

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RENEWABLE FUELS ASSOCIATION,
AMERICAN COALITION FOR
ETHANOL,
GROWTH ENERGY,
NATIONAL BIODIESEL BOARD,
NATIONAL CORN GROWERS
ASSOCIATION, and
NATIONAL FARMERS UNION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No.: 19-_____

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Renewable Fuels Association, American Coalition for Ethanol, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union (collectively, the “Coalition”) hereby petition the United States Court of Appeals for the District of Columbia Circuit for review of the following final action by the Environmental Protection Agency (“EPA”), attached hereto as Attachment A:

Decision on 2018 Small Refinery Exemption Petitions, signed August 9, 2019 (“2018 SRE Decision”).

Although short in length and “different from the approach EPA has taken in the past,” the 2018 SRE Decision is, according to EPA, the “only concrete, identifiable and reviewable EPA ‘final action’” concerning approval or denial of small refinery exemption applications for 2018. EPA Mot. to Dismiss 7, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004. According to EPA, the 2018 SRE Decision is “nationally applicable” for purposes of 42 U.S.C. § 7607(b)(1), and so venue is appropriate only in this Court. *See id.* at 9-14 (“Accordingly, to obtain review of EPA’s [2018 SRE Decision] insofar as it applies to Petitioner, Petitioner must seek review in the D.C. Circuit.”).

This Petition for Review is timely. An agency action that is not published in the Federal Register becomes final action for purposes of judicial review under 42 U.S.C. § 7607(b)(1) “two weeks after it is signed.” 40 C.F.R. § 23.3. The 2018 SRE Decision was signed August 9, 2019, but it was not published in the Federal Register; in fact, its existence remained a secret until September 19, 2019, when EPA attached it as an exhibit to a filing in the U.S. Court of Appeals for the Tenth Circuit. *See* EPA Mot. to Dismiss, Bunker Decl., Ex. A,

Sinclair Wyo. Ref. Co. v. EPA, No. 19-9562 (10th Cir. Sept. 19, 2019), ECF No. 10680004.

Date: October 22, 2019

/s/ Matthew W. Morrison
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Respectfully submitted,

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners provide the following corporate disclosure statement:

The Renewable Fuels Association (“RFA”) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its

members. The Renewable Fuels Association does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The American Coalition for Ethanol (“ACE”) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Growth Energy is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The National Biodiesel Board (“NBB”) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel and renewable diesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth. NBB has no parent companies, and no publicly held company has

a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

The National Corn Growers Association (“NCGA”) is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are corn farmers and supporters of the agriculture and ethanol industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Farmers Educational & Cooperative Union of America (doing business as the National Farmers Union) (“NFU”) is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members include farmers who are producers of biofuel feedstocks and consumers of large quantities of fuel. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Date: October 22, 2019

Respectfully submitted,

/s/ Matthew W. Morrison

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25, D.C. Circuit Rules 15(a) and 25, and 40 C.F.R. § 23.12(a), I hereby certify that on October 22, 2019, I will cause copies of the foregoing Petition for Review and Certificate of Corporate Disclosure to be served by certified mail, postage prepaid, upon the following:

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Correspondence Control Unit
Office of General Counsel, Mail Code 2310A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Jeffrey Bossert Clark
Assistant Attorney General
U.S. Department of Justice, Environmental and Natural Resources Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Respectfully submitted,

/s/ Matthew W. Morrison
Matthew W. Morrison

Attachment A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Decision on 2018 Small Refinery Exemption Petitions

OFFICE OF
AIR AND RADIATION

FROM: Anne Idsal, Acting Assistant Administrator
Office of Air and Radiation

TO: Sarah Dunham, Director
Office of Transportation and Air Quality

Section 211(o)(9)(B) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the RFS program “for the reason of disproportionate economic hardship” (DEH). The Act instructs EPA, in consultation with the Department of Energy (DOE), to consider the DOE Small Refinery Study¹ and “other economic factors” in evaluating small refinery exemption (SRE) petitions. The statute does not define “disproportionate economic hardship,” leaving for EPA’s discretion how it implements this exemption provision.²

As part of EPA’s process for evaluating SRE petitions, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE’s expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from its RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately impact the refinery (collectively described as “disproportionate impacts” when referencing Section 1 and Section 2 of DOE’s scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as “viability impairment” when referencing Section 3 of DOE’s scoring matrix). DOE’s recommendation informs EPA’s decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA considered that DEH exists only when a small refinery experiences *both* disproportionate impacts *and* viability impairment. In response to concerns that the two agencies’ threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the

¹ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

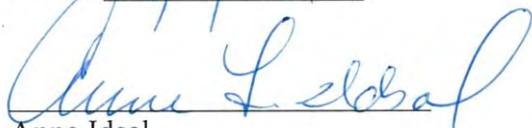
² *Hermes v. Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

2016 Appropriations Act that stated: “If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner.”³ Congress subsequently directed EPA to follow DOE’s recommendation, and to report to Congress if it did not.⁴

Based on DOE’s recommendations for the 2018 petitions, I am today granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because these refineries will face a DEH. I am denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a DEH.

I am also granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief. This decision is appropriate under the Act and is consistent with the case law recognizing EPA’s independent authority in deciding whether to grant or deny RFS small refinery petitions.⁵ DOE’s recommendations recognize an economic impact on these small refineries, and I conclude these small refineries will face a DEH meriting relief. I have concluded that the best interpretation of Section 211(o)(9)(B) is that EPA shall either grant or deny petitions for small refinery hardship relief in full, and not grant partial relief. The exemption available under Section 211(o)(9)(B) is explicitly described as an “extension of the exemption under subparagraph (A).” In turn, subparagraph (A) provides that the requirements of the RFS program “shall not apply to small refineries until calendar year 2011.” It is evident that the original exemption under subparagraph (A) was a full exemption, and therefore I conclude that when Congress authorized the Administrator to provide an “extension” of that exemption for the reason of DEH, Congress intended that extension to be a full, and not partial, exemption. This approach is also consistent with congressional direction since enactment of the provision, which states: “The Agency is reminded that, regardless of the Department of Energy’s recommendation, additional relief may be granted if the Agency believes it is warranted.”⁶

Dated: 8/9/2019



Anne Idsal
Acting Assistant Administrator
Office of Air and Radiation

³ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

⁴ Senate Report 114-281 (“When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE’s recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.”).

⁵ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.* 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

⁶ Consolidated Appropriations Act, 2019, Pub. L. No. 116-6 (2019), *see* H.Rept. 116-9 at 741 (February 13, 2019).