

June 4, 2018

Via Certified and Electronic Mail

The Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Petition for Reconsideration of 40 C.F.R. §80.1405(c), EPA Docket No. EPA–HQ–OAR–2005–0161, promulgated in 75 Fed. Reg. 14,670 (Mar. 26, 2010); Petition for Reconsideration of Periodic Reviews for the Renewable Fuel Standard Program, 82 Fed. Reg. 58,364 (Dec. 12, 2017)

Dear Administrator Pruitt:

Pursuant to Clean Air Act (“CAA”) Section 307(d)(7)(B), the Renewable Fuels Association, American Coalition for Ethanol, Biotechnology Innovation Organization, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union (collectively, the “Coalition”) hereby petition the Environmental Protection Agency (“EPA”) to (1) convene a proceeding to reconsider the annual standard equations in 40 C.F.R. § 80.1405(c), Docket No. EPA–HQ–OAR–2005–0161, 75 Fed. Reg. 14,670, 14,867 (Mar. 26, 2010) (hereinafter referred to as the “Annual Standard Equations” or “Final Rule”), attached hereto as Appendix A and (2) convene a proceeding to reconsider the final action entitled “Periodic Reviews for the Renewable Fuel Standard Program,” notice of which was published at 82 Fed. Reg. 58,364 (Dec. 12, 2017), attached hereto as Appendix B.

The Coalition represents producers of renewable feedstocks and fuels that are blended into transportation fuel as required by the Renewable Fuel Standard (“RFS”). EPA has already recognized the impact of the Final Rule on such entities. *See* 75 Fed. Reg. 14,670.

The Annual Standard Equations account for small refinery exemptions granted for a particular year only if they are issued before the final Renewable Volume Obligations (“RVOs”) are issued for that year. Thus, the Annual Standard Equations do not provide a means to “true up” the annual standards for any retroactive small refinery exemptions, i.e., exemptions granted after the RVOs for that year have been finalized, and any volumes covered by such exemptions are lost. Accordingly, the Annual Standard Equations cannot ensure that the applicable volume requirements of the statute are being met pursuant to 42 U.S.C. § 7545(o)(3)(B)(i). When adopting the Annual Standard Equations in 2010, EPA assumed that it would grant very few extensions of small refinery hardship exemptions in any given year, and that the overall number would decline steadily over time until no more extensions would be granted—and thus assumed that the net effect of the exemptions would be *de minimis* at first and eventually non-existent. In this earlier era when small refinery exemptions were rare, EPA’s failure to account for retroactive exemptions may have been a justifiable administrative convenience. But EPA’s continued use of its Annual Standard Equations in the face of its recently and greatly expanded use of retroactive small refinery exemptions—news reports within the last 60 days reveal a flood of more than two dozen retroactive small refinery hardship exemptions have already been granted this year—is now arbitrary and capricious. The Annual Standard Equations must therefore be reconsidered in accordance with CAA Section 307(d)(7)(B).

The following sections explain the legal basis of this Petition and outline why EPA’s inadequate approach to calculating annual standards has become arbitrary and capricious and must be re-examined.

I. Background

In the RFS, Congress directed EPA to promulgate regulations to ensure that all transportation fuel sold or introduced into commerce in the United States contains, on an annual average basis, the applicable volumes of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel set by Congress for each calendar year. 42 U.S.C. § 7545(o)(2)(A)(i). The CAA also requires EPA to determine and publish a renewable fuel obligation each year “that ensures that requirements are met.” 42 U.S.C. § 7545(o)(3)(B)(i).

As a regulatory flexibility measure, Congress provided a temporary exemption, through December 31, 2010, to small refineries with a crude oil throughput of no more than 75,000 barrels per day. *See* 42 U.S.C. § 7545(o)(9). Congress also provided that small refineries could receive a temporary extension of the exemption beyond 2010 based on either 1) the results of a required Department of Energy (“DOE”) study, or 2) an EPA determination of “disproportionate economic hardship” on a case-by-case basis in response to petitions from small refineries. *Id.* §§ 7545(o)(9)(A)(ii), 7545(o)(9)(B). In reviewing individual petitions to extend a small refinery exemption, EPA must consult with DOE to evaluate how achieving compliance with the RFS requirements affects the refineries’ competitiveness and profitability. *See id.* Small refineries may apply for the disproportionate hardship exemption “at any time,” and EPA must review and decide on the petition within 90 days. *Id.* § 7545(o)(9)(B)(i), (iii).

Each year since the 2010 Final Rule, EPA has calculated the value of the annual standards according to the Annual Standard Equations set forth at 40 CFR § 80.1405(c). Two variables in the denominator of the Annual Standard Equations— GE_i and DE_i —account for the volumes of gasoline and diesel “projected to be produced by exempt small refineries and small refiners, in year i , in gallons in any year they are exempt per §§ 80.1441 and 80.1442,

respectively.” 40 C.F.R. § 80.1405(c). Thus, EPA has accounted for the small refinery hardship exemptions granted before the final RVOs each year by assigning values to GE_i and DE_i , which in turn “result in a proportionally higher percentage standard for remaining obligated parties,” 75 Fed. Reg. 76,790, 76,805 (Dec. 9, 2010). *See, e.g.*, 75 Fed. Reg. 14,716-14,717 (“Thus we have excluded their gasoline and diesel volumes from the overall nonrenewable gasoline and diesel volumes used to determine the applicable percentages until 2011.”); 77 Fed. Reg. 1,319, 1,324 (Jan. 9, 2012) (EPA “has also adjusted the final 2012 percentage standards to reflect the exemption of these small refineries from being RFS obligated parties in 2012.”).

The Annual Standard Equations do not, however, account for small refinery exemptions granted *retroactively* after EPA has finalized a given year’s RVOs.

This practice seemed less problematic until recently. Indeed, the Coalition and other similarly situated parties had little reason to believe that EPA was granting numerous retroactive exemptions, thereby systematically skewing the volumes of renewable fuel required nationally.

II. The Agency Must Reconsider Its Annual Standard Equations to Account for the Unprecedented Increase in Retroactive Small Refinery Exemptions.

News reports in the last 60 days have revealed that EPA has recently granted two dozen small refinery hardship exemptions, most of them seemingly retroactively. *See e.g.*, Jarrett Renshaw & Chris Prentice, *Chevron, Exxon Seek ‘Small Refinery’ Waivers from U.S. Biofuels Law*, Reuters, Apr. 12, 2018, attached hereto as Appendix C (EPA “has already issued an unusually high 25 hardship waivers to small refineries in recent months, according to an agency source, driving blending credit prices down and helping the oil industry reduce compliance costs.”); Jarrett Renshaw & Chris Prentice, *U.S. EPA Grants Biofuels Wavier to Billionaire Icahn’s Oil Refinery-Sources*, Reuters, Apr. 30, 2018, attached hereto as Appendix D (“The Trump Administration has encouraged small refiners to apply for the hardship waivers. A surge

of applications has come to the EPA....”); Jarrett Renshaw & Chris Prentice, *Large U.S. Refiner Marathon Seeks Biofuel Hardship Waiver-Sources*, Reuters, May 23, 2018, attached hereto as Appendix E (“[T]he agency has granted more than two dozen small refinery waivers for 2017 in recent months, a level that former officials say is about triple the number given each year under previous administrations.”). This represents a dramatic increase in the number of such exemptions and thus greatly increases their effect on the use of renewable fuel.

EPA’s apparent new permissive interpretation in granting small refinery economic hardship exemptions constitutes grounds for reconsideration arising after the close of the Final Rule’s public comment period on July 27, 2009. This dramatic development—the full extent of which has been kept secret by EPA—negates the legal basis on which EPA had relied to justify the Annual Standard Equations.

A. EPA Has a Duty to Grant Reconsideration Where, as Here, the Grounds for Reconsideration Are of Central Relevance and Have Arisen After Promulgation of the Final Rule.

EPA is legally required to grant this petition for reconsideration, under both the CAA and general administrative law principles. Section 307(d)(7)(B) of the CAA establishes the following approach for EPA to use in adjudicating reconsideration petitions:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

See 42 U.S.C. § 7607(d)(7)(B). The “time specified for judicial review” is 60 days “after such grounds arise.” *Id.* § 7607(b)(1). This petition satisfies these requirements: it is based on news reports within the past 60 days of a significant increase in the number of small refinery exemptions being granted; and this development is of central relevance to the Annual Standard

Equations rule because it shows that, by not accounting for retroactive exemptions, the rule is now arbitrary and capricious.

The D.C. Circuit recognizes that “new information” may “dictate a revision or modification of any promulgated standard or regulation established under the act.” *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (quoting S. Rep. No. 91-1196, at 41-42 (1970)). The D.C. Circuit has established a process for petitioners and EPA to follow with regard to petitions to reconsider Clean Air Act rules based on “new information”:

(1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials. (2) EPA should respond to the petition and, if it denies the petition, set forth its reasons. (3) If the petition is denied, the petitioner may seek review of the denial in this court pursuant to Section 307.

Id. at 666.

This Petition satisfies the first step outlined in the *Oljato* process because it asks EPA to revise 1) the Annual Standard Equations (40 C.F.R. § 80.1405(c)) and 2) its Nov. 2017 Periodic Review of the RFS to account for retroactive exemptions based on specific legal grounds and appropriate supporting materials. EPA must therefore respond to this Petition, and if it denies the Petition, it must state its reasons for doing so. *See* 515 F.2d at 667 (“[T]he public’s right to petition the Administrator for revision of a standard of performance and the Administrator’s duty to respond substantively to such requests exist completely independently of Section 307 and this court’s appellate jurisdiction.”). Any explanation and record developed by EPA in denying the relief requested by the Coalition may be reviewed in the D.C. Circuit pursuant to the third step outlined in *Oljato*.

B. EPA’s Permissive Granting of Retroactive Exemptions and the Resulting Collective Magnitude of Those Exemptions Invalidate EPA’s Statutory Obligation and Prior Rationale for the Annual Standard Equations.

- i. Until Recently, Small Refinery Hardship Exemptions Did Not Materially Affect EPA’s Ability to Ensure Required Volumes Were Being Met.*

At the time of the RFS2 Final Rule in 2010, there was little need for the Annual Standard Equations to account for retroactive small refinery exemptions prior to 2010 because Congress had mandated that *all* small refineries were exempted until 2011, 75 Fed. Reg. 14,716, and after that, EPA did not anticipate granting additional small refinery hardship exemptions prospectively except in rare circumstances, 75 Fed. Reg. 14,736 (“DOE thus determined that small refineries would not be subject to disproportionate economic hardship under the proposed RFS2 program, and that the exemption should not, on the basis of the study, be extended for small refineries (including those small refiners who own refineries meeting the small refinery definition) beyond December 31, 2010.”); 75 Fed. Reg. 76,790, 76,804 (Dec. 9, 2010) (“Beginning in 2011, gasoline and diesel volumes produced by small refineries and small refiners will generally no longer be exempt, and thus there is no adjustment to the gasoline and diesel volumes in today’s final rule to account for such an exemption.”).

Although EPA later extended the small refinery exemptions for 2011 and 2012 to 13 of 59 small refineries based on a 2011 DOE study, *see Sinclair Wyo. Refining Co. v. EPA*, 874 F.3d 1159, 1163 (10th Cir. 2017), those extensions should, per the CAA, have been determined before the RVOs for 2011 and 2012 were finalized and thus there would have been no reason to expect those exemptions to be retroactive. *See* 42 U.S.C. § 7545(o)(9)(A)(ii). And for a long time thereafter, EPA granted exemptions on a case-by-case basis sparingly. Based on the limited data EPA has released to date, out of the approximately 58 petitions EPA had received for years 2013 to 2016, EPA granted a total of 29 small refinery one-year exemptions. *See* Appendix B at 11

n.33; Jarrett Renshaw, *U.S. Small Refiners Make Surge of Biofuel Waiver Requests – Sources*, Reuters, Jan. 25, 2018, attached hereto as Appendix G. This means that EPA granted on average seven or eight hardship exemptions per year for the first four years in which it made case-by-case exemption determinations based on extension petitions filed by the refineries. *See* Appendix G. And only a fraction of those were *retroactive*.

As recently as the Proposed Rule for the 2018 RVOs, EPA has continued to assert that most small refineries would not qualify for an economic hardship exemption. EPA admitted, “Currently available information shows that the impact on small entities from implementation of this rule would not be significant.” 82 Fed. Reg. 34,206, 34,243 (July 21, 2017). Even using conservative estimates, “the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales.” *Id.* Moreover, EPA concluded that “obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS standards through higher sales prices of the petroleum products they sell than would be expected in the absence of the RFS program.” *Id.*

Although little data has been made public on the number and magnitude of small refinery exemptions, the information EPA has released strongly suggests that exemptions granted after the annual standards were finalized would be rare and would have a miniscule impact on the percentage standards. *Cf.* Response to Petitions of the American Petroleum Institute, American Fuel and Petrochemical Manufacturers, and Monroe Energy LLC for Reconsideration of Portions of the 2013 Renewable Fuel Standards Annual Rule (Sept. 2016) at 14, attached hereto as Appendix P (accounting for one exemption granted between 2013 proposed and final rule only made a difference of 0.01% to the total renewable fuel standard for 2013). Regulatory certainty has been the stated reason, in response to comments over the years, that EPA has consistently

declined to make up volumes waived as a result of retroactive small refinery exemptions when it is setting the next year's standards. *See, e.g.,* 77 Fed. Reg. 1,340. That position may have made sense when any adjustments to the annual standards might arguably have been *de minimis*, but that is no longer true.

ii. *EPA Has Dramatically Increased the Number and Magnitude of Small Refinery Exemptions.*

Given previously available information, the credible reports in April 2018 that EPA had granted a large number of small refinery hardship exemptions for calendar years whose RVOs were already finalized was surprising and troubling. *See* Appendix C.

Based on news reports, it appears that the number of exemptions—and of retroactive exemptions specifically—granted for 2017 is about three times higher than the historical average. *See* Appendix E. In testimony before the House Energy and Commerce Committee on April 26, 2018, Administrator Scott Pruitt acknowledged that EPA had received 24 applications in 2017 (for exemptions in calendar year 2016) and over 30 applications in 2018 (presumably for exemptions in calendar year 2017). Transcript of U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Environment hearing on Fiscal Year 2019 Environmental Protection Agency Budget at ln. 1231-32 (April 26, 2018), attached hereto as Appendix H. Administrator Pruitt also confirmed that EPA approved approximately 25 small refinery waivers in 2017 and an even higher number for 2018. *Id.* at ln. 4371-81. Moreover, according to a summary of recent reports in a letter from Senator Grassley to EPA and as explained further *infra*, EPA appears to have issued these hardship exemptions to small refineries that are evidently profitable, contrary to EPA's own standards for evaluating these petitions. *See* Letter from Charles E. Grassley, United States Senator, to Scott Pruitt, EPA Administrator (Apr. 12, 2018), attached hereto as Appendix Q; EPA, *Financial and Other Information to be*

Submitted with 2016 RFS Small Refinery Hardship Exemption Requests, at 2 (Dec. 6, 2016), attached hereto as Appendix I.

Additionally, it is unknown whether the reported numbers are the full extent of EPA's recent grants of hardship exemptions because EPA itself has not publicly disclosed any decisions regarding any exemption petitions in the Federal Register or elsewhere. *See Lion Oil Co. v. EPA*, 792 F.3d 978, 980 (8th Cir. 2015) ("EPA sent its decision to Lion Oil only."); 78 Fed. Reg. 49,794-49,826 (Aug. 15, 2013) (withholding volume of projected gasoline and diesel from single exempt small refinery on basis of confidential business information). The Coalition has not received actual notice of any of the individual exemptions, save for whatever information has been provided by refiners as part of their respective SEC filings.¹ In fact, to date, EPA has not disclosed information requested pursuant to the Freedom of Information Act ("FOIA") by the Renewable Fuels Association, Growth Energy, and National Biodiesel Board about specific small refinery exemptions. *See* Appendix F. Even members of Congress remain uninformed, which has prompted letters from multiple Senators requesting additional information. *See* Appendix Q; Letter from John P. Sarbanes, United States Representative, to Scott Pruitt, EPA Administrator (May 16, 2018), attached hereto as Appendix R.

iii. EPA's Unannounced Policy Change for Liberally Approving Small Refinery Exemptions Is Unsupportable and Was Unforeseeable in 2010.

EPA's apparent shift in policy to liberally granting small refinery exemptions retroactively is unwarranted, both legally and economically. The dramatic increase in small refinery exemptions evidently reflects what can only be an internal policy shift. EPA has previously expressed, consistent with the RFS statute, that the small refinery hardship waivers

¹ *See* Appendix L at 76.

are a temporary measure and that extensions of the waivers would continue to diminish in number. *See* 75 Fed. Reg. 14,736; 75 Fed. Reg. 76,804. EPA’s sudden hardship exemption free-for-all cannot be explained by the Tenth Circuit Court of Appeals’ decision in *Sinclair Wyoming Refining v. EPA*, 874 F.3d 1159 (10th Cir. 2017); that case does not support EPA’s actions. Although the Tenth Circuit held in *Sinclair* that EPA could not equate “hardship” with long-term “viability,” the court did not permit unfettered exemptions for any small refinery that could demonstrate minimal hardship. The court also directed EPA “to consider the *disproportionate* impact of the RFS Program, which inherently requires a comparative evaluation.” *Id.* at 1170 (emphasis in original). The court therefore faulted EPA’s viability test for not comparing, as the statute establishes it must, “the effect of the RFS Program compliance costs on a given refinery with the economic state of other refineries.” *Id.* In other words, the Tenth Circuit did no more than insist that EPA apply a plausible interpretation of the statutory text when evaluating small refinery waiver petitions. It certainly did *not* give EPA license to—as it now appears to have done—go “far beyond what Congress intended” in the opposite direction, by permitting exemptions for any small refinery that can demonstrate any hardship *at all* as a result of the RFS mandate. If EPA’s current policy is that the RFS Program imposes hardship on *all* small refineries simply because being an obligated party has a cost (and thus is in some sense a “hardship”), such that EPA now finds that they all are deserving of exemptions, EPA is equally “impermissibly read[ing] the word ‘disproportionate’ out of the statute.” *Id.*

Whatever the basis is of EPA’s misguided policy change with regard to these small refinery waivers, the unprecedented increase in small refinery exemptions cannot be attributed to deteriorating refining economics alone. RIN prices are at multi-year lows, oil prices are increasing, and refineries are enjoying solid margins and corporate tax cuts. *See* Nilanjan

Choudhury, *EPA's Hardship Waiver News Sends RIN Prices to 3-Year Lows*, Apr. 6, 2018, attached hereto as Appendix J; Laura Blewitt, *U.S. Refiners Talk Expansion After Reaping Billions in Tax Gains*, Bloomberg, Feb. 1, 2018, attached hereto as Appendix K. For example, in 2017, EPA granted HollyFrontier two retroactive small refinery hardship exemptions for calendar year 2016 that saved the company about \$58 million in RIN compliance costs. See Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, HollyFrontier Corporation (Feb. 21, 2018) at 76, attached hereto as Appendix L. In 2018 EPA also apparently allowed HollyFrontier "to generate new 2018 vintage RINs to replace the RINs previously submitted to meet the Cheyenne Refinery's 2015 RVO." Jarrett Renshaw & Chris Prentice, *U.S. EPA Grants Refiners Biofuel Credits to Remedy Obama-Era Waiver Denials*, Reuters, May 31, 2018 (quoting HollyFrontier first quarter 2018 financial disclosure). During that same 2015 to 2016 period, the company was in the midst of a \$1 billion stock repurchase plan that had been approved in 2015. Appendix L. At the end of 2016, the company had spent over \$800 million for share repurchases. *Id.* Thus, EPA appears to have determined that HollyFrontier could afford to pay its shareholders almost one billion dollars but could not scrounge together \$58 million for compliance with its RFS obligations.

Similarly, CVR Energy, which reportedly received an exemption for its two refineries for 2017, appears to have been profitable that year. According to its investor disclosures, the margin per barrel of crude oil throughput at CVR Refining, LP's Wynnewood Refinery increased to \$9.85 in 2017 from \$8.07 in 2016. See CVR Refining, LP, 4th Quarter 2017 Earnings Report (Feb. 22, 2018) at 16, attached hereto as Appendix S. Due to its retroactive exemption, CVR expects its 2018 cost of compliance with the RFS to be \$120 million less than the amount it had estimated just two months prior. Jarrett Renshaw & Chris Prentice, *CVR Q1 Income Doubles on*

Stronger Crack Spreads, Lower Biofuels Cost, Reuters, Apr. 26, 2018, attached hereto as Appendix M; *see also* Appendix D.

Such an application of the small refinery exemption provision misapplies EPA's statutory authority. Moreover, EPA evinced no expectation that it would use the exemption this way when it finalized the Annual Standard Equations in 2010, which is why the new information about EPA's recent actions granting unprecedented numbers of retroactive small refinery hardship waivers is sufficient grounds to entitle the Coalition to seek review of the RFS2 Final Rule setting the Annual Standard Equations.

- iv. EPA Is Obligated to Ensure that the RFS Volume Requirements Are Being Met, but EPA's Annual Standard Equations No Longer Do So, and Instead Ensure that the RFS Volume Requirements Will Not Be Met by a Significant Amount.*

In light of this change in practice, the Annual Standard Equations can no longer ensure that the RFS volume requirements are met. *See* 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i). Each of the four separate annual renewable fuel standards (for cellulosic biofuel, advanced biofuel, biomass-based diesel, and renewable fuel, respectively) is expressed as a volume percentage of combined gasoline and diesel sold or introduced into commerce in the United States. *See* 75 Fed. Reg. 14,716. Obligated parties use these standards to determine their respective annual renewable volume obligations. *Id.* To generate the specific standards for each type of renewable fuel, EPA inserts applicable values into the Annual Standard Equations.

$$\text{Std}_{\text{CR},i} = 100 * \frac{\text{RFV}_{\text{CR},i}}{(G_i - \text{RG}_i) + (GS_i - \text{RGS}_i) - GE_i + (D_i - \text{RD}_i) + (DS_i - \text{RDS}_i) - DE_i}$$

$$\text{Std}_{\text{BR},i} = 100 * \frac{\text{RFV}_{\text{BR},i} \times 1.5}{(G_i - \text{RG}_i) + (GS_i - \text{RGS}_i) - GE_i + (D_i - \text{RD}_i) + (DS_i - \text{RDS}_i) - DE_i}$$

$$\text{Std}_{\text{AR},i} = 100 * \frac{\text{RFV}_{\text{AR},i}}{(G_i - \text{RG}_i) + (GS_i - \text{RGS}_i) - GE_i + (D_i - \text{RD}_i) + (DS_i - \text{RDS}_i) - DE_i}$$

$$\text{Std}_{\text{RF},i} = 100 * \frac{\text{RFV}_{\text{RF},i}}{(G_i - \text{RG}_i) + (GS_i - \text{RGS}_i) - GE_i + (D_i - \text{RD}_i) + (DS_i - \text{RDS}_i) - DE_i}$$

40 C.F.R. § 1405(c).

As explained above, the Annual Standard Equations do not account for retroactive exemptions for the previous year or for the current compliance year that has already begun. Indeed, the variables GE_i and DE_i in the denominator account for gasoline and diesel volumes from exempt small refineries, but only from those small refineries who received the exemption for the upcoming calendar year prior to the date the standard is finalized. *Id.* Exemptions granted after the standard is finalized are *not* included in the calculation. This means that although the pre-RVO-rule exemptions for the upcoming calendar year “result in a proportionally higher percentage standard” for the remaining obligated parties, 75 Fed. Reg. at 76,805, the volumes of required renewable fuel attributable to retroactive exemptions—which, as just discussed, appear to be the vast majority of the recent wave of hardship exemptions—are simply lost.

That result is unsupportable in light of recent revelations. While a single exemption may affect the annual percentage standard by only a fraction of a percent, ignoring the recent retroactive exemptions altogether artificially suppresses the annual standard by a material amount, contrary to EPA’s obligation to ensure that the necessary volumes are met. 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i).

Taken together, small refineries represent *over 10 percent* of domestic refining output. *See* 75 Fed. Reg. 14,717. Based on recent data, lost renewable fuel volumes from the small refineries to which the EPA is reported to have recently granted exemptions could be as high as 1.6 billion gallons just for the 2016 and 2017 compliance years. *See* Appendix N.

Using 2012 as the anchor point, the 3.2 billion gallons produced from the 13 exempted refineries that year accounted for 2.5% of both gasoline and diesel pools. 76 Fed. Reg. 38,844, 38,858 (July 1, 2011). And recent reports indicate that EPA has granted approximately twice as many exemptions in 2017 and 2018 (for calendar years 2016 and 2017) as it did in 2012. Transcript of U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Environment Hearing on Fiscal Year 2019 Environmental Protection Agency Budget (Apr. 26, 2018) at ln. 4371-81, attached hereto as Appendix O. If true, this would mean that for the past two years EPA's applicable percentage for obligated parties has failed to account for *at least 12 billion gallons* of gasoline and diesel from exempted small refineries, assuming the sizes of the refineries granted exemptions and the scope of exemptions granted (partial vs. full) are similar. This would translate into roughly 1.2 billion gallons of renewable fuel that obligated parties should have blended over the 2016-17 period, but did not because EPA's calculations failed to account for the exemptions.

Of course, if the size of the refineries granted exemptions in 2016-2017 were on average *larger* than those granted exemptions in 2012, as it appears likely that they are, or if previous exemptions applied only to a portion of the small refineries' gasoline and diesel output (i.e., a partial waiver), then effective cut to RFS obligations resulting from EPA's recent actions would be even greater than estimated above. Indeed, EPA's own data strongly implies that small refinery exemptions have resulted in lowering the required volume of renewable fuels for 2017

alone by 1.11 billion gallons, or 6%. The data also show that small refinery exemptions also effectively reduced the 2016 RFS requirement by an additional 523 million gallons. The EPA data show large discrepancies between actual gasoline and diesel consumption and the volumes obligated for renewable fuel blending as reported by obligated parties. The only reasonable explanation for these large discrepancies between actual gasoline and diesel consumption and the volume of gasoline and diesel obligated for renewable fuel blending is the surge in small refinery exemptions for calendar year 2016 and after. Appendix N contains additional details on how Petitioner Renewable Fuels Association estimated these lost volumes.

v. *In Light of EPA's New Approach to Small Refinery Exemption Extensions, Continued Application of EPA's Annual Standards Regulation Is Arbitrary and Capricious.*

The Annual Standard Equations are arbitrary and capricious because they fail to account for the now-substantial volumes of transportation fuel—and thus renewable fuel—that are covered by the many retroactively-exempt small refineries. EPA has a statutory duty under 42 U.S.C. § 7545(o)(3)(B)(i) to ensure the required volumes of renewable fuel are being met. Yet, in the absence of public notice and comment, EPA has shifted from granting only a handful of small refinery exemptions per year to granting all or nearly all the petitions it receives, even those from highly profitable refining companies. As a result of the unprecedented large number of small refinery exemptions EPA retroactively granted for 2016 and 2017, *see* Appendix O, the required renewable fuel volumes have not been met by a material percentage in 2016 and 2017, because the Annual Standard Equations failed to account for the aggregate volume of these exempt refineries. *See* Appendix N. Because the underlying assumptions behind the Annual Standard Equations—that any volumes attributable to small refinery exemptions granted but unaccounted for by the Annual Standard Equations would be *de minimis*—are no longer valid, EPA must revise the Annual Standard Equations.

EPA's prior reasons for not accounting for retroactive exemptions no longer make sense. EPA previously said that it would not adjust the percentage calculation for the current calendar year based on retroactive exemptions because it believed that "the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements." 77 Fed. Reg. 1,340. Similarly, EPA stated that the retroactive exemptions granted for the previous year would not be "made up" the following year because "there is no provision for changing the percentage standards once they are set," and because Congress did not require that the volume requirements be "precisely met" given that the RVOs are defined to be a percentage of *projected* transportation fuel use in the next year. 77 Fed. Reg. 1,340; *see also* 75 Fed. Reg. 76,780. And as recently as September 2016, EPA defended the Annual Standard Equations as striking the right balance between regulatory certainty and its own statutory duty to "achieve the CAA's objectives of ensuring that applicable volumes of renewable fuel are used in the transportation sector." Appendix P at 14.

But retroactively changing RVOs once they have been set is not the only way to make up retroactive exemption volumes. Instead, EPA could account for the exemptions in the *next year's* RVO rulemaking. EPA has used a similar approach in other circumstances. *See NPRA*, 630 F.3d at 155-157; *Monroe Energy*, 750 F.3d at 916, 919-921.² That would also provide ample notice and regulatory certainty to the industry and obligated parties as they prepare to make up exempt volumes. In contrast, EPA's new practice of granting many exemptions after the fact threatens to

² EPA will have to adjust the required volumes for 2019 due to the remand in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017). This remand presents an opportunity for EPA to adjust the applicable percentage to account for previously granted retroactive small refinery exemptions.

substantially disrupt the investment-backed expectations of renewable-fuel producers, obligated parties, and other participants in the transportation fuel industry by suddenly and unexpectedly depreciating the value of RINs. *See* Appendix P at 14. And even though Congress tolerated some gap between the final RVOs and the amount of renewable fuel eventually used, there is a material difference between using best available projections to estimate gasoline and diesel use—which could equally overestimate or underestimate actual use—and structurally excluding retroactive small refinery exemptions from the Annual Standard Equations, which will *always* result in a *reduction in* required renewable-fuel usage. The latter, as explained, violates EPA’s statutory mandate. 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i).

- vi. *EPA Must Revise Its Annual Standard Equations Because EPA’s Failure to Account for Retroactive Exemptions Amounts to an Impermissible Waiver of RFS Volumes.*

EPA’s decision to open the floodgates to retroactive small refinery exemptions effectively serves as a waiver of the previous year’s RVOs. This not only undermines the integrity of the RFS program but also directly contravenes EPA’s obligations under the statute.

Congress established in CAA § 211(o)(7) the procedure for waiving the RFS volumes. Specifically, EPA can waive the statutorily mandated volume requirements *only* if, after public notice and opportunity for comment, the Administrator finds that implementation of those requirements would “severely harm the economy or environment of a State, a region, or the United States” or that “there is an inadequate domestic supply.” 42 U.S.C. § 7545(o)(7). In granting waivers of over one billion gallons of renewable fuel volumes through two dozen or more small refinery waivers in each of the past two years without an opportunity for comment, or even notice of the decisions themselves, and without reallocating the renewable fuel volume obligations from the exempted small refineries to non-exempt obligated parties, EPA effectively issued a waiver not authorized under the Act. Even if EPA were to now argue that its actions

should be considered the equivalent of an waiver based on economic harm to a state, region, or the United States, EPA cannot now invoke § 211(o)(7) because it never complied with the procedures applicable to such waivers. Sneaking an effective waiver of over a billion gallons through a backdoor of small refinery exemptions is simply impermissible. Where Congress has spoken to an issue directly, such as supplying a procedure for reducing the overall RFS volume requirements as it did in § 211(o)(7), Congress has indicated that other authorities – such as the small refinery exemption provision – cannot be used to accomplish the same result by different means. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Although EPA hinted that there could be a change in the number and magnitude of exemptions granted, 82 Fed. Reg. 34,242, it gave no indication of the scope of the coming change to EPA policy. *See* 82 Fed. Reg. 58,523 (“EPA has granted exemptions pursuant to this process in the past. However, at this time no exemptions have been approved for 2018, and therefore we have calculated the percentage standards for 2018 without any adjustment for exempted volumes.”). Nor did it indicate that it had changed its prior position that the RFS program would not pose a significant economic impact on most small refining entities. *See* 82 Fed. Reg. 34,242 (“[T]he impact on small entities from implementation of this rule would not be significant....a cost-to-sales ratio test shows that the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales”), and thus it is difficult to see how there could be such a sudden increase in “disproportionate hardship” to so many small refineries, particularly when RIN compliance costs have recently been at multi-year lows. *See* Appendix G at 4; Appendix J. Yet at the same time EPA declined to adjust the 2018 volumes to account for lost small refinery volumes from calendar years 2016 and 2017, *see* 82 Fed. Reg. 34,242,

unbeknownst to the Coalition and other interested parties, it was apparently in the process of approving a record number of small refinery hardship exemptions.

As a result of new information – namely, the substantial increase in the number of retroactive small refinery exemptions granted – that has been brought to light by credible news reports only within the past 60 days, EPA’s Annual Standard Equations at 40 C.F.R. § 1405(c) now systematically fail to ensure that the required volumes under the RFS are being met pursuant to 42 U.S.C. § 7545(o)(3)(B)(i). Consequently, 40 C.F.R. § 1405(c) can no longer be defended as a reasonable exercise of EPA’s discretion.

III. EPA’s Periodic Review of the RFS Program Arbitrarily and Capriciously Ignored the Impact of Permissively Granting Large Numbers of Small Refinery Exemptions.

Section 211(o)(11)(B) of the CAA requires EPA to conduct periodic reviews of the RFS Program to ensure compliance with the RFS requirements is being achieved. In December of 2017, EPA released its most recent review pursuant to this section. Appendix B. In assessing the feasibility of achieving compliance, EPA completely ignored the impact of granting large numbers of small refinery exemptions retroactively without making them up. EPA did evaluate the feasibility of achieving compliance in the context of multiple waiver requests, however. *See Id.* at 10. And as noted, small refinery exemptions effectively serve as waivers of required volumes if EPA does not require them to be made up in the following year.

In this same document, EPA acknowledged that it *reviewed* 16 small refinery exemptions for 2016, but it gave no indication that the number of exemptions granted had dramatically increased compared to previous years. *Id.* at 11 n.33. Because over one billion gallons of lost renewable fuel volumes impacts the feasibility of compliance with RFS requirements, it was arbitrary and capricious for EPA to ignore the impact of small refinery exemptions in its periodic review, given its knowledge (not shared with the public) that it had already granted an

unprecedented high number of such exemptions or that it was likely to do so. The Coalition requests that EPA reconsider the impact of small refinery exemptions in its review and propose appropriate adjustments of the standards to account for lost volumes from retroactive exemptions.

IV. Conclusion

Section 211(o)(2)(a)(i) requires EPA to ensure that the annual required volumes of renewable fuel are introduced into the nation's transportation fuel supply. By suddenly reversing its prior policy and granting retroactive exemptions to so many small refineries without adjusting its Annual Standard Equations to account for the resulting lost volumes, EPA is failing to meet its statutory obligation to "ensure" that transportation fuels in the United States contain the applicable volumes of renewable fuel. Consequently, EPA's Annual Standard Equation in 40 C.F.R. § 1405(c) and its Periodic Review of the RFS Program are arbitrary and capricious.

Thank you for your consideration of the Coalition's petition.

Sincerely,

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Appendices:

Appendix A, “Annual Standard Equations,” Docket No. EPA–HQ–OAR–2005–0161, 75 Fed. Reg. 14,670, 14,867 (Mar. 26, 2010)

Appendix B, *Periodic Reviews for the Renewable Fuel Standard Program*, EPA-420-S-17-002 (Nov. 2017), notice of which was published at 82 Fed. Reg. 58,364 (Dec. 12, 2017)

Appendix C, *Chevron, Exxon Seek ‘Small Refinery’ Waivers from U.S. Biofuels Law*, Reuters (Apr. 12, 2018)

Appendix D, *U.S. EPA Grants Biofuels Waiver to Billionaire Icahn’s Oil Refinery-Sources*, Reuters (Apr. 30, 2018)

Appendix E, *Large U.S. Refiner Marathon Seeks Biofuel Hardship Waiver-Sources*, Reuters (May 23, 2018)

Appendix F, Freedom of Information Act Requests from Renewable Fuels Association, National Biodiesel Board, and WilmerHale to EPA (April 2018)

Appendix G, *U.S. Small Refiners Make Surge of Biofuel Waiver Requests – Sources*, Reuters (Jan. 25, 2018)

Appendix H, Transcript of U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Environment hearing on Fiscal Year 2019 Environmental Protection Agency Budget (April 26, 2018) (excerpts)

Appendix I, EPA, *Financial and Other Information to be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests* (Dec. 6, 2016)

Appendix J, *EPA's Hardship Waiver News Sends RIN Prices to 3-Year Lows* (Apr. 6, 2018)

Appendix K, *U.S. Refiners Talk Expansion After Reaping Billions in Tax Gains* (Feb. 1, 2018)

Appendix L, HollyFrontier Corporation, Form 10-K, Annual Report (Feb. 21, 2018)

Appendix M, *CVR Q1 Income Doubles on Stronger Crack Spreads, Lower Biofuels Cost* (Apr. 26, 2018)

Appendix N, *EPA's Own Data Show Small Refiner Exemptions Cut 2016 and 2017 RFS Obligations by at Least 1.6 Billion Gallons* (April 24, 2016)

Appendix O, Transcript of U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Environment hearing on Fiscal Year 2019 Environmental Protection Agency Budget (April 26, 2018) (excerpts)

Appendix P, *Response to Petitions of the American Petroleum Institute, American Fuel and Petrochemical Manufacturers, and Monroe Energy LLC for Reconsideration of Portions of the 2013 Renewable Fuel Standards Annual Rule*, at 14 (Sept. 2016)

Appendix Q: Letter from Charles E. Grassley, United States Senator, to Scott Pruitt, EPA Administrator (Apr. 12, 2018)

Appendix R: Letter from John P. Sarbanes, United States Representative, to Scott Pruitt, EPA Administrator (May 16, 2018)

Appendix S: CVR Refining, 4th Quarter 2017 Earnings Report (Feb. 22, 2018)