

Testimony for
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U.S. Environmental Protection Agency
Before the Subcommittee on Environment and Climate Change
U.S. House of Representatives Energy and Commerce Committee
on *H.R. 3006 Renewable Fuel Standard Integrity Act of 2019*

October 29, 2019

Chairman Tonko, Ranking Member Shimkus, and Members of the Subcommittee: thank you for the opportunity to offer comments today on the *Renewable Fuel Standard (RFS) Integrity Act of 2019* discussion draft. The Administration does not have an official position on this draft. The new requirements that the legislation would impose include (1) setting a date certain by which petitions for small refinery exemptions must be submitted, and (2) specifying that information submitted in conjunction with a small refinery petition shall not be considered Confidential Business Information.

As you know, in the RFS program, Congress established exemptions from RFS volume obligations for small refineries (statutorily defined as refineries with an average aggregated daily crude oil throughput of 75,000 barrels per day or less). The statute provided an automatic exemption for all small refineries through 2010. After 2010, the statute provided that those small refineries could also receive an extension of the exemption for not less than two years following a small refinery study by the Department of Energy (DOE), should DOE determine that the requirements of the RFS program impose a disproportionate economic hardship on small refineries. In March 2011, DOE issued such a study that determined that such hardship existed for certain of these small refineries that were evaluated.

As such, beginning in 2013 and thereafter, refineries had the option of petitioning EPA for an extension of the exemption for a subsequent compliance year. EPA makes a threshold determination whether the applicant is eligible for consideration under the statute. Should EPA so determine, EPA then refers the petition to DOE. Thereafter, DOE provides EPA with a recommendation for relief, based on application of a scoring matrix. This matrix quantifies specific factors that DOE determines may indicate disproportionate economic hardship. Next, DOE provides EPA the completed matrix scored for each facility, along with DOE's recommendation. In those circumstances where the Administrator of EPA determines that disproportionate economic hardship would be imposed on a given small refinery that has petitioned for relief, the Administrator is directed by Congress to grant such relief.

In fact, Congress directed the agency, in consultation with the DOE, to grant hardship relief to small refineries if compliance with the RFS would impose a disproportionate economic hardship. Congress provided direction to the agency in the Conference Report to accompany the Fiscal Year 2019 Consolidated Appropriations Act, which appeared originally in Senate Report 114-281 (2017).

The following is the relevant language from that Report:

Small Refinery Relief.--Congress directed the Agency, in consultation with the Department of Energy [DOE], to grant hardship relief to small refineries if compliance with the Renewable Fuel Standard [RFS] would impose a disproportionate economic hardship. In response to several recent petitions, the Agency determined that compliance with the RFS would have a disproportionate economic impact on a small refinery, but denied hardship relief because the small refinery remained profitable notwithstanding the disproportionate economic impact. This is inconsistent with congressional intent because the statute does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability. Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable. In the intensely competitive transportation fuels market, small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics such as limitations on access to capital, lack of other business lines, disproportionate production of diesel fuel, or other site specific factors identified in DOE's original 2011 Small Refinery Exemption Study prepared for Congress. 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.

Previously, the agency had determined that compliance with the RFS would have a disproportionate economic impact on a small refinery but still denied hardship relief because the small refinery remained profitable notwithstanding the disproportionate economic impact. This is inconsistent with congressional intent because the statute does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability. In 2017, the Tenth Circuit held that EPA had inappropriately denied an exemption for a small refinery. *Sinclair Wyoming Refining Co.*, 887 F.3d 986 (10th Cir. 2017). The court held that EPA had “exceeded its statutory authority ... by interpreting the hardship exemption to require a threat to a refinery’s survival as an ongoing operation.” *Id.* at 988.

Most applicants claim their petition, all supporting information, and EPA’s decision on that petition as Confidential Business Information (CBI). Until EPA (or a court) makes a final determination on that CBI claim, the agency’s regulations require it to treat the information as CBI. Accordingly, under its regulations, EPA does not release information regarding small refinery petitions to third parties. EPA does, however, post and regularly updates aggregated information about small refinery exemption petitions and decisions on its RFS data website (commonly referred to as the “dashboard”). EPA established this dashboard in Fall 2018 in order

to promote transparency and to provide equal access to information regarding the Renewable Identification Number (RIN) market. The dashboard informs the public of the aggregate number of those exemption petitions that EPA has received, approved, and denied for each compliance year, along with the aggregate number of volumes and associated RINs exempted. The dashboard also provides information as to the recent weekly average price and volume of RINs traded.

EPA appreciates the invitation to offer this statement.