

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

A. Introduction

On August 15, 2013, the Environmental Protection Agency (“EPA”) issued a final rule establishing 2013 renewable fuel standards under the Clean Air Act (the “2013 RFS Standards Rule” or “the Rule”). 78 Fed. Reg. 49794. Subsequently, on October 10, October 11, and October 15, 2013, respectively, the American Fuel and Petrochemical Manufacturers (“AFPM”), the American Petroleum Institute (“API”) and Monroe Energy LLC (“Monroe”) (collectively, referred to herein as “Petitioners”) filed petitions for reconsideration of the Rule. Certain aspects of the Rule were also challenged and upheld in the United States Court of Appeals for the District of Columbia Circuit. *Monroe v. EPA*, 750 F.3d 909 (DC Cir. 2014). Among the issues regarding the Rule that were resolved in EPA’s favor in *Monroe* were EPA’s authority to issue the 2013 standards after the statutory deadline, EPA’s interpretation of its authority to issue waivers pursuant to CAA 211(o)(7)(D), and the reasonableness of EPA’s consideration of carryover RINs and cost considerations for various obligated parties in declining to use its waiver authority in establishing the 2013 advanced biofuel and total renewable fuel standards. While some of the matters addressed in *Monroe* overlap with issues raised in the petitions for reconsideration (e.g., AFPM’s general arguments with respect to EPA’s delay in issuing the standards) and were resolved by the *Monroe* decision, not all of the matters raised in the petitions for reconsideration were resolved by *Monroe*. EPA granted in part the petitions for reconsideration filed by API and AFPM insofar as the petitions related to the 2013 cellulosic biofuel standard. As a result of that reconsideration, EPA issued a revised 2013 cellulosic biofuel standard on May 2, 2014. 79 Fed. Reg. 25025. This revised standard was not challenged

by any party. As a result, all matters in the petitions for reconsideration related to the original 2013 cellulosic biofuel standard are deemed resolved or moot.

This decision document contains EPA's response to the remaining issues raised in the API, AFPM and Monroe petitions for reconsideration that were not resolved or rendered moot by *Monroe* or by EPA's issuance of a revised 2013 cellulosic biofuel standard. The remaining issues are limited to the following:

1. EPA's use in the 2013 RFS Standards Rule of a projection of gasoline and diesel consumption in 2013 from the Energy Information Administration ("EIA") that was submitted to EPA on May 8, 2013, rather than the earlier October 18, 2012 EIA projection that was referenced in the proposed rule (API and AFPM);
2. EPA's adjustment of the final renewable fuel percentage standards in the 2013 RFS Standards Rule to reflect the grant of a small refinery exemption issued in the interim between publication of the proposed and final rules (API and AFPM); and
3. EPA's reaffirmation in the 2013 RFS Standards rule of its established position regarding the eligibility of refineries for small refinery exemptions (Monroe).

B. Standard for Reconsideration

The petitions were submitted under the reconsideration provisions of section 307(d)(7)(B) of the Clean Air Act (CAA). This section strictly limits petitions for reconsideration both in time and scope. It states that:

Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. 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. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness

of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

Thus the requirement to convene a proceeding to reconsider a rule is based on the petitioner demonstrating to EPA: (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (*i.e.*, within 60 days after publication of the final rulemaking notice in the *Federal Register*, *see* CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule. Regarding the first criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). Thus, CAA section 307(d)(7)(B) does not provide a forum to request EPA to reconsider issues that actually were raised, or could have been raised, during the comment period.

Regarding the second criterion for reconsideration, an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised.¹

As discussed in this decision, EPA is denying the AFPM, API and Monroe petitions for reconsideration because they fail to meet one or both of these criteria.

C. EPA Response to Petitions for Reconsideration of the 2013 RFS Standards Rule

1. EPA's use of an updated EIA projection of 2013 gasoline and diesel consumption.

¹ *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 125 (DC Cir. 2012).

Clean Air Act Section 211(o)(3)(A) provides that, not later than October 31 of each calendar year, EIA shall provide to EPA “an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.” The statute then specifies that “[n]ot later than November 30 of [each calendar year], *based on the estimate provided under subparagraph (A)*, [EPA] shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.” *Id.* § 7545(o)(3)(B)(i) (emphasis added).

Each EIA estimate includes three data points - - the total amount of transportation fuel and the amounts of biomass-based diesel and cellulosic biofuel projected to be sold or introduced into commerce in the coming year. The Act treats all of this information similarly; that is, EPA is to “determine” the RFS obligations for each year “based on” the EIA estimate. The United States Court of Appeals for the D.C. Circuit has interpreted this statutory requirement in the context of a challenge to the 2012 cellulosic biofuel standard. *API v. EPA*, 706 F.3d 474, 478 (DC Cir. 2013). The Court held that the Act “[p]lainly . . . [does not] contemplate slavish adherence by EPA to the EIA estimate”; had Congress so intended, “it could have skipped the EPA ‘determination’ altogether.” *Id.* Instead, “EPA [i]s entitled . . . to read the phrase ‘based on’ as requiring great respect but allowing deviation consistent with that respect.” *Id.* Accordingly, the Court upheld EPA’s supplementation of EIA’s estimate with information EPA received from prospective cellulosic biofuel producers—including information submitted after EPA had received EIA’s estimate—for the purpose of “determin[ing]” the 2012 cellulosic biofuel standard. *Id.*²

² The Court remanded the 2012 cellulosic biofuel standard on other grounds. *Id.* at 479-80.

EPA discussed the *API* decision in the preamble of its proposed 2013 RFS Standards Rule (published approximately two weeks after *API*), and explained how EPA would appropriately use the discretion acknowledged in *API* to determine the 2013 RFS cellulosic biofuel obligations “based on” EIA’s estimate. 78 Fed. Reg. 9282 at 9293-94. EPA’s proposal further made clear that the final 2013 rule would *not* rely *solely* on EIA’s October 2012 estimate and the other information EPA had developed or received prior to the proposal. Rather, EPA also would “continue to monitor the progress of the cellulosic biofuel industry, in particular the progress of the companies which form the basis of our proposed 2013 volume projection.” *Id.* at 9295.

In response to the proposed rule, EPA did not receive any comments asserting that it would be improper for EPA to consider more recent EIA information than was included in the October 2012 EIA estimate. To the contrary, Petitioners API and AFPM argued that EPA should *ignore* the October 2012 EIA cellulosic biofuel estimate of 9.6 million actual gallons altogether, and instead should establish a standard at either zero or up to 21,093 gallons based on actual cellulosic biofuel production rates in 2012. *See* April 8, 2013 AFPM comments on proposed 2013 RFS Standards at 11-12; April 8, 2013 API comments on proposed 2013 RFS Standards at 7. Additionally, Petitioners and many other obligated parties specifically cited an updated EIA cellulosic biofuel projection of 5 million gallons that was reported on February 26, 2013 as support for their arguments that EPA should set a lower cellulosic biofuel standard than had been proposed. *See* 78 Fed. Reg. at 49,804 & n.26; *see also, e.g.*, April 8, 2013 API comment letter on proposed 2013 RFS Standards, p.5; April 8, 2013 AFPM comment letter on proposed 2013 RFS Standards, p. 7; April 7, 2013 Monroe comment letter on proposed 2013 RFS Standards

(adopting AFPM comments); April 2, 2013 Marathon Petroleum comment letter on proposed 2013 RFS Standards, p. 2.

“To ensure that [EPA was] using the most up to date information,” as it previously had indicated it would do—and consistent with Petitioners’ and other commenters’ suggestion that the October 2012 EIA estimate was no longer current—“EPA requested and received from EIA an updated projection of cellulosic biofuel production in 2013 on May 8, 2013.” 78 Fed. Reg. at 49,804-05 & n.27. The May 2013 EIA estimate projected 4 million actual gallons of cellulosic biofuel production in calendar year 2013, a substantial reduction from the 9.6 million actual gallons EIA had projected in its October 2012 estimate. *Compare* 78 Fed Reg. at 49,805 (citing the May 2013 projected figure), *with id.* at 49,804 at Table II.C.2 (tabulating EIA’s October 2012 projections). As Petitioners had requested, EPA took into consideration updated EIA information for cellulosic biofuel for 2013, in conjunction with other appropriate information, in deriving the final cellulosic biofuel applicable volume for 2013. *See generally id.* at 49,804-09. However, the EIA’s May 2013 estimate also included lower projections of the total volumes of gasoline and diesel fuel that would be used in 2013. *See* May 8, 2013 letter from A. Michael Schaal, USEIA, to Christopher Grundler, EPA. Just as it used EIA’s revised cellulosic volume estimate for the final rule, EPA used these additional revised estimates from EIA in setting the percentage standards for cellulosic biofuel and for the other three categories of renewable fuel. As Petitioners note, the decrease in the estimate of total gasoline and diesel fuel to be used in 2013 had the effect of *increasing* the 2013 renewable fuel *percentage* requirements for each obligated party.

The EPA finds that Petitioners’ challenges to EPA’s use in the 2013 RFS standards rule of EIA’s revised estimates of gasoline and diesel consumption in 2013 do not satisfy the

statutory criteria for reconsideration, both because the challenges could have been raised during the comment period and because they are not of central relevance. First, EPA proposed to rely on EIA estimates of 2013 gasoline and diesel consumption and that proposal was sufficient to alert the public to submit any objections to EIA's estimation methodology. In addition, EPA specifically proposed not to rely for the final rule on EIA's October, 2012 cellulosic biofuel projection, but to update that projection with relevant data obtained between the proposed and final rule. There is no logical reason to update EIA information related to cellulosic biofuel production in deriving the final standards while not updating EIA data related to projected gasoline and diesel use, so EPA's statements in the preamble to the proposed rule were sufficient to put the public on notice that EPA may use updated EIA data for all relevant purposes in deriving the final standards, yet Petitioners failed to submit comments on this issue. Moreover, the fact that the Petitioners *asked* EPA to take into consideration the downward revision of EIA's cellulosic volume projection, and to reject the October, 2012 EIA cellulosic biofuel projection altogether to set a volume requirement based on actual use in 2012 confirms that Petitioners viewed the question of whether October 2012 projections or updated data should be used in setting the standards as an appropriate subject for comment.

Second, even assuming *arguendo* that Petitioners could not have raised this issue during the period for public comment, the requests for reconsideration based on use of updated EIA data are appropriately denied since this issue is not of central relevance. An objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 125 (DC Cir. 2012). This conclusion is supported by the Clean Air Act provision noting that a Court may only invalidate a rule due to an alleged procedural error "if the error [was] so serious

and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.” 42 U.S.C. § 7607(d)(8); *see, e.g., Portland Cement*, 665 F.3d 177, 192 (D.C. Cir. 2011). The D.C. Circuit’s decision in *API* dispelled any notion that the statute somehow prohibits EPA from supplementing EIA’s October estimate with additional pertinent information for the purpose of “determining” the calendar year renewable fuel standards. If EPA may consider supplemental information from EIA’s underlying data sources, surely it may also consider an updated estimate from EIA itself. Likewise, if EPA may consider updated EIA estimates of cellulosic biofuel production, as the Petitioners advocated when they submitted their rulemaking comments, then surely EPA may also reasonably consider other updated portions of EIA’s estimate, including its projections of total gasoline and diesel fuel use.

In addition the D.C. Circuit, which is charged with reviewing all challenges to Clean Air Act rules, has long held that “an agency may use supplementary data, unavailable during the notice and comment period that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown.” *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (internal quotations and alterations omitted). Petitioners were not prejudiced by the EPA’s use of the updated data, under *Solite*.

Petitioners do not point to inaccuracies in the data contained in the [survey]. See *Community Nutrition Institute*, 749 F.2d at 58 (no prejudice from agency's response to comments in form of "new scientific studies" where petitioners did "not even suggest that the new studies were defective"). Nor does the record suggest that EPA hid or disguised the information it used, or otherwise conducted the rulemaking in bad faith.

Solite, 952 F.2d at 484. As was the case in *Solite*, Petitioners here do not identify any deficiency or inaccuracy in EIA’s revised estimate of total gasoline and diesel fuel use, and

therefore were not prejudiced by the Agency's use of this information. Indeed, in this case, having received comments specifically advocating that the Agency use updated EIA projections of cellulosic biofuel production, it was appropriate for EPA both to follow the commenters' specific suggestion regarding updated cellulosic biofuel production estimates *and* to follow the *logic* of their suggestion by also using EIA's revised projections of total gasoline and diesel fuel. *See BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 643 (1st Cir. 1979) (finding notice adequate where commenters criticized proposed subcategorization and suggested additional subcategories for final rule, and EPA agreed with criticism of its proposal but responded by creating *fewer* subcategories); *accord Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) ("Agencies [] are free. . . to modify proposed rules as a result of the comments they receive."); *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 134-35 (D.C. Cir. 1976) (same); *see also Treasure State Resource v. EPA*, 805 F.3d 300, 304 (D.C. Cir. 2015)(EPA use of new "weight of the evidence" rule in non-attainment designations upheld despite claims of inadequate notice and comment where the new rule merely codified established practice.).

EPA's methodology in calculating the percentage standards did not change as a result of using the additional EIA data. Rather, EPA used the additional data as more accurate inputs for the formula described in the proposal and set forth in the RFS regulations. Moreover, the differences between the proposed and final percentage standards that resulted, in part, from EPA's revised estimate of total gasoline and diesel fuel use were minor: the total renewable fuels percentage went up slightly from 9.63% to 9.74%; the advanced biofuel percentage changed from 1.60% to 1.62%; the biomass-based diesel percentage changed from 1.12% to 1.13%; and the cellulosic biofuel percentage *decreased* from 0.008% to 0.004%. *Compare* 78

Fed. Reg. at 9286 (Table 1.B.3-2), *with id.* at 49,798 (Table 1.B.3-2).³ The mere fact that there was some change in the percentages does not, by itself, mean that the final rule was not a “logical outgrowth” of the proposal. Indeed, the 2010 rule upheld in *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145 (DC Cir. 2010), involved comparable or greater increases in the final percentage standards as compared with the proposal—for example, the total renewable fuel percentage standard changed from 8.01% to 8.25% in the final 2010 rule, while the advanced biofuel standard changed from 0.59% to 0.61%. *Compare* 74 Fed Reg. 24,904, 24,915, *with* 75 Fed. Reg. at 14,718. If EPA were “required to adopt a final rule that is *identical* to the proposed rule,” it “could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.” *Ne. Md. Waste Disposal*, 358 F.3d at 951 (emphasis added, internal quotation and citation omitted); *see also Am. Frozen Food*, 539 F.2d at 135 n.51.

Because EPA was not precluded from using updated EIA data in the final rule, and because Petitioners have not identified any substantive concerns with the updated EIA data, Petitioners have failed to demonstrate that their objection is of central relevance to the rulemaking (i.e., that their objection provides substantial support for the argument that the regulation should be revised). *See Treasure State Resource v. EPA*, 805 F.3d at 304 (challenge to EPA use of data from monitor calibrated to a prior air quality standard denied where petitioner presented no evidence that the monitor provided a faulty measurement).

EPA is therefore denying reconsideration of the Rule based on this objection, both because the objection could have been raised during the comment period and because the objection is not of central relevance.

³ After reconsideration, the final cellulosic biofuel standard was further reduced to 0.0005%. 79 Fed. Reg. 25025, 25031.

2. EPA's adjustment of the final percentage standards to reflect the grant of a small refinery exemption

In the Energy Policy Act of 2005, Congress temporarily exempted certain small refineries from RFS obligations through December 31, 2010, and provided for possible continuation of the exemptions based either on a study to be conducted by the Department of Energy, or in response to petitions from small refineries alleging that compliance with RFS requirements would cause them disproportionate economic hardship. *See* CAA 211(o)(9)(A), (B). Although major amendments to the RFS program were enacted as part of the Energy Independence and Security Act of 2007, there were no modifications to the small refinery exemption provisions. *See* 78 Fed. Reg. at 9302-03 (describing the history of the exemptions); 40 C.F.R. §§ 80.1441, 80.1442 (codifying the exemptions); *see also* CAA 211(o)(1)(K) (defining “small refinery”). EPA subsequently extended the exemption through December 31, 2012 for certain small refineries based on the results of the Department of Energy study, as required by CAA 211(o)(9)(A)(ii). *See* 78 Fed. Reg. at 9303. Prior to the 2013 rulemaking, EPA had granted several case-by-case small refinery exemptions for both the 2011 and 2012 calendar years. *See id.*

EPA's 2010 rule codified a provision requiring that the calculation of the final RFS percentage standards adopted for each calendar year take into account any small refinery exemptions granted for that year. *See* 40 C.F.R. § 80.1405(c).⁴ Consistent with that requirement, EPA's established practice in RFS rulemakings is that, “[i]f additional individual refinery requests for exemptions are approved following the release of [a proposed RFS rule], the

⁴ This provision identifies the equations used to calculate each of the four RFS percentage standards. *Id.* In each equation, quantities designated as “GE_i” and “DE_i,” respectively, are both subtracted from the denominator. *Id.* “GE_i” and “DE_i” represent the amounts of gasoline and diesel fuel, respectively, “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 1442.” *Id.*

final standards will be adjusted to account for those exempted volumes of gasoline and diesel.” 76 Fed. Reg. 38,844, 38,859 (preamble to proposed 2012 rule); *see also* 77 Fed. Reg. 1320, 1341 (adjustment in final 2012 rule).

In the February 2013 proposed rule preamble, EPA explained that it had “calculated the proposed 2013 standards without a small refinery/small refiner adjustment” because, “at [that] time, no exemptions ha[d] been approved for 2013.” 78 Fed. Reg. at 9303. However, EPA made clear that the calculation of the final 2013 standards would be adjusted accordingly in the event EPA granted any small refiner exemptions prior to promulgating the final rule:

[I]f an individual small refinery or small refiner requests an exemption and is approved following the release of this NPRM and prior to issuance of the final rule, the final standards will be adjusted upward to account for the exempted volumes of gasoline and diesel.

Id. EPA did not request comment on this approach or suggest that the Agency was in any way reevaluating it. Instead, EPA only requested comment on whether it would be appropriate to make *subsequent* changes to the 2013 standards “if small refiner exemptions are granted *after* the final rule is issued,” while noting that such changes would be less than ideal in EPA’s view because “[p]eriodic revisions . . . to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties.” *Id.* (emphasis added). In the final rule, EPA adjusted the standards to account for one small refinery exemption that it had approved after the proposal and prior to promulgating the final rule, but determined that it would not make any *further* adjustments to the standards in the event it granted additional exemptions *after* promulgation. *See* 78 Fed. Reg. at 49,825 (“EPA has granted one exemption for 2013. However, any requests for exemption that are approved after the release of today’s final rulemaking will not affect the 2013 standards.”).

Petitioners object to the final standards' adjusted calculation based on the one small refiner exemption EPA approved before it promulgated the final rule. As shown above, a provision of EPA's 2010 rule—codified at 40 C.F.R. § 80.1405(c)—*required* EPA to adjust the final 2013 standards in this manner. Thus, Petitioners' quarrel is with the 2010 rule, and it is too late to challenge that rule here. *See* CAA 307(b)(1).

Even if EPA's February 2013 proposal could somehow be construed to have reopened this issue—and it cannot since, as shown above, EPA specifically limited its request for comments to the issue of whether to revise the 2013 standards based on exemptions approved *after* promulgating them—Petitioners' request for reconsideration would still be appropriately denied for failure to raise their objection during the comment period. None of the comments EPA received took issue with EPA's statement in the proposed rule preamble that it would adjust the 2013 proposed standards to account for any small refinery exemptions granted prior to promulgating the final rule.⁵ Accordingly, reconsideration is appropriately denied on this basis alone.

In any event, granting the small refiner exemption made virtually no difference in the final percentage standards for 2013. By using the values for the equation terms in Table IV.B.3-1 of the final rule preamble, and assuming zeroes for the quantities "GE₁" and "DE₁," it is possible to re-calculate the final 2013 percentage standards as if there had been no exemption. *See* 78 Fed. Reg. at 49,826; *see also* 40 C.F.R. § 80.1405(c) (explaining the equation terms). The result, if this exercise were performed, is that the cellulosic biofuel, biomass-based diesel,

⁵ EPA acknowledged one commenter who it understood was "opposed to further extending exemptions to small entities," but who further commented that, "lawfully, the standards must be adjusted *whenever* a waiver is granted." 78 Fed. Reg. at 49,826 (emphasis added). While this comment may have disagreed with EPA's decision *not* to revise the standards based on small refiner exemptions granted *after* promulgating the final rule—a decision that no party challenges here—it did not object to EPA's position on the question for which Petitioners seek reconsideration.

and advanced biofuel percentage standards would be unchanged, and the total renewable fuel standard would be negligibly reduced from 9.74% to 9.73%. Thus, granting the exemption and then accounting for it in the final standards as the existing regulations *required* EPA to do, had only a *de minimis* effect on the total renewable fuel standard and otherwise had no effect at all.

Finally, even if EPA had not established this approach in a prior rulemaking, EPA continues to believe that it would have been the appropriate approach to adopt in this rulemaking. Petitioners API and AFPM suggest that the need for regulatory certainty and the fact that the rule was issued after the statutory deadline provide a sufficient basis to ignore the impact of the small refiner exemption on the percentage standards. API Petition at 5; AFPM Petition at 12. EPA appreciates the benefits of regulatory certainty, especially after standards are established, but also is charged with achieving the Act's objectives of ensuring that applicable volumes of renewable fuel are used in the transportation sector. In order to balance those competing considerations, EPA concluded that small refinery exemptions granted prior to the final rule should be reflected in the percentage standards but those granted after the final rule should not. After considering Petitioners' arguments, EPA continues to believe that this is an appropriate balancing. Likewise, while EPA recognizes the additional issues created by missing the statutory deadline for the final rule, EPA believes that we properly took those issues into consideration in issuing the rule, including the impact of the single small refinery exemption. Accordingly, Petitioners' objection is not of central relevance since it does not provide substantial support for the argument that the regulation should be revised.

3. Eligibility for Small Refinery Adjustment

In the NPRM for the 2013 RFS Standards Rule, EPA solicited public comment on two areas related to small refiner/refinery exemptions. The first was whether it would be appropriate

to extend the two-year exemption for small refineries that was provided as a result of the DOE study pursuant to 211(o)(9)(A)(ii)(II). The second was whether EPA should amend the annual percentage standards established by rule to reflect small refinery exemptions that may be approved after issuance of a final rule. 78 Fed. Reg. 9303; *see also* 78 Fed. Reg. 49825-6. In discussing comments received on these two matters, EPA also noted that it had received comments suggesting that EPA extend the opportunity for waivers to mid-size refiners, on the basis that such refiners do not own ethanol facilities, have little control of the RIN and ethanol markets, their location prohibits the export of gasoline, and they have limited financial resources. 78 Fed. Reg. 49825. EPA also noted that this same commenter took issue with EPA's practice of considering "economic viability" in its evaluation of small refinery hardship petitions, when the commenter thought the inquiry should be limited to whether a refiner suffers disproportionately to others in the industry. *Id.* at 49825-6. In responding to these comments, EPA explained the Act's provisions, and the regulatory history associated with current requirements, and explained that it interpreted the small refinery exemption provision to require a showing of "hardship" in addition to "disproportionate impact."

Petitioner Monroe correctly notes that EPA did not solicit public comment on the concept of expanding small refinery exemptions to cover mid-size refiners. Indeed, as Monroe notes, "that issue was well beyond the scope of EPA's requests for comment." Monroe Petition at 2. Monroe argues, however, that by responding to these beyond-the-scope comments, that EPA "considered extending" the hardship exemption to a broader class of obligated parties and that "as a result of EPA's failure to advise the public that it was willing, within the scope of its rulemaking, to consider extending the hardship exemption for small refineries and small refiners to other obligated parties, interested parties like Monroe were deprived of their opportunity to

offer evidence in support of such a rule change.” Monroe argues that this procedural defect, as well as the substantive reasons it articulates in support of a rule change to allow additional obligated parties to qualify for hardship relief, justify reconsideration.

Monroe errs in assuming that EPA “considered extending” the hardship exemption to a broader class of obligated parties simply because EPA provided an explanation of the regulatory history and justification for the longstanding rules related to small refinery exemptions in the preamble to the final rule.⁶ The scope of the small refinery exemption was set in the 2007 rulemaking implementing the original RFS provisions adopted through the Energy Policy Act of 2005. Those provisions were retained, with only minor conforming modifications, in the major 2010 rulemaking implementing the provisions of the 2007 Energy Independence and Security Act. EPA did not propose amending these provisions, and did not “consider” doing so in the 2013 RFS Standards Rule. It is well settled that agencies do not “reopen” a settled matter when, in response to comments that are beyond the scope of the rulemaking the Agency merely reaffirms its prior position. *United Transportation Union v. Surface Transportation Board*, 132 F.3d 71, 76 (DC Cir. 1998). This approach prevents “bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency has re-opened the issue.” *Id.* Monroe attempts just such a bootstrapping procedure here – arguing that EPA has reopened or should reopen a settled issue simply because it responded to other parties’ beyond-the-scope comments by reaffirming its prior long-held position. Because a possible expansion of the small refiner/refinery exemption

⁶ Monroe inartfully attempts to twist EPA’s explanation of why it was not extending the 2-year exemption already provided to qualifying small refineries as a result of the DOE study (because there was no evidence of hardship that would “threaten the viability” of the companies) into a new justification for the longstanding limitations on the size of refineries that are eligible for small refinery relief that EPA merely explained in preceding text. *See* Monroe Pet. at 4.

provisions to additional obligated parties was not within the scope of the 2013 RFS Standards Rule, Monroe has not raised an objection of central relevance to the rulemaking, and Monroe's petition for reconsideration is denied.

D. Conclusion

For the reasons described above, the components of the AFPM, API and Monroe petitions for reconsideration of the 2013 RFS Standards Rule that were not earlier resolved through the *Monroe* case or prior EPA administrative action are denied.