

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Kern Oil & Refining Co.,

Petitioner,

v.

**United States Environmental
Protection Agency,**

Respondent.

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Case No.: 20-1456

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Kern Oil & Refining Co. (“Kern Oil”) hereby petitions this Court for review of the following final agency action of the Administrator of the United States Environmental Protection Agency (“EPA”): *Denial of Small Refinery Gap-Filling Petitions*. (See Exhibit A). This agency action denied Kern Oil’s petitions for small refinery exemptions under the Renewable Fuel Standard program for compliance years 2014, 2015, and 2016. Kern Oil submitted those petitions to EPA on March 3, 2020.

EPA did not date the agency action, but EPA represented in subsequent email correspondence with Kern Oil that EPA issued the agency action on September 14, 2020. To Kern Oil’s knowledge, the agency action has not been published in the

Federal Register. While EPA attempted to email the agency action to Kern Oil on September 17, 2020, Kern Oil did not actually receive that correspondence from EPA until October 19, 2020. (*See* Exhibit A). This petition for review is timely pursuant to 42 U.S.C. § 7607(b)(1) and 40 C.F.R. § 23.3.

Kern Oil has filed a petition for review of the same final agency action in the United States Court of Appeals for the Ninth Circuit because Kern Oil believes that jurisdiction and venue are proper in the Ninth Circuit. Kern Oil is filing this petition as a protective measure because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia within 60 days from the date this final action is published in the Federal Register.” (*See* Exhibit A).

Section 307(b)(1) of the Clean Air Act requires that any final agency action “which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.” 42 U.S.C. § 7607(b)(1). The action in this case applies to one refinery that is located in Bakersfield, California. Notwithstanding this fact, EPA has taken the position that “this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1).” Although Kern Oil was not mentioned in this memorandum, EPA argues that the memorandum was a nationally applicable action.

In summary, although Kern Oil believes its petition for review is properly before the Ninth Circuit, Kern Oil is filing this petition for review out of an abundance of caution, as a protective measure, and without waiving any arguments that jurisdiction and venue are proper in the Ninth Circuit.

[Signature page follows.]

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

Susan G. Lafferty

D.C. Circuit Bar No. 47582

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW, Suite 700

Washington, DC 20001-3980

202.637.3593 (tel)

202.383.0168 (fax)

susanlafferty@eversheds-sutherland.us

David M. McCullough

D.C. Circuit Bar No. 54995

EVERSHEDS SUTHERLAND (US) LLP

The Grace Building, 40th Floor

1114 Avenue of the Americas

New York, NY 10036-7703

212.389.5000 (tel)

212.389.5099 (fax)

davidmccullough@eversheds-sutherland.us

Counsel for Petitioner

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

Kern Oil & Refining Co.,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No.: <u>20-1456</u>
	§	
United States Environmental Protection Agency,	§	
	§	
Respondent.	§	
	§	

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Kern Oil & Refining Co. (“Kern Oil”) provides the following corporate disclosure statement:

Kern Oil is a wholly-owned subsidiary of Casey Co., a privately-held California corporation. Neither Kern Oil nor Casey Co. has any ownership relationship with a publicly-held company.

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

 Susan G. Lafferty
 D.C. Circuit Bar No. 47582
EVERSHEDS SUTHERLAND (US) LLP
 700 Sixth Street, NW, Suite 700
 Washington, DC 20001-3980
 202.637.3593 (tel)
 202.383.0168 (fax)
 susanlafferty@eversheds-sutherland.us

David M. McCullough
D.C. Circuit Bar No. 54995
EVERSHEDS SUTHERLAND (US) LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036-7703
212.389.5000 (tel)
212.389.5099 (fax)
davidmccullough@eversheds-sutherland.us

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c), and 25, and 40 C.F.R. § 23.12(a), I hereby certify that a copy of the foregoing was mailed by certified mail, return receipt requested to the following:

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Hon. William Barr
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

Susan G. Lafferty

D.C. Circuit Bar No. 47582

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW, Suite 700

Washington, DC 20001-3980

202.637.3593 (tel)

202.383.0168 (fax)


susanlafferty@eversheds-sutherland.us

Counsel for Petitioner

Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refineries,” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship.” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

From: Cohen, Janet <cohen.janet@epa.gov>

Sent: October 19, 2020 2:31 PM

To: rwinchester@kernoil.com

Cc: jdehart@manatt.com; Dominguez, Alexander <dominguez.alexander@epa.gov>; Idsal, Anne <idsal.anne@epa.gov>

Subject: Resend: September 14, 2020 Small Refinery Decision Memo

Mr. Winchester,

I am sorry that you did not receive the original email we sent to small refineries covered by our September 14, 2020 decision memo. Chris McKenna subsequently sent you a copy of the email, but because we blind-copied the refineries to protect confidentiality, your name, along with the other recipients, would not show up on the addressee list. Therefore I am including a redacted screenshot here that does show your name as a recipient. I've also attached the original email below.

Janet Cohen, Associate Director
Compliance Division
USEPA Office of Transportation and Air Quality
734-214-4511(office)
734-417-8271 (mobile)
cohen.janet@epa.gov

.....
Screenshot:



September 14, 2020 Small Refinery Decision Memo



Cohen, Janet

To: Cohen, Janet

Cc: Nelson, Karen; Byron Bunker; Hengst, Benjamin; Stahle, Susan

Bcc:

[Redacted BCC list]

Retention Policy: Permanent (Capstone approach) (Never)

Expires: Never

Good afternoon,

You are receiving this email because you submitted one or more petitions for an RFS small refinery exemption for prior decision memo issued on September 14, 2020. Please see EPA's September 14, 2020 memo regarding the disposition of

Janet Cohen, Associate Director
 Compliance Division
 USEPA Office of Transportation and Air Quality
 734-214-4511 (office)
 734-417-8271 (mobile)

Original Email:

From: Cohen, Janet
Sent: Thursday, September 17, 2020 2:50 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Nelson, Karen <nelson.karen@epa.gov>; Byron Bunker <Bunker.Byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: September 14, 2020 Small Refinery Decision Memo

Good afternoon,

You are receiving this email because you submitted one or more petitions for an RFS small refinery exemption for prior compliance years that were addressed in a decision memo issued on September 14, 2020. Please see EPA's September 14, 2020 memo regarding the disposition of your request(s), available [here](#).

Janet Cohen, Associate Director

Compliance Division

USEPA Office of Transportation and Air Quality

734-214-4511 (office)

734-417-8271 (mobile)