷ Clearly, only refiners applying for past-year petitions know what is going on at EPA, while biofuel producers and the general public are again being kept in the dark.

In closing, a change in practice to allow petitions for past compliance years would completely disrupt and undermine the RFS program and further destabilize RIN markets. The endless uncertainty of small refinery exemptions being available for any compliance year since the program’s inception, whenever a refinery chooses to petition – be it five, 10, or more years later – would be devastating to farmers and the ethanol industry. The recent surge in small refinery exemptions has already caused substantial demand loss and economic hardship for U.S. ethanol producers. Granting exemptions for past compliance years would result in further losses to renewable fuel volume requirements, in addition to the more than four billion gallons lost due to unlawfully issued waivers for compliance years 2016-2018. This would exacerbate the economic harm that the ethanol industry is already experiencing due to EPA’s issuance of unlawful small refinery exemptions.

We urge EPA to clarify that small refinery exemption extension petitions for past compliance years are inconsistent with the RFS and will not be entertained by the Agency. We also urge that EPA expeditiously deny any petitions that have already been received, or that are received going forward, for past compliance years.

Sincerely,



Geoff Cooper
President & CEO

⁵ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>

⁶ Hearing of the U.S. Senate, Committee on Environment and Public Works. Examining EPA’s Agenda: Protecting the Environment and Allowing America’s Economy to Grow. August 1, 2018.

⁷ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

cc (via electronic mail):

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