

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

SUNCOR ENERGY (U.S.A.) INC.,

Petitioner,

v.

No.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

**PETITION FOR REVIEW (PUBLIC)**

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), Federal Rule of Appellate Procedure Rule 15(a), and Circuit Rule 15, Suncor Energy (U.S.A.) Inc. hereby petitions this Court for review of the United States Environmental Protection Agency's October 25, 2019, final action denying Suncor's petitions for a one-year small-refinery exemption from the requirements of the Renewable Fuel Standard program for the 2018 compliance year for Suncor's West Refinery (EPA Facility ID #01352) and Suncor's East Refinery (EPA Facility ID #00544) in Commerce City, Colorado. A copy of EPA's letter denying Suncor's petitions is attached as Exhibit A.

EPA's denial of Suncor's petition should be vacated because it is arbitrary, capricious, and not otherwise in accordance with law.

Respectfully submitted,

/s/ Sean Marotta  
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admitted in the District of Columbia*

December 23, 2019

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**CORPORATE DISCLOSURE STATEMENT  
OF SUNCOR ENERGY (U.S.A.) INC.**

Suncor Energy (U.S.A.) Inc., a Delaware corporation, is wholly owned by Suncor Energy (U.S.A.) Holdings Inc., a Delaware corporation, which is wholly owned by Suncor Energy Inc., a federally incorporated Canadian corporation that is publicly traded. Suncor Energy Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respectfully submitted,

/s/ Sean Marotta

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December 23, 2019

## CERTIFICATE OF DIGITAL SUBMISSION

In accordance with Circuit Rule 25.3 and the court's CM/ECF User's Manual, I hereby certify that:

- 1) All required privacy redactions have been made per Federal Rule of Appellate Procedure Rule 25(a)(5) and Tenth Circuit Rule 25.5;
- 2) Hard copies of this pleading that may be required to be submitted to the court are exact copies of the ECF filing; and
- 3) The ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, Version 14.2 RU1 MP1 Build 4814, last updated 12/23/2019, and, according to the program is free of viruses.

Date: December 23, 2019

Respectfully submitted,

/s/ Sean Marotta

Sean Marotta

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing have been served this day by first class mail, postage prepaid, upon each of the following:

Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

Matthew Z. Leopold  
General Counsel  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
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Anne Idsal  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Mail Code: 6101A  
Washington, DC 20460

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Dated at Washington, D.C. this 23rd day of December, 2019.

/s/ Sean Marotta  
Sean Marotta

**EXHIBIT A**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

October 25, 2019

OFFICE OF  
AIR AND RADIATION

Mr. Donald Austin  
Vice President  
Suncor Energy (U.S.A. Inc.)  
5801 Brighton Boulevard  
Commerce City, CO 80022

Dear Mr. Austin:

I am writing in response to the petitions from Suncor Energy U.S.A., Inc., (“Suncor”) for a one-year small refinery exemption from the requirements of the Renewable Fuel Standard (“RFS”) program for Suncor’s two refineries in Commerce City, Colorado (“the East Refinery” and “the West Refinery,” collectively “the Commerce City Refinery”) for the 2018 compliance year. Under the Clean Air Act (“CAA”) and its implementing regulations, a small refinery may petition EPA for an exemption from its RFS obligations.<sup>1</sup> Pursuant to these provisions, Suncor submitted petitions to EPA on December 28, 2018, for exemptions from the RFS obligations for the East Refinery and the West Refinery for the 2018 RFS compliance year.

While we appreciate the information Suncor provided in its petitions, we have determined that the East Refinery and the West Refinery are not eligible to petition for a small refinery exemption. In order to be eligible for a small refinery exemption under the RFS program, the refinery must meet the definition of a small refinery. Both the CAA and EPA’s implementing regulations define a “small refinery” as “a refinery for which the average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels.”<sup>2</sup> EPA implemented the Energy Policy Act of 2005 (“EPAct”) to provide an automatic exemption from the RFS through 2010 for refineries that satisfied the statutory 75,000 barrel per day (“bpd”) average aggregate daily crude oil throughput limitation in calendar year 2004.<sup>3</sup> The same statutory definition was enacted in the Energy Independence and Security Act (“EISA”), and the same regulatory requirements were implemented except the relevant calendar year was changed to 2006.<sup>4</sup> In 2014, EPA promulgated its existing small refinery eligibility provisions which provide that “[i]n order to qualify for an extension of its small refinery exemption, a refinery must meet the definition of ‘small refinery’ . . . for the most recent full calendar year prior to seeking an extension and must be projected to meet the definition of ‘small refinery’ . . . for the year or years for which an exemption is sought.”<sup>5</sup>

<sup>1</sup> CAA section 211(o)(9)(B), 40 CFR §§ 80.1441(a)(1) and (e)(1).

<sup>2</sup> CAA section 211(o)(1)(K), 40 CFR § 80.1401.

<sup>3</sup> 40 CFR § 80.1141(a)(1); “Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program,” 72 Fed. Reg. 23900, 23911, 23924 (May 1, 2007) (“RFS1”).

<sup>4</sup> 40 CFR § 80.1141(a)(1) (2010); “Regulations of Fuel and Fuel Additives: Changes to Renewable Fuel Standard Program,” 75 FR 14670, 14735-7 (March 26, 2010) (“RFS2”).

<sup>5</sup> 40 CFR § 80.1441(e)(2)(iii).



Therefore, only a refinery with an average aggregate daily crude oil throughput less than 75,000 bpd in 2017 and projected to have an average aggregate daily crude oil throughput less than 75,000 bpd in 2018 is eligible for an exemption for 2018.

The statute does not define the word “refinery” or the phrase “average aggregate daily crude oil throughput” in the “small refinery” definition. EPA has promulgated various definitions of the word “refinery” in its regulations which are informative but not definitive for this evaluation.<sup>6</sup> EPA has not defined the phrase “average aggregate daily crude oil throughput” in its regulations. The statutory and regulatory definitions provide neither guidance nor limits on how EPA must evaluate the words and phrases in the definition when determining whether a refinery meets the “small refinery” definition. EPA therefore has discretion to choose what factors and information it will consider in this evaluation.

EPA considers many different sources of information in the Agency’s overall assessment of whether a refinery is eligible to petition for an RFS small refinery exemption. In evaluating eligibility when reviewing the Suncor petitions, EPA considered the extent of Suncor’s integration of the East Refinery and the West Refinery with respect to production of non-renewable gasoline and diesel fuel since annual non-renewable gasoline and diesel fuel production volume is the primary basis for determining Suncor’s obligation to comply with the RFS program. Suncor’s East Refinery partially processes crude oil into gasoline blending components and intermediate distillate feedstocks that are ultimately converted into gasoline, CBOB, and ULSD in the West Refinery. Therefore, EPA considers the aggregate volume of crude distilled at both the East Refinery and the West Refinery when determining the eligibility of the East Refinery and the West Refinery to petition as small refineries for an exemption from the RFS.<sup>7</sup>

EPA recognizes that the East Refinery and the West Refinery were among the small refineries that received the original small refinery exemption in 2006.<sup>8</sup> However, Suncor has since done significant work to integrate the process operations of the two facilities so that they now function as a single refinery with an average aggregate daily crude oil throughput that exceeded 75,000 bpd in 2017 and 2018 and thus no longer meet the definition of a small refinery. The data Suncor submitted to the Department of Energy’s (“DOE”) Energy Information Administration (“EIA”) on the EIA-810 form report the East Refinery’s average aggregate daily crude oil throughput as 34,474 bpd in 2017 and 32,874 bpd in 2018. The West Refinery had an average aggregate daily crude oil throughput of 63,855 bpd in 2017 and 66,619 bpd in 2018, resulting in a combined average aggregate daily crude oil throughput for the Commerce City Refinery of 98,329 in 2017 and 99,493 bpd in 2018.<sup>9</sup>

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<sup>6</sup> See, e.g., 40 CFR § 60.101(a) (definition of “petroleum refinery”); 40 CFR § 80.2(h) (definition of “refinery”).

<sup>7</sup> EPA acknowledges that Suncor submitted two refinery capacity reports to EIA as of January 1, 2018, which were combined into a single report by EIA as part of a trial effort to correct an error in Suncor’s reports. However, the refinery capacity report is just one of many source EPA considers. See email from Mike Korenblat, Director Legal Affairs, Suncor Energy U.S.A., Inc., to Chris McKenna, Staff Engineer, U.S. EPA (August 23, 2019, 17:49 EST) (on file with U.S. EPA).

<sup>8</sup> Letter from Vance Kopp, Fuels Quality Specialist, Suncor Energy U.S.A., Inc., to U.S. EPA (August 18, 2007) (on file with U.S. EPA).

<sup>9</sup> EIA, “Form EIA-810,” found at <http://www.eia.gov/Survey/#eia-810>. Last accessed on August 7, 2019. Form EIA-810 is a monthly report filed with the EIA that “[c]ollects information regarding the balance between the supply

The extent of integration between Suncor’s East Refinery and West Refinery is evident in the technical and operational features of the refineries’ transportation fuel production.<sup>10</sup> Based on our own research of Suncor’s operations, we understand that while the two refineries originally operated as two, separate refineries when owned and operated by two, separate owners, Suncor purchased and modified the two refineries to now operate as a single refinery.<sup>11</sup> [REDACTED]

[REDACTED]

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(beginning stocks, receipts, and production) and disposition (inputs, shipments, fuel use and losses, and ending stocks) of crude oil and refined products located at refineries.”

<sup>10</sup> A refinery’s overall production of non-renewable gasoline and diesel establishes the basis for its RFS compliance obligations. 40 CFR § 80.1407.

<sup>11</sup> EPA twice asked Suncor for more information regarding process flows between the East and West refineries, but Suncor twice declined to provide more information. *See* email from Chris McKenna, Staff Engineer, U.S. EPA, to Angela Shields, Fuels Quality Specialist, Suncor Energy U.S.A., Inc. (July 12, 2019, 10:56 EST) (on file with U.S. EPA), and email from Mike Korenblat, Director of Legal Affairs, Suncor Energy U.S.A., Inc., to Chris McKenna, Staff Engineer, U.S. EPA (July 18, 2019, 16:41 EST) (on file with U.S. EPA). *See also* email from Chris McKenna, Staff Engineer, U.S. EPA, to Mike Korenblat, Director of Legal Affairs, Suncor Energy U.S.A., Inc. (July 23, 2019, 8:59 EST) (on file with U.S. EPA), and email from Mike Korenblat, Director of Legal Affairs, Suncor Energy U.S.A., Inc. (August 23, 2019, 17:49 EST) (on file with U.S. EPA). EPA has therefore had to conduct its own research to understand the present operating configuration of Suncor’s Commerce City Refinery. EPA’s descriptions of operations are based on that research which was obtained from previous reports submitted by Suncor to EPA, public sources, and conversations with and information provided by EIA.

[REDACTED]

[REDACTED]

Suncor also routinely characterizes the East Refinery and the West Refinery as a single refinery – the Commerce City Refinery – in both public presentations and business reports:

- Suncor’s website describes the Commerce City Refinery as a “98,000-barrel-per-day refinery [that] produces gasoline, diesel fuel and paving-grade asphalt.”<sup>17</sup>
- Suncor’s 2018 Annual Report lists the Commerce City Refinery as a single 98,000 bpd refinery.<sup>18</sup>
- Suncor described the Commerce City Refinery as a “nominal 90,000 bpd Fuels Refinery” in a June 10, 2010, presentation to the Crude Oil Quality Association.<sup>19</sup>
- In a 2005 article following Suncor’s acquisition of the East Refinery from Valero, the Oil and Automotive Marketing News quotes Suncor President and CEO, Rick George, as stating, “This acquisition provides an immediate expansion of our presence in the Rocky Mountain marketplace,” and, “With a capacity of 90,000 barrels per day, the integrated operation is expected to be more competitive with refineries in Texas and Oklahoma.”<sup>20</sup>
- [REDACTED]

Additionally, the unified management chain at the Commerce City Refinery and its operation as a single profit center provide further evidence that the East Refinery and the West Refinery are in fact a single facility. There is one vice president for the Commerce City Refinery: Donald Austin. Mr. Austin, as vice president of the Commerce City Refinery, “is responsible for providing overall leadership for safe, reliable and profitable operations, and is also accountable for environmental

[REDACTED]

<sup>17</sup> See Suncor, “Refining,” found at <https://www.suncor.com/en-CA/about-us/refining>. Last accessed on September 17, 2019.

<sup>18</sup> See Suncor, “2018 Annual Report,” found at <https://www.suncor.com/en-CA/investor-centre/financial-reports/annual-disclosure>, at 12, 27. Last accessed on September 17, 2019.

<sup>19</sup> See Randy Segato, Suncor, “Suncor Denver Refinery Overview,” found at [http://www.coqa-inc.org/docs/default-source/meeting-presentations/06102010\\_Segato.pdf](http://www.coqa-inc.org/docs/default-source/meeting-presentations/06102010_Segato.pdf), at slide 7. This slide also has a combined list of all key processing units at both refineries; it does not identify them separately by refinery.

<sup>20</sup> See Oil and Automotive Marketing News, “Suncor Acquires Colorado Refining Company,” August 2005, found at [http://www.kalpub.com/OANews/archives/2005/oa\\_08-05.html](http://www.kalpub.com/OANews/archives/2005/oa_08-05.html). Last accessed on September 17, 2019.

compliance and product quality of *the facility*.”<sup>21</sup> Suncor did not submit to EPA financial data for a separate East Refinery and a West Refinery, but rather provided only aggregated financial information for the whole Commerce City Refinery in its PI-588 form and financial statements.<sup>22</sup>

Suncor asserts that the East Refinery and the West Refinery should be considered separate facilities because they have been issued separate EPA facility identification (“ID”) numbers for use in EPA’s gasoline programs and Title V air permitting, and are referenced by these separate facility ID numbers in EPA consent decrees.<sup>23</sup> These separate facility ID numbers were issued and referenced when each refinery was owned by previous, separate owners, in contrast to the current Suncor ownership and operation of the single integrated refinery.<sup>24</sup> Additionally, the objectives of the above-mentioned programs — regulating the Reid vapor pressure, sulfur, and benzene content of gasoline, or regulating stack emissions from fired heaters or boilers — are very different than those of the RFS program, where compliance (and threshold, definitional eligibility for an exemption) is based primarily on annual transportation fuel production volume. Since these programs have separate objectives that are unrelated to the objectives of the RFS program, they are not relevant to EPA’s consideration of Suncor’s eligibility as a small refinery under the RFS program.

However, since Suncor raised the issue of facility ID numbers in connection with other EPA programs, it is important to note that Suncor failed to mention that the East Refinery and the West Refinery are registered as a single facility (facility ID 82133) under EPA’s diesel sulfur program, consistent with EPA’s description of Suncor’s integrated ULSD production above. For reference, EPA has attached Suncor’s cover letter and registration form for EPA’s diesel sulfur program.<sup>25</sup> Of particular relevance is Suncor’s statement in its cover letter: “Our intent is to operate these facilities as a single refinery with respect to EPA’s Clean Diesel Program. This is noted on the registration forms.”<sup>26</sup>

Based on the information available to EPA, including Suncor’s own statements, it is evident that the Suncor East Refinery and the West Refinery have been integrated to the point that they are now operated as a single refinery with an average aggregate daily crude oil throughput that exceeded 75,000 bpd in both 2017 and 2018. [REDACTED]

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<sup>21</sup> Suncor, “Meet Commerce City refinery VP Donald Austin,” November 2017, found at <https://connections.suncor.com/suncor-usa/november-2017/meet-commerce-city-refinery-vp-donald-austin>. Last accessed on September 18, 2019. (emphasis added). It is important to note that Suncor did not separately identify the East Refinery or the West Refinery as being part of Mr. Austin’s responsibilities, simply “the Commerce City refinery” as a single facility.

<sup>22</sup> Suncor Petition at 11-15, 17-22.

<sup>23</sup> *Id.*

<sup>24</sup> EPA confirmed the separate title V permits and consent decrees were carried over from the previous ownership. See emails between Chris McKenna, Timothy Russ, Gail Fallon and Donald Law, EPA employees, Aug. 28, 2019 to Sept. 5, 2019 (on file with U.S. EPA).

<sup>25</sup> Letter from Vance Kopp, Fuels Quality Specialist, Suncor Energy U.S.A., Inc., to U.S. EPA (December 13, 2005) and Diesel Programs Facility Registration (OMB form 2060-0308) (December 15, 2005) (on file with U.S. EPA).

<sup>26</sup> *Id.*

[REDACTED]

[REDACTED]

[REDACTED] In order to properly account for the integrated nature of Suncor's operation, the most reasonable boundary is one encompassing both refineries in order to combine the average aggregate daily crude oil throughput and the overall transportation fuel production volume from both refineries' operations.

Given the preceding analysis and cited information, EPA has determined that Suncor's East Refinery and Suncor's West Refinery do not meet the definition of "small refinery" in the CAA and the regulation; therefore, these entities are ineligible to petition for a small refinery exemption. Accordingly, EPA is declining to evaluate Suncor's 2018 petitions for a one-year small refinery exemption for these entities. The effect of this determination is that as of January 1, 2018, the gasoline and diesel production from the Commerce City Refinery remain subject to the percent standards of 40 CFR § 80.1405, and the Commerce City Refinery is subject to all other requirements applicable to obligated parties.

If you have any questions, please contact Byron Bunker of my staff at (734) 214-4155.

Sincerely,



Anne L. Idsal  
Acting Assistant Administrator

