



# *Kern Oil & Refining Co.*

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VIA CERTIFIED MAIL

July 15, 2019

Hon. Andrew R. Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

***RE: Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604 for Failure to Perform Non-Discretionary Duty to Approve or Disapprove Kern Oil & Refining Co.'s Petition for an Exemption from the Renewable Fuel Standard's Requirements in 2018 as a Small Refiner Suffering Disproportionate Economic Hardship under Section 211(o)(9)(B) of the Clean Air Act***

Dear Administrator Wheeler:

By this letter Kern Oil & Refining Co. ("Kern Oil" or "the Company") respectfully provides notice of its intent to file suit against you pursuant to Section 304 of the Clean Air Act ("CAA"), 42 U.S.C. § 7604, in your official capacity as Administrator of the Environmental Protection Agency ("EPA") for failure to perform the non-discretionary duty under the Clean Air Act of acting upon the Company's petition for an exemption from the requirements of the Renewable Fuel Standard for the 2018 compliance year. Kern Oil also requests that if EPA grants its petition, EPA provide the Company with current-year vintage RINs to address the disproportionate economic hardship that it suffered, and continues to suffer, as a result of compliance with the Renewable Fuel Standard ("RFS").

I. EPA's Failure to Perform a Non-Discretionary Duty

On December 4, 2018, Kern Oil submitted, and EPA received, the Company's petition for an exemption from the requirements of the RFS for the 2018 compliance year due to Kern Oil's qualification as a small refinery suffering disproportionate economic hardship. Under Section 211(o)(9)(B)(3) of the CAA, EPA is required to act on Kern Oil's petition within ninety days after the date of receipt of the petition. The requirement to act within 90 days is a non-discretionary duty, and EPA failed to perform that non-discretionary duty as it has not acted upon Kern Oil's petition by either granting or denying the petition.

While EPA has failed to act on the petition, Kern Oil made repeated attempts to engage with EPA on the subject and provide any information EPA might need to render a decision. In fact, in March 2019, Kern Oil met with EPA to discuss its petition and EPA acknowledged that its petition application was complete. Despite EPA having all of the information it needs to render a decision and Kern Oil's repeated outreach, EPA has not taken any action on the petition. EPA therefore has failed to perform its non-discretionary duty to act on the petition.

## II. Kern Oil Suffered Disproportionate Economic Harm

The EPA's failure to act is all the more significant given that Kern Oil unquestionably qualifies as a small refinery and suffered disproportionate economic hardship. As detailed in its petition for an exemption, the Company maintained an aggregate daily crude oil throughput capacity of less than 75,000 barrels, thereby meeting the statutory definition of a small refinery under the CAA. Under the factors the CAA and federal courts require EPA to utilize,<sup>1</sup> Kern Oil suffered disproportionate economic impact due to its location, lack of vertical integration, significant diesel production, state regulatory regime, compliance costs and individualized special events associated with Kern Oil's refinery. Kern Oil is confident it has suffered disproportionate economic hardship as determined under the factors that must be applied to this analysis.

## III. Kern Oil Should be Refunded Current-Year Vintage RINs

Kern Oil also continues to suffer economic hardship from EPA's failure to grant the Company's petition. In 2018, Kern Oil incurred an obligation to retire over 20 million RINs, and retired 2018 RINs to comply with this obligation. Because EPA has failed to act on its petition, Kern does not have the number of RINs that it would otherwise have available to comply with its RFS obligations for 2019 refining activity that will come due on March 31, 2020. Alternatively, Kern Oil could have sold these RINs into the market at a time when the 2018 RINs were most valuable, i.e., the year of generation. Instead, Kern Oil must continue to accumulate and acquire RINs for its upcoming compliance deadline that it may not otherwise need to acquire if EPA had acted on Kern Oil's petition and refunded RINs to the Company. Even if Kern Oil's pending 2018 petition is granted, Kern Oil incurred the high expense of accumulating and acquiring over 20 million RINs, and should be adequately refunded by the EPA to be made whole, which would not be accomplished by the return of dated RINs that do not have the same utility as those Kern Oil retired. Because EPA has failed to act on its petition, Kern Oil has forgone the opportunity to sell the RINs it retired into the market and mitigate its economic hardship.

As a result, Kern Oil requests that EPA refund current-year RINs in the event that EPA grants the Company's petition. Providing current year vintage RINs will allow Kern Oil to use these RINs for current year compliance or otherwise market them to other parties. As EPA is aware, prior year RINs are significantly less marketable and have less utility because they will expire at the end of the compliance year (RINs are only valid for two years). Issuance of current-year

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<sup>1</sup> *Sinclair Wyoming Refining v. EPA*, Doc. No. 16-9532, (10<sup>th</sup> Cir. 2017).

RINs is consistent with EPA's past practice when it has retroactively granted petitions for waivers of the RFS to small refineries.<sup>2</sup>

IV. Compliance with EPA Regulations

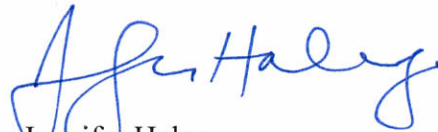
Pursuant to 40 C.F.R. §54.3(a), the full name and address of the person providing this notice is:

Kern Oil & Refining Co.  
7724 E. Panama Lane  
Bakersfield, California 93307-9210  
Attention: Jennifer Haley

V. Notice of Intent to Sue

Kern Oil would prefer to resolve this matter and receive a response to its petition for an exemption from the RFS requirements for 2018 without the need for litigation. We therefore look forward to EPA contacting Kern Oil and acting upon its petition. If EPA does not, however, Kern Oil intends to sue you and EPA in US District Court pursuant to Section 304 of the CAA for failure to perform their non-discretionary duties as set forth in Section 211 of the CAA and following sixty (60) days after delivery of this letter.

Sincerely,



Jennifer Haley  
President  
Kern Oil & Refining Co.

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<sup>2</sup> HollyFrontier Corp., Form 10-Q filing with the United States Securities and Exchange Commission (Quarterly Period Ending June 30, 2018).