PERKINSCOIE

700 13th Street, NW
Suite 800
Washington, D.C. 20005-3960

+1.202.654.6200
+1.202.654.6211
PerkinsCoie.com

LeAnn M. Johnson Koch
LeAnnJohnson@perkinscoie.com
D. +1.202.654.6209
F. +1.202.654.9943

March 30, 2020

By Certified Mail - Return Receipt Requested

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Re: Petition for Waiver Under Clean Air Act Section 211(o)(7)(A)(i) of the Renewable Fuel Standard ("RFS")

Dear Administrator Wheeler:

The Tenth Circuit's recent ruling in *Renewable Fuels Association v. EPA*,[1] effectively eliminating small refinery hardship relief, coupled with the COVID-19 pandemic and the precipitous drop in crude oil prices due to the Russia-Saudi Arabia disagreement, have caused a 30 percent decrease in demand for refined petroleum products, putting the future of small refineries and the well-being of their employees and communities at great risk. Without relief, small refineries across the United States will abandon capital projects, lay-off employees, and curtail production or shutdown entirely, irreparably harming their companies, their contractors, and the rural communities in which they operate. This emergency situation is precisely the type of event Congress envisioned when it established EPA's waiver authority under the Clean Air Act. EPA must now use this authority to prevent the burdens of the RFS program from imposing severe economic harm upon the states and regions in which they operate, and the United States as a whole.

In accordance with Section 211(o)(7)(A)(i)[2] of the Clean Air Act ("CAA" or "the Act"), the small refineries identified in Attachment A[3] (collectively, the "petitioners") submit this petition

1 948 F.3d 1206, 1247 (10th Cir. 2020).

2 42 U.S.C. § 7545(o)(7)(A)(i)(2017).

3 Attachment A contains Confidential Business Information ("CBI") that should not be disseminated or otherwise disclosed.

requesting that the Environmental Protection Agency ("EPA" or "the Agency") use its waiver authority to provide relief to small refineries for the 2019 and 2020 compliance years by waiving small refineries' RFS renewable volume obligations ("RVO"). Providing this relief will lessen tensions in the renewable identification number ("RIN") market, for the benefit of all RFS-obligated parties, without harming the biofuels industry. Despite their statements to the contrary, small refinery relief does not harm biofuel producers or agricultural interests. Government data conclusively establishes that small refinery relief has no influence on ethanol demand.

The economic harm resulting from the curtailment or shutdown of capital projects and refineries and the layoff of direct employee and full-time equivalent contractor jobs in Pennsylvania, Alabama, Montana, Wyoming, Texas, Louisiana, Arkansas, Mississippi, West Virginia, Washington, Indiana, Utah, California, Kentucky and Hawaii will cause severe economic harm in states, regions, and the United States and EPA should act immediately to prevent it in the midst of this national emergency.

I. SEVERE ECONOMIC HARM

On Friday, March 13, 2020, President Trump declared a national emergency related to control of the novel coronavirus known as COVID-19. Previously, on Wednesday, March 11, 2020, the World Health Organization had declared COVID-19 a pandemic, citing impacts in over 110 countries and territories around the world. The macroeconomic impacts of COVID-19 have resulted in suppressed international demand for refined products including gasoline and diesel. The International Energy Agency ("IEA") has cut its 2020 growth forecast for global oil demand, predicting the first quarterly contraction in more than 10 years. The IEA has also revised down the outlook for global refinery runs.[4] As the world economy responds to measures adopted to contain COVID-19, demand for refined products for air and ground transportation, global delivery of goods, and petrochemicals are on a rapid decline.

During this time, the U.S. refining sector as a whole is facing extraordinary financial challenges. For small refineries that lack economies of scale, have less access to capital and credit, limited geographic reach, and less market diversification, the downturn poses an unprecedented threat to their continued viability. In December 2019, the IEA predicted that U.S. demand for crude oil may drop by 90,000 barrels per day (bpd) due to the COVID-19 global pandemic and

[4] Martin Menachery, Covid-19: Impact on refining and petrochemicals industry, Refining & Petrochemicals, March 1, 2020, available at https://www.refiningandpetrochemicalsme.com/petrochemicals/28211-covid-19-impact-on-refining-and-petrochemicals-industry (last accessed March 30, 2020).

related economic fallout.[5] In less than three months, that prediction changed, and the IEA reported that "[t]oday 3 billion people in the world are locked down. As a result of that, we may see demand fall about 20 million bpd," said Fatih Birol, Executive Director of the IEA, in a media briefing on Thursday, March 26, 2020.[6]

Compounding the harm to small refineries is the Tenth Circuit's misreading of the Clean Air Act and its determination that "at any time" does not actually mean "at any time." The court's ruling that small refineries may only receive small refinery hardship relief under 40 CFR 80.1441 if they were eligible for and retained hardship relief from 2006 to the present is entirely at odds with the plain language of the Clean Air Act, Congressional intent, and the findings in DOE's 2011 study. From the beginning, DOE understood that small refineries would be RIN buyers and that they would be at a permanent competitive disadvantage that would grow increasingly acute as the volume mandates and RIN prices increase.[7] In reaching its decision, the Tenth Circuit additionally ignored EPA's 2014 rulemaking in which EPA determined that small refineries must be eligible for relief in the year for which relief was sought and the prior compliance year.[8] The Court's sentiment that Congress intended for small refineries either to figure out how to comply with the RFS or decide whether it "made sense to…remain in the market" reflects an outcome driven determination that small refineries should shut down if they cannot afford over-priced RINs.[9] Quite clearly, the court misunderstands how small refineries achieve RFS compliance and that small refinery hardship relief does not destroy demand for renewable fuel.

It is impossible for EPA to agree with the court's conclusion that Congress intended for small refineries to be put out of business because the program's structure competitively advantages large integrated refineries and non-refining blenders that control the downstream blending and

---

5 Krishnamoorti, Ramanan, Lower For Long: COVID-19's Impact On Crude Oil And Refined Products, Forbes (Mar. 22, 2020), available at https://www.forbes.com/sites/uhenergy/2020/03/22/lower-for-longer-covid-19s-impact-on-crude-oil-and-refined-products/#56db83542fe8 (last accessed Mar. 30, 2020).

6 Sharma, Gaurav, Global Oil Demand Could Fall 20% With Billions of People In Coronavirus Lockdown, Forbes, (Mar. 26, 2020), available at https://www.forbes.com/sites/gauravsharma/2020/03/26/global-oil-demand-could-fall-20-with-billions-of-people-in-lockdown/#8e249705800e (last accessed Mar. 30, 2020).

7 DOE, Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship 17-18 (March 2011) ("DOE Study").

8 Regulation of Fuels and Fuel Additives: RFS Pathways II, and Technical Amendments to the RFS Standard and E15 Misfuelling Mitigation Requirements, 79 Fed. Reg. 42128, 42,152 (July 18, 2014) ("The final rule places the focus on the time period immediately prior to and during the desired exemption period, which we believe is most appropriate given the objectives of the provision.").

9 *Renewable Fuels Ass'n, et al., v. EPA*, 948 F.3d 1206, 1247 (10th Cir. 2020).

distribution of gasoline and diesel over refineries that purchase RINs for compliance.[10] EPA has affirmed the position, for years, that small refineries may petition for relief "at any time." In addition, in its RFS2 rulemaking, EPA stated that RINs would be cheap and available,[11] and promised to reconsider the rule's structure if it did not work as EPA intended—meaning that it ended up increasing costs for obligated parties.[12]

The enduring injury of the Tenth Circuit's decision isn't limited to its elimination of small refinery hardship relief. The decision has also led to a striking price increase in the RIN market. Not only do small refineries no longer have access to the relief that Congress provided to them, the disproportionate economic harm from which they otherwise would have been shielded has substantially increased—to the point where viability is at stake. Although EPA solicited comments on RIN market reforms to protect obligated parties from the wild volatility and fraud that has been a hallmark of the broken credit trading program, EPA did not finalize any reforms. Obligated parties, other than small refineries, acquire RINs on a ratable basis, and will not be adversely impacted by the spike in RIN prices for the 2019 compliance year (although they are already being adversely impacted by RIN prices for the 2020 compliance year). Therefore, by pulling the rug out from underneath small refineries on the eve of the compliance deadline and in the midst of the extraordinary economic downturn and national emergency, the Tenth Circuit has done unprecedented harm to small refineries that only EPA can remedy. Of the 31 small refineries that received small refinery hardship relief in 2018, only two will remain eligible to receive small refinery hardship relief in 2019 if the Tenth Circuit's decision is applied nationwide.

The economic crisis caused by the coronavirus combined with the immediate and continuing drop in demand, the elimination of small refinery hardship relief, and the surge in RIN prices has created the perfect storm. The question is no longer one of hardship. It is a question of survivability. EPA must act expeditiously to save small refineries and prevent severe economic harm to the states and regions in which they operate.

---

[10] DOE, Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship, Appx. B-5 (March 2011)

[11] *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,676 (Mar. 26, 2010) ("In addition, an adequate supply of RINs is expected to be available for compliance by obligated parties.").

[12] *Id*. at 14,722 ("We will continue to evaluate the functionality of the RIN market. Should we determine that the RIN market is not operating as intended, driving up prices for obligated parties and fuel prices for consumers, we will consider revisiting this provision in future regulatory efforts.").

II. ARGUMENT

A. EPA's Failure to Grant Relief Will Severely Harm the Economy of States, Regions, and the United States

The petitioners own and operate refineries in fifteen states where they produce a range of refined petroleum products. Collectively, small refineries represent less than 5% of national supply. However, in the mostly rural communities where small refineries operate, small refineries account for disproportionately large positive contributions to high paying skilled jobs in small towns, municipal tax revenues, spinoff employment to myriad other small local businesses, and a source of fuels that would otherwise be provided at higher cost by major producers. Small refineries lack economies of scale, access to capital, significant downstream integration and diversified operations, as described in their petitions for small refinery hardship relief. These characteristics of small refineries make them uniquely vulnerable to market downturns.

The negative economic consequences of multiple small refinery plant curtailment or closures will be felt at the refinery level, but they will also impact related industries along the oil and gas industry's value chain. Their curtailment or closure would also harm other industries whose success is partly dependent on the performance and economic output of the oil and gas industry, including wholesale trade, truck transportation, hospitals, restaurants, real estate, and retail outlets, among others. These sectors are already under severe pressure because of the recent economic downturn and looming recession.

Congress created the RFS program, in part, to reduce the country's reliance on foreign oil, to increase energy independence and energy security. Absent relief, the RFS would do just the opposite. It would force small refineries out of the market, reduce domestic production of refined petroleum products, and leave many parts of the country without adequate fuel supply—all of which reduce US energy independence and security. Any disruption in domestic supply will necessarily increase imports of foreign transportation fuel to fill the void. The availability of foreign supply to these regions will depend on pricing in the world market, which is increasingly volatile, also as a result of COVID-19 and the related economic instability. The availability of these foreign imports is also uncertain as borders and transport has taken an unprecedented hit in light of COVID-19. Increased reliance on foreign imports of transportation fuel will increase price volatility in these markets and cause further uncertainty in the United States' economic future.

Viewing the above outlined economic and national security factors against the backdrop of the United States' current economic environment should encourage EPA to do everything in its power to help small refineries remain in business. The most effective avenue for EPA at this time

is to utilize its CAA statutory waiver authority and grant relief to petitioners to ensure they are able to continue to operate at this crucial time.

B. EPA Has Authority to Grant Relief to Small Refineries

The CAA authorizes the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, to waive in whole or in part the requirements of the RFS program to avoid severe economic harm to a state or region. The Administrator "may" do so, by reducing the "national quantity of renewable fuel." The text of section 211(o)(7)(A) of the Act reads:

> The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, **may waive the requirements of paragraph (2) in whole or in part** on petition by one or more States, **by any** person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the **national quantity** of renewable fuel required under paragraph (2)—
>
> (i) based on a determination by the Administrator, after public notice and opportunity for comment, that **implementation of the requirement** would severely harm the economy or environment **of a State, a region**, or the United States; or
>
> (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.[13]

The statute does not limit the agency's waiver authority to "nationwide" reductions or adjustments in the context of the annual rulemaking setting the nationwide standards. The choice of the words "national quantity" does not speak to how or where the national quantity must be reduced. For example, the "national quantity" of orange juice might be reduced by a freeze in Florida, even if California had a bumper crop. The use of the statutory language of discretion, "may," rather than "shall," and the flexibility to waive RFS program requirements "in whole or in part," cannot be reconciled with an exclusively nationwide approach. The statute is intended to give EPA flexibility to respond quickly (within 90 days) to emergencies (such as refinery closings) that threaten severe economic harm to a state or a region. Indeed, EPA has regularly used exactly this logic in providing targeted relief of seasonal RVP requirements in historical supply disruption events. If "national quantity" were meant to be read as "nationwide quantity," then the findings of harm to a state or region would have been omitted from section 211(o)(7)(A)(i) of the Act. The only determination of harm that would be necessary to justify a uniform, nationwide reduction of volume would be the third finding of harm, that is, harm to the United States as a whole.

[13] 42 U.S.C. § 7545(o)(7)(A) (emphasis added).

1. A Holistic Reading of the Statute Confirms That the Administrator May Provide Tailored Relief.

The Administrator may waive, in whole or in part, the "requirements" in paragraph (2) (titled "Renewable fuel program"). Subparagraph 2(A) requires that gasoline and diesel fuel sold in the United States contain the "applicable volumes" of renewable fuel in subparagraph 2(B). The requirement to ensure that the "applicable volumes" are blended is delegated to individual refineries and importers through paragraph 2(A)(iii), which directs the Administrator to promulgate regulations with compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that "**the requirements**" of paragraph 2 are met. In promulgating its regulations, EPA chose to require that refiners and importers, but not blenders and distributors, ensure that the applicable volumes are blended by making them "obligated parties."

The clause "in whole or in part" indicates that the Administrator may tailor the antidote to "severe economic harm" to the source of the ailment. This point is buttressed when the grant of waiver authority is read as a whole: "The Administrator may waive … the requirements of paragraph (2) in whole or in part on petition by one or more States [or] by any person subject to the requirements of this subsection[.]" Read as a whole, the grant of authority to the Administrator—"may waive . . . in whole or in part"—gives the Administrator power to relieve a "person" of any of the "requirements" of paragraph (2) that are found to cause state, regional, or national harm. This reading is further supported by the fact that there are different and severable duties in paragraph (2). Thus, the structure of paragraph (2) itself supports the view that the Administrator may tailor the remedy to the problem, including the waiver of a refiner's renewable volume obligations to avoid state or regional harm where that refiner operates.

The use of the word "requirement(s)" in the waiver provision makes clear that individual obligations may be waived. Since EPA makes adjustments to the "applicable volume" on a nationwide basis by rulemaking every year, limiting the wavier to nationwide reductions would be untenable. The waiver becomes redundant of the annual adjustment if limited to a uniform reduction of nationwide volume. This reading of the use of the word "requirement(s)" in the wavier provision is further supported by EPA's implementing regulations. Those regulations effectuate the statute's "renewable fuel obligation" by imposing specific requirements on an "obligated party." In the section titled "To whom does the Renewable Volume Obligation apply?", an "obligated party" is defined as "a refiner that produces gasoline within the 48 contiguous states, or an importer that imports gasoline into the 48 contiguous states." The regulations then go on to state that "an obligated party must comply with the requirements." There can be no doubt that the waiver provision concerns the individual requirements of an "obligated party" because "paragraph (2)" incorporates the regulations by reference.

That the Administrator may provide tailored relief is also confirmed by the addition in 2007 of the right of "any person subject to the requirements of this subsection" to petition for a waiver. The use of the words "person" and "requirement" in describing both the petition of a regulated party and the scope of the waiver itself is strong textual evidence that the Administrator must have authority to tailor the waiver to a specific refinery or refineries in the state or region threatened with severe economic harm.

Indeed, the CAA defines "person" as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Because this definition was on the books in 2007, Congress is charged with knowledge of, and intent to adopt, the preexisting definition of "person" in the statute being amended. If relief is only available on a nationwide basis, then the right of "any person" to petition for a waiver becomes meaningless. Why add "any person" to those who have the right to request a waiver if these same "persons" cannot get any meaningful relief under the statute? Constructions that render any term—or here an entire amendment of the statute—superfluous are always to be avoided.

Although the use of the waiver is conditioned on a showing of severe economic or environmental harm to a state or region, the harm to a state or region must, by definition, be derivative of harm to particular refiner(s) within the state. Loss of jobs, increases in fuel costs, shortages, increased reliance on foreign sources, etc., can only be remedied by giving relief to the owners of specific refineries in the state or the region, rather than "nationwide" relief. This approach is perfectly logical. Congress chose not to base the waiver on a showing of economic harm to a particular "person" (meaning refinery owner) but instead tied relief only to harm to a larger geographical area. The design is to address public, not private, harms. But harm to the state or region from the RFS requirements can only be derivative of harm to the obligated parties within that state or region. The loss of major private refining assets is one obvious source of the kind of state and regional harm the statute is meant to address.

In order to harmonize the authorized petitioners, the state or regional harm determinations required by the statute's relief section must be read to allow a waiver to address specific requirements imposed by paragraph (2). Thus, a waiver of any one of these "requirements" to avoid individual economic harms is the means to avoid state or regional harm. As the EPA has itself observed, limiting the waiver authority to "nationwide" reductions would render the waiver provision useless and ineffective in addressing discrete harm to a state or region.

A reading where "national quantity" is construed to authorize only a uniform reduction on a nationwide basis is simply not the statute that was enacted into law. Attempting to use uniform nationwide reductions to avoid severe economic harm to "states" or "regions" is like using a canon to kill a fly. The tool is inefficient and unnecessarily destructive. Use of the waiver, if limited to

nationwide relief, would require such an enormous nationwide downward adjustment of volume that a single waiver sufficient to avoid the shut-down of critical refining infrastructure in a particular state would cripple the entire program. No statute should be construed to contain useless or absurd provisions or to disserve the overall goal of the statutory program itself.

While the small refinery petitioners acknowledge that a few EPA waiver decisions contain dictum suggesting that a waiver can only be nationwide, those statements were only made in the context of denying relief on other grounds. Those decisions do not undertake a detailed statutory analysis of the waiver provision and its relationship to the rest of the CAA. Moreover, those decisions did not consider the effect of the addition in 2007 of the right of "any person" to petition for relief. Thus, there is no meaningful past precedent. Accordingly, the Administrator should treat the issue as one of first impression and apply the same canons of statutory construction as would a federal court.

2. Supreme Court Precedent Counsels in Favor of Targeted Relief.

Recent Supreme Court precedent confirms that the statutory scheme and the overall purpose of the statutory provision have a central role in the interpretation of any statute. This is because "the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." Thus, to determine whether "national quantity" encompasses targeted as well as nationwide relief, a court must "read the words in their context and with a view to their place in the overall statutory scheme." Considering this phrase in light of the broader statutory context confirms that it must permit less than nationwide relief to be effective.

As the Supreme Court explained in *King v. Burwell*, it is misguided to construe a statutory phrase to categorically preclude action that the rest of the statute clearly contemplates. There, the Court found that giving "the phrase 'the State that established the Exchange' its most natural meaning," would result in there being no "'qualified individuals' on Federal Exchanges." This result was incongruous with the broader statutory scheme, which set requirements for both Federal and State Exchanges based on the participation of qualified individuals. The Federal Exchanges could not meet those requirements "if qualified individuals did not exist." This result suggested that "the meaning of that phrase may not be as clear as it appears when read out of context."

Finally, if there were any doubt about the Administrator's authority to grant a waiver tailored to the specific danger faced by a state or region, that doubt is removed by the introduction of the waiver authority by the word "may." This point finds further support in the fact that other provisions within paragraph (2) limit the Administrator's discretion by use of the word "shall." Given the very conscious use of "shall" and "may" in the same statute, "may" has to be read to confer on the Administrator the flexibility to address the situations that justify a waiver on the state itself.

3. Even If Reducing the "National Quantity" Requires A Uniform Nationwide Reduction, This Interpretation Can Apply Only to Waivers on the Administrator's Own Motion.

The only other plausible reading of paragraph 7 of the CAA would also authorize the Administrator to grant a waiver of small refineries' 2019 and 2020 RVOs. Under this reading—which we do not believe is the best reading—the modifying phrase "by reducing the national quantity" would only limit the Administrator's waiver authority "on his own motion," and would not apply to waivers "on petition" by State(s) or refiners.

When the Supreme Court "has interpreted statutes that include a list of terms or phrases followed by a limiting clause," it has "typically applied an interpretive strategy called the "rule of the last antecedent." Under this rule, "a limiting clause or phrase…should ordinarily be read as modifying only the noun or phrase that it immediately follows." As the Court has explained, "[t]he rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. Conversely, "[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."

Applied here, the last antecedent principle suggests that the phrase "by reducing national quantity" modifies only the phrase that it immediately follows: "or by the Administrator on his own motion." This is because the qualifying phrase, "by reducing the national quantity," is not separated from the antecedent phrases by a comma. The doctrine of the "last antecedent would thus provide that the phrases "on petition by one or more states" and "by any person subject to the requirements of this subsection" are not constrained by the limitation of waivers to "national quantity."

Nor is the interpretation urged by the rule of the last antecedent overcome by "other indicia of meaning." To the contrary, the waiver provision's context fortifies the meaning that the syntactical rule commands. For example, under this construction the state and region may get relief "on petition" by waiver "in whole or in part" of specific requirements of paragraph (2). The Administrator, on the other hand—who is unable to petition him or herself—can act "on his own motion" to reduce the "national quantity" and would likely only do so, as it has in the past, when market constraints prevent the statutory volumes from being met.

But reading "national quantity" as a flexible tool, one that the Administrator can use to target waivers to determinations of state and regional harm, is the best reading of the statute. This reading comports with the text and purpose of the statute. It allows for the effective exercise of the waiver while it also maintains the limitations on the waiver authority intended by Congress.

The key point is that the Administrator has the authority to grant this petition under any plausible interpretation of paragraph 7. Put another way, there is no plausible interpretation of paragraph 7 that would deny the Administrator the authority to waive specific volume requirements imposed on refiners in States or regions threatened with severe economic harm.

III. CONCLUSION

For the forgoing reasons, the petitioners respectfully request that EPA reduce the petitioners' portion of the national volume of renewable fuel, relieving the petitioners of their 2019 and 2020 RFS obligations to avoid harm to the states and regions in which they operate, and the United States, as described above.

Respectfully submitted,

LeAnn Johnson Koch

cc: Mandy Gunasekara, EPA Chief of Staff (via electronic mail)
Anne Idsal, Principal Deputy Assistant Administrator of EPA's Office of Air and Radiation (via electronic mail)
Petitioners in Attachment A (via electronic mail)