



February 7, 2022

Attention: Docket ID No. EPA-HQ-OAR-2021-0566

Joseph Goffman
Principal Deputy Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via: www.regulations.gov

Re: Comments on *Proposed RFS Small Refinery Exemption Decision* (EPA-420-D-21-001)

Dear Assistant Administrator Goffman,

The Renewable Fuels Association (RFA) appreciates the opportunity to submit these comments regarding the U.S. Environmental Protection Agency's (EPA's) December 7, 2021 proposed denial of 65 pending small refinery exemption (SRE) petitions. RFA is the leading trade association for America's ethanol industry, and our mission is to drive expanded demand for American-made renewable fuels and bioproducts worldwide.

RFA fully supports EPA's proposal to deny all pending SRE petitions on the basis that compliance with the Renewable Fuel Standard (RFS) program does not cause disproportionate economic hardship to small refineries. RFA also encourages EPA to deny the compliance year 2018 SREs, which were inappropriately issued in 2019 and recently remanded to EPA by the D.C. Circuit following a legal challenge led by RFA.

As the lead petitioner in *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020) ("*RFA*") and the respondent in *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*, 141 S. Ct. 2172 (2021) ("*HollyFrontier*"), RFA has been at the forefront of the legal debates surrounding the RFS's SRE provisions. Congress intended that the RFS would force increased use of renewable fuels in order to reduce greenhouse gas emissions and increase U.S. energy security. These goals have been undermined over the past several years by the increasing number of SREs granted and left unaccounted for in the RFS annual standards. America's renewable fuel producers and farmers have been forced to pay the price—the uncertainty and market instability caused by the surge of exemptions have left them unable to fully benefit from a program intended to increase demand for their products.

RFA is therefore pleased by EPA's proposal to revise its approach to SREs. EPA's proposed decision is consistent with the statute and with EPA's repeated determinations that small refineries pass through the cost of RFS compliance to the wholesale prices of their products and therefore do not face disproportionate economic hardship.

The attached comments provide more detail on RFA's response to EPA's proposed denial of the pending SREs. In summary:

- RFA urges EPA to apply the Tenth Circuit's holdings in *RFA* nationwide;
- RFA supports EPA's recommitment to its consistent position that all refineries recoup RFS compliance costs;
- EPA's position that all refineries recoup RFS compliance costs is supported by findings from academic literature, financial analysts, and oil refiners themselves;
- EPA should deny the 2018 SREs that the D.C. Circuit recently remanded; and
- RFA supports EPA's decision to make public its proposed adjudication and to open its SRE policy to public comment.

When finalized, the proposed approach will restore confidence in the RFS program, which in turn will stimulate the increased investment in renewable fuel production that Congress sought to encourage. Thank you again for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Geoff Cooper". The signature is written in a cursive, flowing style.

Geoff Cooper
President & CEO

**COMMENTS OF THE
RENEWABLE FUELS ASSOCIATION (RFA)
IN REGARD TO
EPA’S PROPOSED RFS SMALL REFINERY EXEMPTION DECISION
DOCKET ID NO. EPA-HQ-OAR-2021-0566
(DECEMBER 7, 2021)**

The Renewable Fuels Association (RFA) submits these comments in response to the U.S. Environmental Protection Agency’s (EPA’s) December 7, 2021 proposed denial of 65 pending small refinery exemption (SRE) petitions.

I. RFA Urges EPA to Apply the Tenth Circuit’s Holdings in *RFA* Nationwide

EPA should apply the Tenth Circuit’s decision in *RFA* nationwide and, as proposed, require that small refineries seeking an SRE: (1) demonstrate that any disproportionate economic hardship (DEH) they experience is caused by compliance with the RFS program, and (2) reconcile any such showing with RIN cost passthrough.

In *RFA*, the Tenth Circuit vacated and remanded three challenged SREs for two reasons that were not addressed by the Supreme Court in *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*, 141 S. Ct. 2172 (2021) (“*HollyFrontier*”). First, the Tenth Circuit held that EPA exceeded its statutory authority by “[g]ranting extensions of exemptions based at least in part on hardships not caused by RFS compliance.” 948 F.3d at 1254. EPA’s decisions cited to “[a] difficult year for the refining industry as a whole” and an “industry-wide downward trend” of lower net refining margins, among other factors that the court determined were “not restricted to disproportionate economic hardship caused by RFS compliance.” *Id.* at 1253.

Second, the Tenth Circuit held that it was arbitrary and capricious for EPA to have “ignored or failed to provide reasons for deviating from prior studies showing that” the costs of purchasing the credits needed to show RFS compliance (*i.e.*, “RINs”) “do not disproportionately harm refineries which are not vertically integrated.” 948 F.3d at 1255. This is because “merchant refineries typically recoup their RIN purchase costs through higher petroleum fuel prices.” *Id.* at 1257.

RFA strongly supports EPA’s proposal to adopt these holdings as its nationwide policy for adjudicating SREs, and further supports EPA’s proposed application of these holdings to deny all pending SREs based on its finding that “no small refinery experiences DEH due to their compliance with the RFS program.” EPA’s decision to alter its approach is clearly reasonable given that the change was triggered by the Tenth Circuit’s explicit rejection of EPA’s prior approach. Moreover, applying *RFA* nationwide would restore stability to the RFS and provide the certainty and predictability that is necessary for renewable fuel producers to survive in the marketplace and safely deploy investment into new technologies. The alternative of EPA retaining

a split in its administration of SREs between circuits would be impracticable to apply and would further undermine the RFS.

II. RFA Supports EPA's Recommitment to Its Consistent Position that All Refineries Recoup RFS Compliance Costs

RFA agrees with EPA's determination that small refineries do not suffer disproportionate economic hardship pursuant to the statute because: (1) RFS compliance costs are the same for all obligated parties, and (2) all obligated parties, including small refineries, recover their compliance costs through the market price they receive when they sell their fuel products.

EPA's position regarding the passthrough of RFS compliance costs has been unwavering for almost a decade. An EPA report assessing the 2013 RIN market concluded that "obligated parties were generally able to recover [the] increase in the costs of meeting their RIN obligations in the price they received for their petroleum-based products," and thus "these higher costs have a similar impact on all obligated parties." *See* Dallas Burkholder, Office of Transp. & Air Quality, EPA, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* 29 (May 14, 2015). The report specifically addressed merchant refiners "who largely purchase separated RINs to meet their RFS obligations," and determined that these refiners "should not therefore be disadvantaged by the higher RIN prices, as they are recovering these costs in the sale price of their products." *Id.* at 3.

EPA has consistently reiterated the conclusions of this report in the following years. For example, in a 2017 rulemaking, EPA reviewed studies submitted by commenters purporting to show "an inability to pass-through the cost of the RFS program to consumers," but EPA did "not find these assessments convincing" and concluded that "[a]ll obligated parties, including merchant refiners, are generally able to recover the cost of the RINs they need for compliance with the RFS obligations through the cost of the gasoline and diesel fuel they produce." EPA, EPA-420-R-17-008, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, (Nov. 2017), at 23–24. EPA underscored its findings again in response to comments received on the proposed rule for 2018 RFS standards, concluding that "refiners are generally able to recover the cost of RINs in the prices they receive for their refined products, and therefore high RIN prices do not cause significant harm to refiners." EPA, EPA-420-R-17-007, Renewable Fuel Standard Program-Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments, (Dec. 2017), at 198.

EPA has reaffirmed its position on the ability of all refineries to pass through and recover their compliance costs in rulemakings as recent as the 2020 RFS standards. In the final rule for the 2020 standards, EPA stated: "We have reviewed and assessed the available information, which shows that obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS standards. ... Even if we were to assume that the cost of acquiring RINs was not recovered by obligated parties ... a cost-to-sales

ratio test shows that *the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales.*” 85 Fed. Reg. 7,016, 7,067–68 (Feb. 6, 2020) (emphasis added).

III. EPA’s Position that All Refineries Recoup RFS Compliance Costs is Also Supported by Findings from Academic Literature, Financial Analysts, and Oil Refiners Themselves

Over the past decade, EPA has conducted extensive and robust analysis on RIN passthrough and RFS compliance costs. Numerous other public, private, and commercial entities—including academia, financial analysts, and refining companies—have also analyzed these issues in depth, reaching the same conclusions as EPA. The finding by EPA that all refineries—whether large or small, merchant or integrated—recoup their RFS compliance costs is confirmed by an expansive body of literature on the topic and is further corroborated by the statements of numerous oil refiners.

For example, economists at Iowa State University concluded that “added refiner costs from complying with the RFS are passed on to blenders through higher [wholesale] gasoline prices. We show that high RIN prices, holding constant gasoline consumption levels, have no impact on the profits of refiners” See B.A. Babcock, G.E. Lade, and S. Pouliot, Iowa State University Center for Agricultural and Rural Development, *Impact on Merchant Refiners and Blenders from Changing the RFS Point of Obligation*, CARD Policy Brief 16-PB 20, at 1 (Dec. 2016).

In addition, several financial and energy market analysts who cover the refining sector have come to similar conclusions after assessing RFS compliance costs. Analysts from Wells Fargo Securities, for instance, found in a 2017 analysis that “[m]ost independent refiners now enjoy a net benefit from RINs” and “RINs costs are being passed along.” See T. Neeley, Progressive Farmer DTN, *Wells Fargo: Most Independent Refiners Benefit from RIN* (Nov. 27, 2017). Similarly, energy and commodity market intelligence firm S&P Global Platts recently underscored that the value of RINs is embedded in the prices all refiners receive for refined products, noting that “[w]hile RINs are a cost, refined products prices are inflated by those RINs. ... when the price of RINs rise, so does the RVO cost as well as the value of refined products produced.” See J. McGurty, S&P Global Platts, *Refinery Margin Tracker: Rising RINs costs pump up US refinery margins* (Feb. 1, 2021).

Moreover, many oil refiners themselves have consistently taken the position that RIN costs are passed through to wholesale customers and, thus, there is no net impact on refining margins. In 2017 comments to EPA, refiner Tesoro (which later became part of Marathon Petroleum Company) stated, “RIN costs are passed through at the bulk finished product sales points and provide refiners with coverage of their exposure to them.” See EPA-HQ-OAR-2016-0544-0244. An executive from refining company Phillips 66 recently noted that “[o]ur view is that the RINs are in the crack [i.e., refining margin]. It’s a cost that refining pays and that the crack has passed on ...” See The Motley Fool, *Phillips 66 (PSX) Q2 2021 Earnings Call Transcript* (Aug. 3, 2021). Responding to EPA’s proposed rule for 2020 RFS standards, the American Petroleum Institute

(API), which represents companies owning and operating both large and small oil refineries, noted that “RIN costs are largely recovered by refineries, large and small, through the increased value of gasoline and diesel fuel they supply to the market.” See EPA-HQ-OAR-2019-0136-0721. And, as recently as January 2022, the CEO of CVR Energy, which operates a small refinery in Oklahoma, stated that “high RIN prices ... go right to the price of gasoline,” confirming that RIN values are embedded in the wholesale price CVR and other refiners receive for gasoline blendstock. See J. McGurty, S&P Global Platts, *Fuel for Thought: Is it time to take politics out of the US EPA’s Renewable Fuel Standard?* (Jan. 11, 2022).

IV. EPA Should Also Deny the 2018 SREs That the D.C. Circuit Recently Remanded

EPA notes in its proposed SRE decision that “[s]hould [EPA] receive additional petitions for SREs subsequent to the release of this proposed action, we may decide to include those petitions in our final action, if appropriate.” EPA did in fact subsequently receive additional petitions; one day after EPA released the proposed SRE decision, the D.C. Circuit remanded to EPA 31 SREs that EPA had granted for the 2018 compliance year.

In a decision signed on August 9, 2019, EPA granted SREs to 31 small refineries. RFA and a group of other biofuels interests filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit to challenge these SREs on October 22, 2019. The biofuels petitioners submitted our opening brief in December 2020, but the case was subsequently held in abeyance after the Supreme Court granted the petition for certiorari in *HollyFrontier*. After the Supreme Court issued its decision in *HollyFrontier*, EPA moved the court for voluntary remand of the SREs without vacatur. The Court granted EPA’s motion on December 8, 2021, remanding the 31 SREs to EPA and ordering that EPA issue new decisions within 90 days. The Court explained that “remand is warranted so that EPA may reconsider its positions in light of the principles behind” the Tenth Circuit’s holdings in *RFA* and the Supreme Court’s holding in *HollyFrontier*.

As discussed above, the *RFA* holdings combined with EPA’s steadfast position that all refineries recoup RFS costs dictate that no small refineries suffer DEH as to justify an SRE. Therefore, EPA should include the 31 remanded SREs in its decision to deny all pending SREs. The exact same logic that applies to the currently pending 65 SRE petitions applies to the 31 SRE petitions previously granted for the 2018 compliance year; therefore, it would be arbitrary for EPA to reach any other result with respect to the 2018 SRE remand.

V. RFA Supports EPA’s Decision to Make Public Its Proposed Adjudication and to Open Its SRE Policy to Public Comment

RFA has been a strong advocate for increased transparency regarding EPA’s adjudication of SRE petitions, and is therefore pleased that EPA decided to publish this proposed SRE decision, shedding some light onto EPA’s analysis concerning SREs. This, coupled with EPA’s recent related proposal to “identify certain types of RFS information collected by EPA ... as not entitled to confidential treatment pursuant to Exemption 4 of the FOIA ...,” will help ensure greater visibility and openness in the SRE process. See 86 Fed. Reg. 72,436, 72,477 (Dec. 21, 2021).

Increased transparency moving forward will afford biofuels producers with greater confidence in their investments, which will in turn increase the production and use of low-carbon renewable fuels, thus supporting the Congressional purpose behind the RFS program.

VI. Conclusion

For the reasons detailed above, RFA strongly supports EPA's proposed decision to deny pending SRE petitions. We also encourage EPA to apply the same decision to the 2018 SREs that were recently remanded by the D.C. Circuit. We urge EPA to swiftly finalize the proposed decision, which would restore confidence in the RFS program and stimulate the increased investment in renewable fuel production that Congress sought to encourage.