

July 16, 2019

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VIA CERTIFIED MAIL

Hon. Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

**Re: 2018 Petitions for Small Refinery Hardship Relief
NOTICE OF INTENT TO SUE UNDER 42 U.S.C. § 7604(a)(2)**

Dear Administrator Wheeler:

I represent numerous small refinery owners, identified in Appendix A, who are awaiting overdue decisions on their 2018 petitions for small refinery hardship relief under the Renewable Fuel Standard (“RFS”).¹ EPA’s delay in issuing decisions on the 2018 petitions is compounding rather than relieving the harm to small refineries. The uncertainty over whether or not hardship relief will be granted has tied up small refineries’ precious working capital and prevented them from investing in their refineries to make efficiency improvements to remain competitive and profitable. Because EPA did not decide the 2018 petitions before the deadline for compliance, small refineries were forced to retire RINs, leaving their RINs stranded in EPA’s coffers, or carry forward a deficit and, in the meantime, buy more RINs for 2019 compliance that will not be needed if 2018 relief is granted. 2017 RINs that were retired are now invalid and 2018 RINs, which can only be used to satisfy 20% of an obligated party’s 2019 RVO, are diminishing in value each day as we approach the 2019 compliance deadline. Thus, even the petitioners who receive relief from the 2018 RFS obligations have already suffered economic harm that will only grow worse with further delay.

While small refinery owners continue to wait for the decisions, recent media reports indicate that the Secretary of Agriculture has been attempting to influence the decision whether to grant small refinery hardship relief. As a matter of law, the Secretary’s interference is improper because the Clean Air Act (“CAA”) does not give the Secretary any authority or role over the petitions. *See* 42 U.S.C. § 7545(o)(9)(B)(ii) (the CAA authorizes only “the Administrator [of EPA], in consultation with the Secretary of Energy,” to act on petitions from small refineries).

¹ The identity of the small refinery petitioners is confidential business information. Therefore, the names of the parties on whose behalf this NOI is being submitted are identified in Appendix A and Appendix A is confidential business information.

The Secretary of Agriculture and other opponents of small refinery hardship relief oppose hardship relief, not on the merits of the need for relief, but on the mistaken belief that hardship relief destroys demand for ethanol and biofuels. However, in 2016 and 2017, when EPA granted more relief than it had in prior years, the blend rate increased, proving once again that small refinery hardship relief does not destroy demand. Hardship relief does not destroy demand for two simple reasons – ethanol would be blended without a mandate, even though the RFS forces billions of dollars to change hands every year to force ethanol blending, and small refineries are not the entities doing the blending, which is why they suffer hardship in the first instance. Relief given to an upstream small refinery does not affect the downstream blender’s decision whether or not to blend. The downstream blender is not obligated to blend and will make the decision whether or not to blend based on its best economic interest without regard to biofuel mandates.² The gradually increasing blend rate is clear proof that ethanol is economic and blending of ethanol is not impacted in any way due to hardship relief. For these reasons, denying small refinery hardship relief is a lose-lose proposition. Small refineries are harmed without any corresponding benefit to the parties battling to prevent it.

Even if demand destruction existed, foreign biofuels producers are the only biofuels producers that would be affected. Due to infrastructure constraints, domestic biofuels producers cannot economically produce enough fuel to meet the biodiesel-specific mandate, let alone the 15-billion-gallon conventional biofuel requirement. For the same reasons, they are also unable to blend 15 billion gallons of conventional ethanol into gasoline. Thus, setting aside the fact that hardship relief does not destroy demand, domestic biofuels producers would still reap no economic reward from less hardship relief because they do not have the capacity to produce or blend more biofuels and ethanol. Accordingly, the Secretary’s assertion of influence over small refinery hardship relief would not only be improper, but also unproductive for the domestic ethanol and biofuels industries.

Under the CAA, EPA is required to act on a petition within ninety (90) days after the date of receipt of the petition. 42 U.S.C. § 7545(o)(9)(B)(iii); *see also* 40 C.F.R. § 80.1441(e)(2)(ii). That duty is nondiscretionary. *See Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 (4th Cir. 1992); 40 C.F.R. § 54.3(a). Thus, EPA’s failure to issue timely decisions for the small refinery owners constitutes a failure to perform a nondiscretionary act or duty. EPA also failed to issue decisions on the 2018 petitions by March 31, 2019, which is the deadline for obligated parties to demonstrate compliance with their 2018 RFS obligations.

² Cumberland Farms, which owns one of the largest retail convenience store chains in the country, describes itself as “fuel-agnostic”. It views its job as safely and legally supplying the fuels that its customers demand “without particular regard to what that fuel is made from.” Cumberland Farms’ comments in response to EPA’s Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, page 9. November 2, 2016.

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For the reasons described above, this letter, sent on behalf of the small refinery owners in Appendix A, provides notice of our intent to sue in federal court 60 days after delivery of this letter for the Administrator's failure to perform a nondiscretionary duty and to "order the Administrator to perform" the nondiscretionary duty. 42 U.S.C. § 7604(a); *id.* § 7604(b)(2). The small refinery owners, however, urge the Administrator to issue the 2018 decisions as soon as possible, so it will be unnecessary to file suit. As discussed above, any further delay will compound the harm to small refineries, which is antithetical to Congress' intent.

The full name and address of the person giving this notice of intent to file suit on the small refinery owners' behalf is LeAnn Johnson Koch, Perkins Coie LLP, 700 13th Street N.W., Suite 600, Washington, DC, 20005. *See* 40 C.F.R. § 54.3(a).

Very truly yours,

A handwritten signature in black ink, appearing to read "LeAnn Koch", written in a cursive style.

LeAnn M. Johnson Koch

cc: Small refinery owners in Appendix A