

**IN THE UNITED STATES COURT DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

SMALL RETAILERS COALITION,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	CIVIL ACTION NO. 7:17-cv-00121
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
and)	
)	
SCOTT PRUITT, in his Official Capacity as)	
Administrator, United States Environmental)	
Protection Agency,)	
)	
<i>Defendants.</i>)	
)	

ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Small Retailers Coalition (“SRC”), files this Original Complaint (the “Complaint”) and hereby alleges as follows:

I. NATURE OF THE ACTION

1) This civil action seeks judicial review under section 611(a) of the Regulatory Flexibility Act (“RFA”) of the final rule promulgated by the United States Environmental Protection Agency (“EPA”) that established annual percentage standards for renewable fuels under the Renewable Fuel Standard (“RFS”) program for the year 2017 and the volume of biomass-based diesel under the RFS program for 2018 (the “Final Rule”).¹ A true and correct copy of the 2016 Final Rule is attached to this Complaint as Exhibit A and incorporated by reference. SRC seeks (i) a remand of the Final Rule and (ii) an injunction ordering EPA to take

¹ See Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016).

corrective action consistent with the requirements of the RFA, including ordering EPA to promptly prepare and make available for public comment regulatory flexibility analyses concerning the impact of the Final Rule on small petroleum retailers as required by sections 603 and 604 of the RFA. In particular, the EPA must review the impact on small petroleum retailers resulting from placing the obligation for compliance (the “Point of Obligation”) with the RFS annual standards on refiners and importers of gasoline and diesel fuel. *See* 40 C.F.R. § 80.1406.

2) This civil action also seeks to compel the Administrator of the EPA to perform nondiscretionary duties mandated by the RFS program under section 211(o) of the Clean Air Act (“CAA”) (codified at 42 U.S.C. § 7545(o)). Specifically, EPA has failed to annually evaluate and adjust the regulations implementing the RFS program (in particular, the Point of Obligation) to ensure that they are “appropriate” as required by 42 U.S.C. §§ 7545(o)(2)(A), (o)(3)(B). EPA has also failed to complete the periodic review mandated by 42 U.S.C. § 7545(o)(11) to allow for the appropriate adjustment of the requirements of the RFS program as it relates to the Point of Obligation. SRC requests a declaration that EPA failed to perform these nondiscretionary duties, and SRC seeks an injunction requiring EPA to promptly conduct rulemaking; ensure the requirements of the program are met; conduct the periodic feasibility and impacts reviews; and appropriately and fairly regulate entities.

II. JURISDICTION AND VENUE

3) Jurisdiction is proper in this Court pursuant to section 611 of the RFA, 5 U.S.C. § 611(a)(2) (“Each court having jurisdiction to review such rule for compliance with [the Administrative Procedure Act (“APA”)], or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with [the RFA].”); section 304(a)(2) of the

CAA, 42 U.S.C. § 7604(a) (“The district courts shall have jurisdiction . . . to order the Administrator to perform such act or duty”); 28 U.S.C. § 1331 (Federal question jurisdiction); and 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

4) Venue is proper in this district because a substantial part of the events or omissions giving rise to this civil claim against the government occurred in this district. *See* 28 U.S.C. § 1391(e)(1). Several SRC members sell and market gasoline and diesel throughout this district and a number of members operate in this division. For example, member facility Bowie Bulk Plant, a subsidiary of Douglass Distributing, is located in Bowie, Texas. Additionally, member retailer H-P Oil Co., is located in Baylor, Texas. Consequently, the economic impact of EPA’s actions and omissions on SRC’s members is most prominent in this district.

III. THE PARTIES

5) Plaintiff SRC is national trade association representing approximately 200 small, independent petroleum retailers and convenience store owners from across the United States. SRC members are subject to and impacted by the RFS program.² All or most of SRC’s members are classified as small businesses under the Small Business Administration’s (“SBA”) size standards. *See* 15 U.S.C. § 632. SRC is a Texas non-profit entity that operates as a tax-exempt organization under the provisions of section 501(c)(6) of the Internal Revenue Code. SRC is a “person” within the meaning of section 302(e) of the CAA, 42 U.S.C. § 7602(e).

² SRC members are regulated by the Final Rule as retailers and distributors pursuant to the plain language of the rule. It applies to “entities . . . involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel, or renewable fuels such as ethanol and biodiesel.” 81 Fed. Reg. 89,746.

6) Defendant EPA is the federal executive agency subject to the APA and the RFA, and the agency obligated to implement and enforce the CAA, including the RFS program.

7) Defendant Scott Pruitt is the Administrator of the EPA and is sued in his official capacity. Defendant Pruitt is the federal official responsible for the final agency actions at issue in this Complaint.

8) Pursuant to Federal Rule of Civil Procedure 4(i) and 42 U.S.C. § 7604(c)(3), Defendants may be served with process by delivering copies of the summons and complaint via registered or certified mail to the United States Attorney for the district in which this action is brought, the Attorney General of the United States, and the EPA Administrator.

IV. ORGANIZATIONAL STANDING

9) SRC has standing to pursue this action on behalf of its members under the three-part test of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), because (i) SRC's members would otherwise have standing to sue in their own right; (ii) the interests at stake in this case are germane to SRC's organizational purposes; and (iii) neither the claims asserted nor the relief requested requires the participation of SRC's individual members.

10) First, SRC's members would otherwise have standing to sue in their own right because imminent and irreparable harm has and will continue to occur to all of SRC's members as a result of the Point of Obligation providing large fuel retailers with the ability to undercut the market price of gas at the pump, capture additional market share, and ultimately drive small retailers out of business. Unless the Point of Obligation is changed or the Final Rule is remanded or enjoined by this Court, SRC members will be forced to cease operations or sell their

businesses to non-obligated large retailers who receive a financial advantage over SRC members solely from an unintended consequence of Point of Obligation in the Final Rule.

11) Second, the interests at stake in this action are germane to SRC's organizational purposes because SRC was formed specifically to raise awareness of how the current Point of Obligation is threatening the viability of small petroleum retailers across the country, reducing choice and fair price competition for consumers, and resulting in the decreased distribution of renewable fuels in the United States.

12) Finally, the claims asserted and relief requested by SRC do not require participation of individual SRC members because SRC's Complaint challenges (i) EPA's failure to comply with requirements under the RFA, and (ii) EPA's failure to perform nondiscretionary duties mandated under the CAA. The Complaint is entirely based on principles of law and the Administrative Record, and thus does not require individual member participation.

V. STATUTORY AND REGULATORY FRAMEWORK

The Regulatory Flexibility Act

13) The Regulatory Flexibility Act requires EPA and other federal agencies to consider the impacts of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601–612).

14) The RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act ("SBREFA") to ensure that EPA convene a small business advocacy review panel prior to proposing any rule that will have a significant economic impact on a substantial number of small entities. Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. §§ 601–612).

SBREFA added provisions that provided for judicial review of agency compliance with certain RFA provisions and required agencies to perform more detailed and substantive regulatory flexibility analyses.

15) The RFA applies to any rule subject to notice-and-comment rulemaking under section 553(b) of the APA or any other law. *See* 5 U.S.C §§ 553(b), 603(a). Accordingly, regulations promulgated under the RFS program are subject to the requirements of the RFA.

16) “Whenever an agency . . . publish[es] general notice of proposed rulemaking for any proposed rule,” the RFA requires agencies to “prepare and make available for public comment an initial regulatory flexibility analysis” that “describe[s] the impact of the proposed rule on small entities.” 5 U.S.C. § 603(a).

17) An agency must prepare a final regulatory flexibility analysis whenever it “promulgates a final rule under section 553 of [the APA].” *Id.* § 604(a).

18) An agency can bypass the analyses requirements in the RFA if the head of the agency certifies that the “rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b).

The Renewable Fuel Standard

19) Congress enacted the RFS program as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), to require the use of renewable fuels such as ethanol and biodiesel to replace or reduce the quantity of petroleum-based transportation fuel used in the United States. The statute originally mandated 4 billion gallons of renewable fuels be used in 2006, with the renewable volume obligations (“RVOs”) increasing each year until reaching 7.5 billion gallons in 2012. Under the Energy Independence and Security Act of 2007, Congress

expanded the RFS program, increasing the long-term volume goals for renewable fuels to 36 billion gallons by 2022. *See* Pub. L. No. 110-140 § 201, 121 Stat. 1492, 1519, 1521–22 (2007).

20) In setting annual volume goals, EPA has “waiver authority” to reduce the annual renewable fuel volumes if, after public notice and comment, the EPA Administrator determines that (i) implementation of the volume requirements “would severely harm the economy or environment” or (ii) “there is an inadequate domestic supply” of renewable fuels. 42 U.S.C. § 7545(o)(7). To date, EPA has only exercised its waiver authority based on an insufficient domestic supply. *See, e.g.*, Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420 (Dec. 14, 2015).³

21) The CAA requires EPA to promulgate annual regulations “to ensure that transportation fuel sold or introduced into commerce in the United States . . . , on an annual basis, contains at least the applicable volume” of renewable fuel. 42 U.S.C. § 7545(o)(2)(A)(i). To ensure that the requirements of the RFS program are met, EPA must “determine and publish” these standards “[n]ot later than November 30” of each calendar year. *Id.* § 7545(o)(3)(B)(i).

22) EPA must express the annual regulations as a “percentage of transportation fuel sold or introduced into commerce in the United States.” *Id.* § 7545(o)(3)(B)(ii)(II). The obligation to satisfy these annual percentage standards “shall . . . be applicable to refineries, blenders, and importers, as appropriate.” *Id.* § 7545(o)(3)(B)(ii)(I).

23) The CAA requires EPA to regulate the “appropriate” entities to ensure that the statutorily required fuel volumes are met. *See id.* §§ 7545(o)(2)(A)(iii), (o)(3)(B)(ii). To this

³ In *Americans for Clean Energy v. EPA*, No. 16-1005, the United States Court of Appeals for the District of Columbia Circuit vacated EPA’s decision to reduce the total renewable fuel volume through the use of “inadequate domestic supply” and remanded the waiver to EPA expressly directing it to consider if the implementation of the RFS would “severely harm the economy or environment of a state, a region, or the United States.”

end, EPA must regulate “appropriate” entities to ensure that its own rule does not contribute to the necessary use of the Administrator’s waiver authority to address the inadequate supply of renewable fuel. *See id.* §§ 7545(o)(2)(A), (o)(3)(B).

24) Under the RFS program, every gallon of renewable fuel produced or imported into the United States is assigned a unique Renewable Identification Number (“RIN”). Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,909 (May 1, 2007); 40 C.F.R § 80.1426. A RIN remains attached to the renewable fuel until it is blended into a motor vehicle fuel. *Id.* Once the renewable fuel is blended, the RIN associated with the fuel detaches from the renewable fuel and is owned and controlled by the entity that blended the motor fuel.

25) EPA chose refiners and importers, but not blenders, as the “obligated parties” under the RFS program. *See* 72 Fed. Reg. at 23,937; 40 C.F.R. § 80.1406. These obligated parties must demonstrate compliance with their individual renewable volume obligations (“RVOs”) by obtaining and remitting RINs to EPA. 72 Fed. Reg. at 23,932–33.

26) The Final Rule regulates small petroleum retailers as “[e]ntities . . . involved with the . . . distribution and sale of transportation fuels, including gasoline and diesel fuel, or renewable fuels such as ethanol and biodiesel.” 75 Fed. Reg. 14,670, 14,670 (Mar. 26, 2010); 81 Fed. Reg. at 89,746; *see also* 42 U.S.C. 7545(o)(2)(A)(iii) (“[T]he regulations promulgated under [the RFS program] shall contain compliance provisions applicable to refineries, blenders, *distributors*, and importers, as appropriate.” (emphasis added)).

27) The CAA requires EPA to conduct “periodic reviews of . . . the feasibility of achieving compliance with the requirements” and of “the impacts of the requirements . . . on

each individual and entity” regulated under the program “[t]o allow for the appropriate adjustment” of the statutory volumes. 42 U.S.C. § 7545(o)(11).

VI. FACTUAL BACKGROUND

28) On March 26, 2010, EPA issued final regulatory amendments to the RFS program, including promulgating 40 C.F.R. § 80.1406, which established the obligation for compliance with the RFS annual standards on refiners and importers of gasoline and diesel fuel (“obligated parties”). *See* 75 Fed. Reg. at 14,867–88, as amended at 75 Fed. Reg. 26,026, 26,037 (May 10, 2010) (commonly referred to as the RFS2). As required by section 604 of the RFA, EPA prepared a final regulatory flexibility analysis (“FRFA”) in conjunction with issuance of the March 26, 2010 final rule. *See* U.S. ENVTL. PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS: CHANGES TO RENEWABLE FUEL STANDARD PROGRAM 988–1001 (Jan. 29, 2010), attached to this Complaint as Exhibit B and is incorporated by reference herein.

29) EPA’s FRFA, however, only considered gasoline and diesel *fuel refiners* of 1,500 or less employees to be small entities. *See id.* at 1000, 1001. EPA’s FRFA did not consider the significant economic impact the Point of Obligation would have on small petroleum *retailers* even though petroleum retailers are expressly regulated under the RFS.

30) In subsequent revisions to the RFS, EPA relied on this deficient analysis as the basis for RFA certifications by making a finding that the revisions did not “have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). This error was repeated in the Final Rule where, again, even after numerous requests from the effected small entities, EPA failed to perform the required FRFA analyzing the economic impacts of the rule on small retailers. In addition, EPA once again relied on the inadequate FRFA which only looked at

potential impacts on small refiners in the RFS2 as the basis for its RFA certification. EPA did not evaluate the impact of the RFS or the point of obligation on small petroleum retailers before making the RFA certification. A true and correct copy of the RFA certification for the Final Rule is attached to this Complaint as Exhibit C.⁴

31) During the comment period prior to issuance of the Final Rule, small petroleum retailers, including many SRC members, submitted comments that outlined the adverse impact the Point of Obligation has on small retailers and requested that EPA address the appropriateness of the Point of Obligation in its rulemaking.⁵

32) Since at least 2014, certain obligated parties and other stakeholders have questioned whether the Point of Obligation should be amended, filing formal petitions for reconsideration or revision of the definition of “obligated party” in 40 C.F.R. § 80.1406. Among their assertions is that “the regulatory definition of ‘obligated party’ is a root cause of the RIN system’s inefficiency, because it allows unobligated blenders to profit from RINs rather than passing their value through to retail customers in the form of subsidized E85 prices.” Obligated Party Petitioner’s Opening Brief Regarding EPA’s Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule, at 31, *Americans for Clean Energy, et al. v. EPA*, No. 16-1005 (D.C. Cir. Sept. 8, 2016), ECF No. 1634780.

⁴ 81 Fed. Reg. at 89,802-03

⁵ See Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018; Proposed Rule, Docket ID No. EPA-HQ-OAR-2016-0004; Comment submitted by Bill Douglass, Chairman of the Board and Founder, Douglass Distributing, Small Retailers Coalition, ID No. EPA-HQ-OAR-2016-0004-3574 (Aug. 22, 2016); Comment submitted by Brooks Woodall, President, Woodall Oil Co., ID No. EPA-HQ-OAR-2016-0004-3627 (Oct. 20, 2016); Comment submitted by John C. Netherson, Fuel Consultant, Customer Success Manager, Danielson Fuel Servs., ID No. EPA-HQ-OAR-2016-0004-3762 (Feb. 7, 2017); Comment submitted by Yvonne Jones, Vice President, Retail Operations, Eastern Petroleum Corp., ID No. EPA-HQ-OAR-2016-0004-3763 (Mar. 13, 2017).

33) In response to these petitions, EPA issued a Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation on November 10, 2016 (the “Proposed Denial”), attached to this Complaint as Exhibit D and incorporated by reference herein. EPA published notice of its Proposed Denial on November 22, 2016. *See* Notice of Opportunity to Comment on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, 81 Fed. Reg. 83,776 (Nov. 22, 2016).

34) In comments submitted in response to EPA’s request, the SRC expressly requested that EPA perform the required analysis under the RFA to consider the economic impacts of the point of obligation on small retailers. Attached to this Complaint as Exhibit E and incorporated by reference herein is the February 20, 2017 response to EPA’s request for comment on the Proposed Denial.

35) In every notice and comment rulemaking period regarding the RFS since 2014, numerous obligated parties and stakeholders have submitted comments raising issue with the Point of Obligation, requesting that EPA review the economic impact on small refiners and retailers.

36) Despite these petitions and numerous comments from obligated parties and other stakeholders, EPA did not consider whether the Point of Obligation regulates the “appropriate” entities in its 2015 and 2016 rulemakings that adjusted the renewable fuel volumes for that year.⁶ Rather, EPA stated in its 2015 rulemaking that changing the Point of Obligation is “beyond the scope of th[e] rulemaking,” while the 2016 Final Rule merely noted that the EPA Administrator signed the Proposed Denial. *See* 80 Fed. Reg. at 77,431; 81 Fed. Reg. at 89,781 n.133. EPA’s

⁶ *See* 80 Fed. Reg. 77,420; 81 Fed. Reg. 89,746 at 89,803.

Proposed Denial, however, does not satisfy its nondiscretionary duty to consider the Point of Obligation and fails to recognize that this duty is nondiscretionary. EPA's Proposed Denial also did not consider comments from small, single-store owners and medium-sized gas stations and convenience stores, which together, comprise approximately 75 percent of the retail fuel market in the United States.⁷

37) EPA has continually failed to meet its statutory duty under sections 604 and 605(b) of the RFA. Despite being aware of the significant impact the Point of Obligation has had and continues to have on small petroleum retailers, EPA did not prepare a regulatory flexibility analysis when it promulgated the Final Rule on December 12, 2016 and improperly certified that the rule would “not have a significant impact on a substantial number of small entities.” *See* 81 Fed. Reg. at 89,802-03.

38) EPA has failed to perform mandatory duties under sections 211(o)(2)(A)(iii) and 211(o)(3)(B)(ii) of the CAA to evaluate and adjust annually the regulations implementing the RFS program to ensure that it regulates the “appropriate” parties. 42 U.S.C. §§ 7545(o)(2)(A)(iii), (o)(3)(B)(ii).

39) EPA has failed to perform mandatory duties under section 211(o)(11) of the CAA to “conduct periodic reviews of . . . the feasibility of achieving compliance with the [RFS] requirements; and the impacts of the [RFS] requirements . . . on each individual and entity” regulated under the program. 42 U.S.C. § 7545(o)(11). Small petroleum retailers, as “distributors” of renewable fuel, are entities regulated under the RFS program. *See* 42 U.S.C. § 7545(o)(2)(A)(iii)(I).

⁷ *See* NAT'L ASSOC. CONVENIENCE STORES, 2016 RETAIL FUELS REPORT 3 (2016), <http://www.nacsonline.com/YourBusiness/FuelsCenter/Documents/2016/2016-Retail-Fuels-Report.pdf>.

VII. INJURIES RESULTING FROM EPA’S FAILURE TO ACT

40) SRC members are directly harmed by EPA’s failure to perform nondiscretionary duties under the CAA as it relates to the appropriateness of the Point of Obligation. The Point of Obligation has created a multi-billion dollar government subsidy for large retailers who control the vast majority of blending terminals across the country.

41) The reason that small retail gas stations cannot compete fairly in the current market is because the current point of obligation is removed from the rack⁸—that is, the bulk terminal or truck loading terminal where entities control whether gasoline is blended. Big corporate retail chains largely control these terminals and can decide who gets positions at the rack. As a result, large retail conglomerates are able to purchase gasoline unobligated and then blend it with ethanol or biofuels at the rack to generate a RIN which is a nine-digit number intended to track how much renewable fuel is being blended.

42) The large retailers are not obligated in any way to turn RINs into EPA or to track compliance with the RFS. Because of this, large retailers sell the RIN to parties who are obligated to turn the RIN into EPA for compliance. Thus, the unobligated blenders can turn the RIN into a commodity instead of it being a tracking number. This unintended consequence of the current Point of Obligation generates enormous windfall profits for a very few large entities that they can use to defray their costs of prop up revenues. This allows large retail blenders to have a direct price advantage over small and medium-sized retailers that cannot blend fuel at the rack and therefore cannot sell the RIN to obligated parties or brokers.

⁸ The “rack” (also called terminal or terminal rack) is the point at which fuel is prepared and distributed into the commercial market. It is where fuels are blended to meet the RFS and other requirements, and are then distributed into commerce.

43) Small retailers have to purchase blended fuel at a premium. As a result, the base cost of the product is higher than the cost large competitors that can blend fuel. This is a market reality that can be addresses through innovation and other marketing incentives. What the SRC members cannot overcome is that the largest competitors also get a \$.10 to \$.15 per gallon subsidy for selling the RIN to obligated parties. They are then able to use this profit to roll up small businesses or undercut their prices until they close.

44) As such, large retailers with blending capabilities are profiting from the sale of RINs, which allows them to artificially lower the price of gasoline to undercut small retailers and push them out of the market. Because of the economic impact of the market inefficiencies created by the Point of Obligation, many SRC members will be forced to cease operations or sell their businesses to their larger competitors.

45) SRC members are directly and substantially harmed by EPA's failure to fulfill its statutory duties under the RFA to consider the significant impacts of the Point of Obligation on small retailers. As distributors of renewable fuel, SRC members are directly regulated under the RFS program and should have been considered in EPA's regulatory flexibility analysis. Had this been done, EPA could have explored, through appropriate comment and rulemaking, significant alternatives to the Point of Obligation that would still accomplish the RFS's objectives but minimize the significant economic impact on small petroleum retailers. *See* 5 U.S.C. §§ 603, 604. EPA's continuing failure to address the Point of Obligation's significant impact on small retailers in a regulatory flexibility analysis threatens the viability of SRC members' businesses and all small petroleum retailers throughout the United States.

VIII. NOTICE OF INTENT TO SUE

46) The citizen suit provisions of the CAA require that a prospective plaintiff give at least 60 days' notice to the EPA administrator prior to commencing a lawsuit. 42 U.S.C. § 7604(b).

47) SRC submitted the required notice of its intent to file this civil action in a letter addressed to the Administrator (the "Notice Letter") on May 8, 2017. Its pre-suit notice period expired on July 7, 2017. A true and correct copy of the Notice Letter is attached to this Complaint as Exhibit F and incorporated by reference herein.

IX. CAUSES OF ACTION

COUNT I: Failure to Conduct Regulatory Flexibility Analyses to Consider Economic Impact on Small Petroleum Retailers as Required by RFA Sections 603 and 604

48) Plaintiff re-alleges and incorporates herein the allegations in Paragraphs 1 through 47 as if fully set forth herein.

49) An actual controversy exists regarding EPA's obligations under the RFA. EPA did not prepare a regulatory flexibility analysis evaluating the significant economic impact on small petroleum retailers when it promulgated the Final Rule on December 12, 2016 and improperly certified that the Final Rule would "not have a significant impact on a substantial number of small entities." *See* Exhibit A. In fact, EPA has never met its statutory obligation under the RFA to evaluate the economic impact of the RFS or the point of obligation on small petroleum retailers since the promulgation of the RFS final rule (*see* 75 Fed. Reg. at 14,670) or in any revision to the rule to date.

50) EPA's failure to perform this statutory duty continues to this day. Absent an appropriate order of this Court, EPA will continue to disregard this statutory duty.

51) EPA's failure to comply with the RFA has harmed and continues to harm SRC. As provided in section 611 of the RFA, 5 U.S.C. § 611(4), and section 552 of the APA, 5 U.S.C. § 552(a)(4)(E), EPA's failure to comply with the RFA entitles SRC to a remand of the Final Rule, injunctive relief, and recover costs and reasonable attorneys' fees.

**COUNT II: Failure to Perform Nondiscretionary Duty to Annually
Evaluate and Adjust the RFS Regulations to Ensure
They Are "Appropriate" as Required by CAA Section 211(o)**

52) Plaintiff re-alleges and incorporates herein the allegations in Paragraphs 1 through 47 as if fully set forth herein.

53) An actual controversy exists regarding EPA's implementation of the RFS program. EPA failed to evaluate and adjust annually the regulations implementing the RFS program (including the definition of "obligated party") to ensure that they are "appropriate" as required under 42 U.S.C. §§ 7545(o) (2) (A), (o) (3) (B).

54) EPA's failure to perform this nondiscretionary duty continues to this day. Absent an appropriate order of this Court, EPA will continue to disregard this nondiscretionary statutory duty.

55) The delay caused by EPA's failure has harmed and continues to harm SRC. As provided in sections 304(a) and (d) of the CAA, 42 U.S.C. § 7604(a), (d), EPA's failure to perform its nondiscretionary duty entitles SRC to injunctive relief and recover costs and reasonable attorneys' fees for this action.

COUNT III: Failure to Perform Nondiscretionary Duty to Conduct a Periodic Review of the Impact of the Point of Obligation on Small Petroleum Retailers as Required by CAA Section 211(o)

56) Plaintiff re-alleges and incorporates herein the allegations in Paragraphs 1 through 47 as if fully set forth herein.

57) An actual controversy exists regarding EPA's implementation of the RFS program. EPA has failed to perform its nondiscretionary duty to complete the periodic review mandated by section 211(o)(11) of the CAA, 42 U.S.C. § 7545(o)(11).

58) EPA's failure to perform this nondiscretionary duty continues to this day. Absent an appropriate order of this Court, EPA will continue to disregard this nondiscretionary statutory duty.

59) The delay caused by EPA's failure has harmed and continues to harm SRC. As provided in sections 304(a) and (d) of the CAA, 42 U.S.C. §§ 7604(a) and (d), EPA's failure to perform its nondiscretionary duty entitle SRC to injunctive relief and recover of costs and reasonable attorneys' fees for this action.

X. PRAYER FOR RELIEF

WHEREFORE, SRC prays that the Court:

- A. Declare that Defendants have failed to prepare regulatory flexibility analysis regarding the significant impact that the Point of Obligation has on small petroleum retailers as required under RFA section 604, 5 U.S.C. § 604;
- B. Order Defendants to prepare and publish regulatory flexibility analyses regarding the significant impact that the Point of Obligation has on small petroleum retailers as required under RFA sections 603 and 604, 5 U.S.C. §§ 603, 604;

- C. Remand and defer enforcement of the Final Rule until EPA completes the required analyses under RFA sections 603 and 604, 5 U.S.C. §§ 603, 604;
- D. Declare that Defendants have failed to perform a nondiscretionary duty to annually evaluate and adjust the regulations implementing the RFS program (including the definition of “obligated party”) to ensure that they are “appropriate” as required under CAA sections 211(o)(2)(A) and 211(o)(3)(B), 42 U.S.C. §§ 7545(o)(2)(A), (o)(3)(B);
- E. Declare that Defendants have failed to perform a nondiscretionary duty to complete the periodic review mandated by CAA section 211(o)(11), 42 U.S.C. § 7545(o)(11);
- F. Order Defendants to conduct rulemaking by a date certain forthwith to satisfy their nondiscretionary duties under 42 U.S.C. §§ 7545(o)(2)(A), (o)(3)(B), and (o)(11);
- G. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to Plaintiff caused by Defendants’ disregard of their statutory duty;
- H. Retain jurisdiction to ensure compliance with the Court’s order;
- I. Award Plaintiff its costs, reasonable attorneys’ fees, and pre- and post-judgment interest as the Court may deem just and proper; and
- J. Grant such other relief as the Court deems just and proper.

Dated: August 28, 2017

Respectfully submitted,

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