UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RENEWABLE FUELS ASSOCIATION, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*, and HOLLYFRONTIER REFINING & MARKETING LLC, *et al.*, *Intervenor-Respondents*.	Case No. 18-9533

PETITIONERS' MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE AND/OR CONSIDER EXTRA RECORD EVIDENCE OF THREE DOCUMENTS

Petitioners the Renewable Fuels Association, American Coalition for Ethanol, National Corn Growers Association and National Farmers Union (collectively, the "Coalition") respectfully request that the Court take judicial notice of or, alternatively, consider as extra-record evidence three documents that bear on Respondent United States Environmental Protection Agency's ("EPA" or

the "Agency") evolving interpretation of Section 211(o)(9)(B) of the Clean Air Act and whose provenance cannot be disputed.

At oral argument, Respondent's counsel, Mr. Jacobi, referred the panel to EPA's explanation of its current interpretation of Renewable Fuel Standard ("RFS") eligibility requirements, which is contained in the Final Response Brief for the Respondents, *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, at 50 n.13 (D.C. Cir. July 8, 2019), ECF No. 1796068. In doing so, Mr. Jacobi expressly invited the panel to consider extra-record evidence concerning EPA's interpretation of RFS statutory provisions and implementing regulations.[1]

In response, and in light of relevant EPA documents that have come to light as a result of related litigation only very recently, Petitioners ask the Court to take notice of or consider three documents:

1. The August 9, 2019 memorandum from Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation to Sarah Dunham, Director, Office of Transportation and Air Quality (the "Idsal Memorandum" SUPP_791-92);

[1] Petitioner's note that Mr. Jacobi's invitation for the Court to review EPA's public statements in other proceedings directly conflicts with EPA's response to the Coalition's previous Motion for Judicial Notice in this matter, where EPA argued, extensively, that this Court has no authority to consider four extra-record documents, including EPA's Brief in *American Fuel and Petrochemical Manufacturers v. EPA*, No. 17-1258 (D.C. Cir. Oct. 25, 2018), ECF No. 1757157. *See* EPA's Opp. to Pet'rs' Mot. for Judicial Notice 9, ECF No. 10612217.

2. The June 1, 2018 memorandum for the President of the United States authored by Francis Brooke, Special Assistant to the President for Energy and Environmental Policy, National Economic Council, titled *Renewable Fuel Standard (RFS) Agreement* and obtained by Petitioners through the Freedom of Information Act ("FOIA") (the "Brooke Memorandum" SUPP_793-94); and

3. A July 31, 2017 email thread between EPA employees regarding David Schnare, former EPA advisor to the Administrator of EPA, also obtained by Petitioners through FOIA (the "Schnare Email" SUPP_795-97).

Respondent EPA opposes this Motion and intends to file a response. Intervenors HollyFrontier Refining & Marketing LLC, HollyFrontier Woods Cross Refining LLC, and HollyFrontier Cheyenne LLC; and Intervenor Wynnewood Refining Company, LLC oppose this Motion but do not anticipate filing responses at this time.

ARGUMENT

Although judicial review under the Administrative Procedure Act ("APA") is generally limited to the administrative record, *see Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (10th Cir. 2010), "Tenth Circuit precedent indicates . . . that the ordinary evidentiary rules regarding judicial notice apply when a court reviews agency action." *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1069 (D.N.M. 2018). Accordingly, "at any stage of the proceeding" this Court "may judicially notice a fact that is not subject to a reasonable dispute because it . . . can be accurately and readily determined

from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a), (b); *see also New Mexico ex. rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of information "not subject to reasonable factual dispute" and "capable of determination using sources whose accuracy cannot reasonably be questioned"). Public records—including the Idsal Memorandum, Brooke Memorandum, and Schnare Email—are sources whose accuracy cannot reasonably be questioned. *See Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1107 n.18 (10th Cir. 2007) (public records are subject to judicial notice); *In re Am. Apparel, Inc. Shareholder Litig.*, 855 F. Supp. 2d 1043, 1064 (C.D. Cal. 2012) ("Because plaintiffs obtained the documents by making a FOIA request, the court will take judicial notice of them as matters of public record."). Indeed, a court "*must* take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c) (emphasis added).

This Court also has "recognized that consideration of extra-record materials is appropriate in extremely limited circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 609 (10th Cir. 2018) (quoting *Lee v. U.S. Air Force*, 354

F.3d 1229, 1242 (10th Cir. 2004)). The Court may also consider extra-record evidence where the agency has "swept stubborn problems or serious criticism under the rug," *id*. at 609-10, or "when there is a 'strong showing of bad faith or improper behavior.'" *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). *Cf. Water Supply and Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1267 (D. Colo. 2012) (discussing Tenth Circuit case law on supplementation of the record and granting motion to complete the record with notes "reflect[ing] agency thoughts and plans on matters vital to their challenged decision-making"). Where the Court is "faced with an agency's technical or scientific analysis,"—such as the technical evaluation of a refinery's disproportionate economic hardship,[2]—"an initial examination of the extra-record evidence in question may aid . . . in determining whether these circumstances are present." *Lee*, 354 F.3d at 1242.

The Idsal Memorandum is relevant in that it shows that an interpretation and position advanced by EPA in this case are inconsistent with the interpretation and position currently maintained by the Agency. The Brooke Memorandum provides important additional evidence that the White House did not consider the small

[2] *See Hermes Consol., LLC v. EPA*, 787 F.3d 568, 574 (D.C. Cir. 2015).

refinery exemption extensions its EPA had granted as of July 2018 (including the three challenged exemptions in this case) to be based on "true disproportionate economic hardship," as the statute requires. Relatedly, the Schnare Email describes then-Administrator Pruitt's willingness to depart from statutory requirements as well as his disregard for following administrative procedures.

Together these documents evidence that the administrative record does not provide the full picture of the EPA's legal interpretations underpinning the three small refinery exemption extensions challenged in this action.[3] They also reveal the type of "stubborn problems or serious criticism" that warrants extra-record review. *See Audubon Soc'y of Greater Denver*, 908 F.3d at 609-10.

The Idsal Memorandum

Petitioners became aware of the Idsal Memorandum, which is dated August 9, 2019, only after it was included as an attachment to EPA's Motion to Dismiss in *Sinclair Wyoming Refining Co., v. EPA*, No. 19-9562 (10th Cir. filed Sept. 19,

[3] To be clear, Petitioners are not arguing that these documents themselves were relevant materials that were withheld from the administrative record. These documents do not "complete" the administrative record, but rather "supplement" it as they aid the Court in conducting a substantive inquiry. *See Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1238 (D. Colo. 2010) (contrasting "materials which were actually considered by the agency, yet omitted from the administrative record ('completing the record'); and … materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry ('supplementing the record')").

2019), ECF No. 10680004. In the memorandum, titled "Decision on 2018 Small Refinery Exemption Petitions," Acting Assistant Administrator, Office of Air and Radiation Anne Idsal granted extensions of full exemptions pursuant to 42 U.S.C. § 7545(o)(9)(B)(i) to all 31 refineries to which the Department of Energy had recommended should receive either full or fifty percent exemptions for compliance year 2018. SUPP_792. Ms. Idsal denied all petitions of those small refineries for which the Department of Energy had recommended no exemption.[4] *Id*.

The significance of Ms. Idsal's memorandum is her conclusion that any extension offered in 2018 must comport with the initial full "temporary exemption" in subparagraph A of section 211(o)(9), which exempted small refineries from RFS requirements between 2007 and 2010. Ms. Idsal's conclusion is flatly inconsistent with EPA's stated position, advanced by Mr. Jacobi in oral argument and documented in footnote 13 of Respondents' brief in *Advanced Biofuels*, that EPA's current eligibility requirements "focus[] on the small refinery's throughput for the desired exemption period, regardless of whether it qualified for or received the blanket exemption [in subparagraph A]." *Advanced*

[4] Petitioners do not address the substantive validity of the Idsal Memorandum (particularly its decision to grant full exemptions where DOE had recommended partial denials), as that issue is not before the Court. Petitioners offer the Memorandum merely to underscore the agency's inconsistent and contradictory positions on small refinery exemptions.

Biofuels Ass'n v. EPA, No. 18-1115, at 50 n. 13 (D.C. Cir. July 8, 2019), ECF No. 1796068. The Idsal Memorandum instead read subparagraph (A) and (B) together, noting that "[t]he exemption available under Section 211(o)(9)(B) is explicitly described as an 'extension of the exemption under subparagraph (A).'" SUPP_792.

The Idsal Memorandum also notes that the Agency would not be granting any exemption extensions where DOE recommended against such extensions. *Id*. This stands in stark contrast to EPA's disposition of the HollyFrontier Cheyenne Refinery exemption extension request, which gave the refinery a full exemption extension notwithstanding DOE's recommendation that the request be denied in its entirety.

In sum, the argument advanced by EPA counsel at oral argument and the actions of EPA in responding to DOE's recommended denials are flatly contradicted by the Agency's most recent decision memorandum on small refinery exemption extension requests.

The Brooke Memorandum

The Brooke Memorandum is a "Decision Memorandum for the President" prepared by Francis Brooke, Special Assistant to the President for Energy and Environmental Policy, dated June 1, 2018. SUPP_793.

Although EPA produced the Brooke Memorandum in response to Petitioner Renewable Fuels Association's FOIA requests as part of a large production of records on May 28, 2019, a federal district court order precluded Petitioners from disseminating the record until October 10, 2019.[5] The memorandum, which was to be presented to the President "through" Lawrence Kudlow, Director of the National Economic Council, requested the President's approval on "a plan to implement the agreement reached on the Renewable Fuels Standard ('RFS')

[5] The Brooke Memorandum and the Schnare Email discussed below were among several hundred pages of emails and records produced by EPA approximately 48 hours prior to Petitioners' filing of their Reply Brief in this matter. Before Petitioners could bring the Brooke Memorandum to the Court's attention shortly after the filing of the Reply Brief, EPA demanded that Petitioners return the document. EPA informed Petitioners that the document was subject to executive privilege and the deliberative process exemption of FOIA and had been inadvertently produced. *See* J. Status Rep., *Renewable Fuels Ass'n v. EPA*, No. 18-2031 (D.D.C. filed July 8, 2019), ECF No. 22 (discussing attempted clawback). Shortly thereafter, EPA filed a motion for a protective order seeking an order barring Petitioners from disclosing the document until a decision on its use could be made later in the proceedings. *See* Mot. for Protective Order, *Renewable Fuels Ass'n v. EPA*, No. 18-2031 (D.D.C. filed July 12, 2019), ECF No. 23. Although the district court denied EPA's motion for a protective order, the district court precluded dissemination of the record until it ruled on EPA's request to claw back the record. Minute Order, *Renewable Fuels Ass'n v. EPA*, No. 18-2031 (D.D.C. filed Sept. 3, 2019). EPA finally filed a Notice with the district court on September 24, 2019—just over 36 hours prior to oral argument in this matter—notifying the district court that EPA would henceforth decline to prevent the distribution of the memo. On October 10, 2019, the district judge issued an order allowing dissemination of the record. Minute Order, *Renewable Fuels Ass'n v. EPA*, No. 18-2031 (D.D.C. filed Oct. 10, 2019).

following [the President's] meetings on the subject." *Id*. The memorandum sought to implement an agreement reached with the Secretary of Agriculture, then EPA Administrator Pruitt, and four senators to satisfy concerns about the RFS program expressed by both the refining industry and biofuel producers. Paragraph Three of the reported agreement called for EPA to "grant future small refinery exemptions based only on '*true* disproportionate economic hardship'" (emphasis added) – as though the administration had been doing otherwise up until that point.

The relevance of this June 2018 memorandum, reflecting an agreement reached less than three months after EPA granted the Wynnewood Refinery's exemption extension, is self-evident in the memorandum's phrase "true disproportionate economic hardship." Petitioners have argued all along that EPA's interpretation of the statutory requirements at 42 U.S.C. § 7545(o)(9)(B)(i) reads "disproportionate" and "hardship" out of the statute. *See* Pet'rs' Br. 34-44, ECF No. 10609974. In this document memorializing an (apparently unsuccessful) attempt to restore "disproportionate economic hardship" analysis to its statutory moorings, one of the President's advisors implicitly acknowledged that Petitioners' characterization of the Agency's exemption extension decisions is correct.

The fact that the Brooke Memorandum is dated after the three challenged exemption decisions is immaterial. Extra-record material that post-dates a

challenged agency action is "highly relevant evidence—notwithstanding the date of the communication itself" when it involves a "Department employee discussing an earlier effort to implement" a change in agency standards or interpretations that is "contrary to its position" in litigation. *See Am. Bar Ass'n v. U.S. Dep't of Ed.*, 370 F. Supp. 3d 1, 39 (D.D.C. 2019) (granting motion to consider extra-record emails). *Cf. Hawaii v. Trump*, 859 F.3d 741, 773 & n.14 (9th Cir. 2017) (taking judicial notice of President Trump's statement made via twitter when challenged executive order "[did] not provide a rationale"), *vacated on other grounds*, 138 S. Ct. 377 (2017).

The Schnare Email

The Brooke Memorandum is not an aberration. The Schnare Email provides context for when EPA began to depart from the statutory criteria of 42 U.S.C. § 7545(o)(9)(B)(i). Petitioners obtained the Schnare Email from the same FOIA litigation as the Brooke Memorandum. While the majority of the email thread is redacted under the deliberative process exception, a July 31, 2017 email from Elizabeth Bowman to her colleagues at EPA documented the "full response" of former EPA advisor Dr. David Schnare in a presumed exchange with EPA employees concerning the details of his departure from the Agency in 2017.

In his response, Dr. Schnare provided "the specifics" underlying his previous statement that then-Administrator Scott Pruitt had ordered a course of action that Dr. Schnare believed to not be permitted under law. SUPP_796. Dr. Schnare detailed a March 8, 2017 meeting wherein he briefed the Administrator on several small refinery exemptions and stressed that "the Agency has no discretion in the event a small refiner does not meet the statutory and regulatory criteria for an exemption." *Id*. Dr. Schnare related that the Administrator read only the top page of a five-page briefing document recommending denial before indicating that he was "not going to deny the exemptions." *Id*. When Dr. Schnare proposed changing the exemption criteria to carry out Mr. Pruitt's intent, the Administrator rejected the idea because "[i]t would take 18 months." *Id*. Dr. Schnare reported that when he informed the Administrator that the Agency's position would be entitled to no *Chevron* deference unless it was enacted under the notice and comment regulatory process, Mr. Pruitt asked "who is going to sue me?"[6] *Id*. Finally, Dr.

[6] The Schnare Email is admissible under the Federal Rules of Evidence. Mr. Pruitt's statements are party admissions and thus not hearsay pursuant to Fed. R. Evid. 801(d)(2)(D). In any event, the email documenting Mr. Schnare's response was memorialized by an EPA employee for distribution to her Agency colleagues for the express purpose of maintaining a record of Dr. Schnare's response (and was in fact produced as an Agency record in response to a FOIA request). The thread thus qualifies as a business record entitled to the hearsay exception codified at Fed. R. Evid. 803(6).

Schnare reported that after his resignation he talked to a "senior career official in the Air Office" who confirmed that Mr. Pruitt, through a third party, "directed granting the exemptions." *Id*. Although Dr. Schnare does not identify the specific small refinery exemptions at issue in this incident, the alleged events took place mere days after HollyFrontier submitted its request for an exemption, *see* REC_589, but before EPA provided its decision document. The change in approach described by Dr. Schnare is thus contemporaneous to the one acknowledged by EPA in its decision documents.[7] *See* REC_636.

Dr. Schnare's response is relevant because it identifies Mr. Pruitt, and not the officers listed on the Challenged Decisions, as the Agency decisionmaker and discloses that Mr. Pruitt disregarded the conclusions of his own career staff as to the interpretation of the relevant statute and regulations. It is the epitome of bad faith in administrative decision-making. *See Citizens for Alternatives to Radioactive Dumping*, 485 F.3d at 1096.

[7] Even if the Schnare Email did not describe any of the exemptions challenged in this case, because the document describes a general change in agency interpretation, the Court should still consider it. *See Am. Bar Ass'n*, 370 F. Supp. 3d at 39 ("[A]lthough the email does not concern Voigt's case specifically, that is part of the point—it demonstrates that the Department adopted a new standard for 'public education services' and then applied that standard across the board, to the borrower reflected in the email as well as others….").

CONCLUSION

For the reasons set forth herein, the Coalition respectfully requests that the Court take judicial notice or consider extra-record evidence of the three agency records included in Petitioners' Supplement, attached hereto.

Date: October 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, according to the word-processor used to compose the motion, this motion contains 2,949 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).
2. This motion complies with the typeface requirements of Fed. R. App. P. 27(a)(5)-(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size and Times New Roman type style.

Date: October 15, 2019

/s/ Matthew W. Morrison

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I caused copies of the foregoing motion to be delivered electronically through CM/ECF to all counsel of record.

Date: October 15, 2019

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CERTIFICATE OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User's Manual, I hereby certify that:

1. All required privacy redactions have been made per 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, and according to the program, is free of viruses.

Date: October 15, 2019

/s/ Matthew W. Morrison

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

MEMORANDUM

SUBJECT: Decision on 2018 Small Refinery Exemption Petitions

OFFICE OF
AIR AND RADIATION

FROM: Anne Idsal, Acting Assistant Administrator
Office of Air and Radiation

TO: Sarah Dunham, Director
Office of Transportation and Air Quality

Section 211(*o*)(9)(B) 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 RFS program "for the reason of disproportionate economic hardship" (DEH). The Act instructs EPA, in consultation with the Department of Energy (DOE), to consider the DOE Small Refinery Study[1] and "other economic factors" in evaluating small refinery exemption (SRE) petitions. The statute does not define "disproportionate economic hardship," leaving for EPA's discretion how it implements this exemption provision.[2]

As part of EPA's process for evaluating SRE petitions, 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 its 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 impact 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 considered that DEH exists only when a small refinery experiences *both* disproportionate impacts *and* viability impairment. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the

[1] "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).
[2] *Hermes v. Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

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."[3] Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.[4]

Based on DOE's recommendations for the 2018 petitions, I am today granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because these refineries will face a DEH. I am denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a DEH.

I am also granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief. This decision is appropriate under the Act and is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny RFS small refinery petitions.[5] DOE's recommendations recognize an economic impact on these small refineries, and I conclude these small refineries will face a DEH meriting relief. I have concluded that the best interpretation of Section 211(*o*)(9)(B) is that EPA shall either grant or deny petitions for small refinery hardship relief in full, and not grant partial relief. The exemption available under Section 211(*o*)(9)(B) is explicitly described as an "extension of the exemption under subparagraph (A)." In turn, subparagraph (A) provides that the requirements of the RFS program "shall not apply to small refineries until calendar year 2011." It is evident that the original exemption under subparagraph (A) was a full exemption, and therefore I conclude that when Congress authorized the Administrator to provide an "extension" of that exemption for the reason of DEH, Congress intended that extension to be a full, and not partial, exemption. This approach is also consistent with congressional direction since enactment of the provision, which states: "The Agency is reminded that, regardless of the Department of Energy's recommendation, additional relief may be granted if the Agency believes it is warranted."[6]

Dated: 8/9/2019

Anne Idsal
Acting Assistant Administrator
Office of Air and Radiation

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[3] 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.

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

[5] *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).

[6] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6 (2019), *see* H.Rept. 116-9 at 741 (February 13, 2019).

THE WHITE HOUSE

WASHINGTON

June 1, 2018

DECISION MEMORANDUM FOR THE PRESIDENT

THROUGH: LARRY KUDLOW

FROM: Francis Brooke, Special Assistant to the President for Energy and Environmental Policy, National Economic Council

SUBJECT: Renewable Fuel Standard (RFS) Agreement

Purpose

To seek your approval on a plan to implement the agreement reached on the Renewable Fuel Standard (RFS) following your meetings on the subject.

Background

EPA, USDA, and the White House have been engaged in discussions with Members of Congress and a range of stakeholders regarding proposed reforms to the RFS program. Non-integrated (or "merchant") refineries have complained about the compliance costs of the program, principally associated with the requirement to buy Renewable Identification Numbers (called "RINs"). On the other side of the debate, the biofuels industry and certain agriculture interests oppose any changes to the RFS program that, in their view, would reduce the blending of biofuels into the transportation fuels market and decrease demand for their products (mostly soybean and corn).

At your most recent meeting, you reached an agreement with Secretary Perdue, Administrator Pruitt, and Senators Cruz, Toomey, Grassley, and Ernst to satisfy some of the concerns raised by both sides. A path forward to implement this agreement is below.

Discussion

All components of the RFS agreement will be addressed in a single rulemaking made by EPA in consultation with USDA. This rulemaking will contain three main provisions, and will be completed in time to affect the 2019 RVO.

1. RVP waiver for E15: EPA will propose a rule to extend the Reid Vapor Pressure (RVP) waiver for E10 to E15 so that gasoline blends with up to 15 percent ethanol can be sold year-round.

2. RIN Credits for Exports: EPA, in consultation with USDA, will propose a rule to establish a program that allows ethanol exports to be used for RFS compliance. Under this program, one gallon of exported ethanol will create one detachable Renewable Identification Number (RIN) credit that can be used to satisfy an obligated party's Renewable Volume Obligation (RVO) requirement. This RIN can be sold to a third party

as well, thereby increasing the pool of RINs and reducing the cost of RINs.

3. Restructuring of small refinery exemptions: EPA will grant future small refinery exemptions based only on true disproportionate economic hardship. EPA will also propose a rule, in consultation with USDA and DOE, to restructure the timing of small refinery exemption applications so that all future exemption applications will have to be submitted before EPA sets the RVO for the following year. This rule will also set forth that EPA will reallocate future small refinery exemptions to the RVO.

Recommendation

Approve the recommendation that EPA proceed with a rulemaking to enact the agreement that you negotiated.

Approve (signature) _____

Disapprove (signature) _____

Needs more discussion (X-mark; notes/taskings, if any) _____

Message

From: Bowman, Liz [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C3D4D94D3E4B4B1F80904056703EBC80-BOWMAN, ELI]
Sent: 7/31/2017 1:56:58 PM
To: Dravis, Samantha [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ece53f0610054e669d9dffe0b3a842df-Dravis, Sam]
Subject: RE: Schnare again

Deliberative Process / Ex. 5

From: Dravis, Samantha
Sent: Monday, July 31, 2017 9:37 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: RE: Schnare again

Deliberative Process / Ex. 5

From: Jackson, Ryan
Sent: Monday, July 31, 2017 9:36 AM
To: Dravis, Samantha <dravis.samantha@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: RE: Schnare again

Deliberative Process / Ex. 5

From: Dravis, Samantha
Sent: Monday, July 31, 2017 9:29 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: RE: Schnare again

Deliberative Process / Ex. 5

From: Bowman, Liz
Sent: Monday, July 31, 2017 9:25 AM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: RE: Schnare again

I really don't want to litigate this back-and-forth with this guy…but just so you have it, this is his full response:

Dr. Schnare responds:

I stand by earlier statement and expand on it upon request to respond to EPA. Neither EPA nor Mr. Pruitt denied that a Red Team – Blue Team on climate science is silly; nor that under the Global Change Research Act of 1990, OSTP, not EPA, has the responsibility and authority to conduct a fresh analysis of climate science.

Neither EPA nor Mr. Pruitt denied that "a delegated EPA authority was going to be used by a career manager on a sensitive issue, an action required by law. I advised him on the Agency's options and he rejected them all. Mr. Pruitt then ordered a different course of action, one I firmly believe is not permitted under law." The Agency's response was tantamount to demanding specifics before admitting (or failing to deny) this statement. Because EPA demands the specifics, here they are.

On March 8th, on the daily morning senior staff meeting with Mr. Pruitt, I brought forward four issues requiring decisions: the Chorpyrifos petition, the TSCA §21 petition on TBBPA, the RFS Small Refineries Exemption Denials, and the Pebble Mine premature veto matter. These were identified in the March 8, 2017 "Daily Hot Topics" briefing paper used at these kinds of meetings. The Small Refiner Renewable Fuels Exemptions were a "sensitive issue," in part because of Mr. Pruitt's long-standing campaign support from the refinery industry; and, because the requests for exemption from the standard for four of the 11 small refineries were clearly without merit, granting those exemptions would have two adverse effects. First, the Agency has no discretion in the event a small refiner does not meet the statutory and regulatory criteria for an exemption. To grant the exemptions would be a clear violation of Mr. Pruitt's oath of office. Second, granting improper exemptions would look like a quid pro quo to the refinery industry – something that could only harm the reputation of both the Agency and Mr. Pruitt.

When I raised the RFS issue during the March 8 meeting, Mr. Pruitt instantly rejected the staff's intent to deny the exemptions. I suggested he would benefit from a briefing on the issue. He said, "Well then, brief me." I handed him a five page brief that I had distributed to senior staff the previous day. He read the top page and then indicated he was not going to deny the exemptions. I then suggested that we could change the exemption criteria in order to carry out his intent. Mr. Pruitt instantly rejected that idea stating "We aren't going to do that. It would take 18 months." I then asked on what basis he would like to grant the exemptions. He stated: "Chevron deference." I then explained that it is black letter administrative law that we would still have to use a notice and comment regulatory process to employ that deference, again requiring about 18 months to accomplish.

At that point Mr. Pruitt turned to face me and stated, "Dave, who is going to sue me?" It was instantly obvious that Mr. Pruitt believed he need not "faithfully discharge the duties of [his] office" unless it was likely he would be caught. This is a violation of his oath of office under 5 U.S. Code §3331, subject to enforcement under 18 U.S.C. § 1918 and constitutes a criminal act – a felony. After I resigned, I check in with a senior career official in the Air Office and that person confirmed that Mr. Pruitt, through a third party, directed granting the exemptions, in direct violation of the Agency's rules.

Regarding my position while at EPA and as intended by the White House, apparently, whomever responded on behalf of EPA is ignorant of the White House's plans for my appointment as Assistant Deputy Administrator. The Transition Team managers, who were in charge of the entire transition, created the position of EPA Assistant Deputy Administrator specifically for me. It was a condition I requested in order to agree to serve on the EPA Beachhead Team. OPM approved the position description and EPA's White House Liaison, Charles Munoz, coordinated with the Presidential Personal Office process to complete the appointment process. The day before I resigned, he informed me that all the paperwork on my appointment was completed and was due at EPA any day. EPA had no involvement in this other than to process the appointment, once made, require a new oath of office and institute some additional ethics reporting. The appointment decisions were all at the White House. The Senior White House Liaison, Don Benton, was fully aware of and supportive of this appointment and as my acting in that capacity during the transition period before the final appointment.

As for meetings with senior officials, the story is more nuanced that EPA indicates. Immediately upon Mr. Pruitt coming aboard, we had a welcoming session with all the acting assistant administrators. He also participated in the monthly teleconference with acting regional administrators and acting assistant administrators. Further, we proposed he have a one-hour meet and greet with each of the major offices. He rejected that but eventually agreed to a half-hour with each. In none of these cases were issues brought forward for his decision-making. Rather, we calendared decision meetings to address those issues. While I was there, we scheduled at least five decision meetings between Mr. Pruitt and acting assistant administrators or the acting deputy administrator, each of which were taken off his calendar and subsequently handled through the daily senior staff "Hot Topics" process.

From: Jackson, Ryan
Sent: Monday, July 31, 2017 9:13 AM
To: Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Subject: Re: Schnare again

Deliberative Process / Ex. 5

Ryan Jackson
Chief of Staff
U.S. EPA
Ex. 6

On Jul 31, 2017, at 8:11 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

Deliberative Process / Ex. 5

Sent from my iPhone

On Jul 31, 2017, at 7:50 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

Deliberative Process / Ex. 5

Sent from my iPhone

On Jul 31, 2017, at 7:47 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

Deliberative Process / Ex. 5

Sent from my iPhone

On Jul 30, 2017, at 9:22 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote: