Message

**From**: Jackson, Ryan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=38BC8E18791A47D88A279DB2FEC8BD60-JACKSON, RY]
**Sent**: 12/19/2017 8:40:03 PM
**To**: McCormack, Brian [Brian.Mccormack@hq.doe.gov]
**CC**: Yunaska, Kyle [Kyle.Yunaska@hq.doe.gov]; Wehrum, Bill [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33d96ae800cf43a3911d94a7130b6c41-Wehrum, Wil]; Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Baptist, Erik [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10fc1b085ee14c6cb61db378356a1eb9-Baptist, Er]
**Subject**: RE: small refinery hardship

Yes, I've cc'd our team. Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

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**From:** McCormack, Brian [mailto:Brian.Mccormack@hq.doe.gov]
**Sent:** Tuesday, December 19, 2017 12:40 PM
**To:** Jackson, Ryan <jackson.ryan@epa.gov>
**Cc:** Yunaska, Kyle <Kyle.Yunaska@hq.doe.gov>
**Subject:** FW: small refinery hardship

Ryan- per our convo earlier. Can we get our teams together?

---

**From:** Henry Barbour [mailto:hbarbour@capitolresourcesllc.com]
**Sent:** Tuesday, December 19, 2017 12:07 PM
**To:** Susan Butler <sbutler@capitolresourcesllc.com>; McCormack, Brian <Brian.Mccormack@hq.doe.gov>; Yunaska, Kyle <Kyle.Yunaska@hq.doe.gov>
**Subject:** RE: small refinery hardship

Brian and Kyle –

Thanks again for the phone visit last week about the small refinery hardship issue. I am just following up to see if you had a chance to visit with Mandy at EPA about this issue.

We are most eager to find a resolution for the small refinery coalition with this incomplete and inconsistent scoring of the existing metrics. We appreciate y'all and your determination to get this right.

Best,
Henry

Henry Barbour

601.948.6020 – office
Ex. 6 - cell

---

**From:** Susan Butler
**Sent:** Thursday, December 14, 2017 12:45 PM
**To:** Brian McCormack (brian.mccormack@hq.doe.gov) <brian.mccormack@hq.doe.gov>; Kyle Yunaska (kyle.yunaska@hq.doe.gov) <kyle.yunaska@hq.doe.gov>

**Cc:** Henry Barbour <hbarbour@capitolresourcesllc.com>
**Subject:** small refinery hardship

Thank you for your time yesterday. In follow up, I just want to reiterate that the small refinery coalition is not asking for something new, but for DOE to exercise oversight over the contractor by having them score the existing metrics **which have been in place since 2011** in their entirety, and consistently – both internally and amongst petitioners.

5 of the metrics - for which the data is now available - are not being scored. (1.c. ii and iii, 2. B. ii and iii, and 2.d. highlighted in gray in the table in attached excerpt from the 2011 study). While the data was not initially available in 2011, it has been for several years now – and is submitted in a spreadsheet with the petitions.

It seems unnecessary to have public comment re: whether the existing metrics should be scored correctly and completely…and applied to petitioners consistently.

We recognize that there is a larger debate ongoing re: RFS…and the political reality that it is unlikely to be resolved soon. The hardship process was established by Congress and is intended to mitigate ongoing hardship faced by small refineries under the current law. To that end, there is appropriations report language addressing hardship again this year in both the House and Senate bills.

I have also attached the coalition's more detailed background paper on this. We would be happy to discuss any of this in more detail and look forward to your response. Thank you, Susan

Susan Butler
Capitol Resources LLC
915 Prince Street
Alexandria, VA 22314
(703)739-5860 (office)
Ex. 6 (cell)

Small Refiner Exemption Meeting
May 20, 2014

Tom White, Pete Whitman DOE
EPA - Janet Cohen, Byron Bunker, Mary Manners, Chris McKenna
Stillwater – Dave Hackett, Dave Bulfin, Barry Schaps,

1. Introductions
2. Stillwater's scope of work – DEH Ranking Table
    a. Access to capital – all the refineries are meeting the threshold for Metrics 1 & 2 to warrant an exemption
    b. Relative refining margin
    c. RINs net revenue or cost
        i. RINs values
        ii. RINs cost sharing arrangements
    d. Hardship – special events - refinery specific
3. Discussion of the refiner submissions
4. Next steps
    a. May 29 meeting – get to the final decisions for the applicants
        i. Resolve the open issues
    b. Look at the range of RINs costs across applications as % of revenue
    c. 10 AM EDT start
5. Need to present a consistent story
    a. We score on a level playing field

Message

**From**: McKenna, Chris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4DA2E1588A1E4971AB729F6D58631BDD-CMCKENNA]
**Sent**: 3/6/2014 8:05:41 PM
**To**: Whitman, Peter [Peter.Whitman@hq.doe.gov]; Bunker, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ddf7bcf023d241a9a477a2dc75d5901c-Bunker, Byron]
**CC**: White, Thomas [Thomas.White@hq.doe.gov]; Weihrauch, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=74d426b7439045d9a0a65b186ea68b21-Jweihrau]
**Subject**: RE: draft EPA thank-you email to DOE

Pete - thanks, EPA has received 15 petitions total for exemptions in 2013.

Byron – here's a revised version of the thank-you note to DOE, please have this version sent to Melanie Kenderdine at DOE. Thanks.

To: Melanie Kenderdine,
Director of the Office of Energy Policy and Systems Analysis, Department of Energy

**Deliberative Process / Ex. 5**

Sincerely,
Janet McCabe

---

**From:** Whitman, Peter [mailto:Peter.Whitman@hq.doe.gov]
**Sent:** Thursday, March 06, 2014 2:54 PM
**To:** McKenna, Chris
**Cc:** White, Thomas
**Subject:** RE: draft EPA thank-you email to DOE

There are more than 7 petitions now. Can you fill in a number? I believe it is at least 15 so far.

Other than that let's just move on with this.

Pete

---

**From:** McKenna, Chris [mailto:McKenna.Chris@epa.gov]
**Sent:** Thursday, February 27, 2014 5:09 PM
**To:** Bunker, Byron
**Cc:** Whitman, Peter; White, Thomas; Bunker, Byron
**Subject:** RE: draft EPA thank-you email to DOE

Byron – Here is a draft email that I'm pretty sure was sent from Gina McCarthy to David Sandalow back in late 2011 saying thank you for all your help in evaluating RFS hardship petitions. I think it would be OK to have Janet McCabe send this to Melanie Kenderdine at DOE (and cc: Carmine Difiglio), I'm cc'ing the DOE folks to doublecheck this.

David,

# Deliberative Process / Ex. 5

Gina

Pete/Tom - would it be OK to have Janet McCabe (she's Gina's replacement) send this same email to Melanie Kenderdine and Carmine, or should it go to someone else at DOE? If you have any comments on the content of the email, or anything else on this, please let me know.

Thanks very much,
Chris

---

**From:** McKenna, Chris
**Sent:** Tuesday, February 04, 2014 4:55 PM
**To:** 'Whitman, Peter'; White, Thomas
**Cc:** Bunker, Byron
**Subject:** RE: draft EPA thank-you email to DOE

Pete – that's fine with me, I was doing this at Byron's request, I'm cc'ing him on this response to keep him posted.

Byron – Pete thought we should hold off for now on a thank-you note from EPA to DOE, they can let us know when they think it's appropriate and helpful. See bottom email for a thank-you note that was sent from Gina to David Sandalow (he was Assistant Secretary for Policy and International Affairs) back in 2011, I had asked Tom and Pete if they thought we should resend the same note to Melanie Kenderdine.

Thanks,
Chris

---

**From:** Whitman, Peter [mailto:Peter.Whitman@hq.doe.gov]
**Sent:** Tuesday, February 04, 2014 4:25 PM
**To:** McKenna, Chris; White, Thomas
**Subject:** RE: draft EPA thank-you email to DOE

Why don't you hold off for a bit? We need to wait for a prime time.

Thanks.

---

**From:** McKenna, Chris [mailto:McKenna.Chris@epa.gov]
**Sent:** Tuesday, February 04, 2014 4:20 PM
**To:** White, Thomas; Whitman, Peter
**Subject:** draft EPA thank-you email to DOE

Tom/Pete,

Below is a draft email that I'm pretty sure was sent from Gina McCarthy to David Sandalow back in late 2011 saying thank you for all your help in evaluating RFS hardship petitions. Would it be OK to have Janet McCabe (she's Gina's

replacement) send this same email to Melanie Kenderdine and Carmine, or should it go to someone else at DOE? If you have any comments on the content of the email, or anything else on this, please let me know.

Thanks very much,
Chris

David,

**Deliberative Process / Ex. 5**

Gina

David L. Carroll
Sr. Vice President and General Counsel

May 6, 2014

**VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED**

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

**Re: Hunt Refining Company - Freedom of Information Act Request for Records**

To whom it may concern:

In accordance with 40 C.F.R. Part 2, Hunt Refining Company ("HRC") requests the following documentation related to HRC's September 23, 2011 and April 26, 2013 petitions for hardship relief under 40 C.F.R. § 80.1441 of the renewable fuel standard (the "Petitions"):

1. For each Petition, the U.S. Department of Energy ("DOE") scoring sheet for HRC's responses to the RFS2 Small Refinery Survey ("Form PI-588"); and

2. All correspondence between EPA and DOE regarding HRC's Petitions, including but not limited to, all communications and memoranda related to DOE and/or EPA's review of HRC's score on the Form PI-588.

To the extent EPA withholds a subset of responsive documentation under a FOIA exemption, we request that EPA provide all other responsive documentation (including the Form PI-588 scoring sheets) within the 20 working day timeframe specified by 40 C.F.R. § 2.104(a).

HRC agrees to pay all applicable fees charged under 40 C.F.R. § 2.107, up to $100.00.

If you have any questions regarding this request, please contact me at DCarroll@huntrefining.com or (205) 391-3447. Thank you very much.

Sincerely,

David L. Carroll
Senior Vice President and General Counsel

cc: Mr. Byron Bunker (via electronic mail)
Mr. John Weihrauch (via electronic mail)
Mr. Chris McKenna (via electronic mail)



HUNT REFINING COMPANY
2200 Jack Warner Parkway, Suite 400 · Tuscaloosa, Alabama 35401
P.O. Box 036995 · Tuscaloosa, Alabama 35403-6995
(205) 391-3300 · FAX: (205) 758-6371

**No. 17-1839**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ERGON-WEST VIRGINIA, INC.,
*Petitioner*,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

On petition for review of an order of the
United States Environmental Protection Agency

# BRIEF FOR PETITIONER

LEANN M. JOHNSON
JONATHAN G. HARDIN
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*Attorneys for Ergon-West Virginia, Inc.*

# CORPORATE DISCLOSURE STATEMENT



UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. _____ Caption: Ergon-West Virginia, Inc. v. U.S. Environmental Protection Agency

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ergon-West Virginia, Inc.
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Ergon, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Albert M. Ferlo Date: July 17, 2017

Counsel for: Ergon-West Virginia, Inc.

## CERTIFICATE OF SERVICE

**********

I certify that on July 17, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Scott Pruitt, Administrator, U.S. EPA
1200 Pennsylvania Avenue, N.W. Mail Code: 1101A
Washington, D.C. 20460

Kevin S. Minoli, Acting General Counsel, U.S. EPA
1200 Pennsylvania Avenue, N.W. Mail Code: 2310A
Washington, D.C. 20460

The Hon. Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenu , N.W.
Washington, D.C. 20530

s/ Albert M. Ferlo
(signature)

July 17, 2017
(date)

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## JURISDICTIONAL STATEMENT

The U.S. Environmental Protection Agency ("EPA") ruled on Ergon-West Virginia's ("EWV") petition for small refinery hardship relief from the renewable fuel standards under 42 U.S.C. § 7545(o)(9)(B). EPA denied the petition on May 4, 2017. Joint Appendix ("JA") 0312-330. Because the decision was not published in the Federal Register, it became a final agency action two weeks later—on May 18, 2017. 40 C.F.R. § 23.3; *see also* 50 Fed. Reg. 7268, 7269 (Feb. 21, 1985). EWV filed a timely petition for review on July 17, 2017. JA0001. This Court has jurisdiction under 42 U.S.C. § 7607(b)(1), which provides that any final EPA action "which is locally or regionally applicable may be filed in the United States Court of Appeals for the appropriate circuit." Because EPA's decision applies to only one refinery located in West Virginia, this case is properly before this Court.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether EPA's denial of Ergon-West Virginia's hardship petition was arbitrary, capricious, or otherwise contrary to law, because EPA's decision adopted the U.S. Department of Energy's recommendation, which contained clear errors, misapplied its own scoring metrics, and failed to consider relevant factors.

2. Whether EPA's denial of Ergon-West Virginia's hardship petition was arbitrary, capricious, or otherwise contrary to law, because EPA exceeded its statutory authority by reading a "viability" requirement into its evaluation of EWV's petition for exemption from the RFS Program based on "disproportionate economic hardship." *Sinclair Wyo. Refining Co. v. EPA*, --- F.3d ----, 2017 WL 3481856 (10th Cir. Aug. 15, 2017).

## STATEMENT OF THE CASE

### I. The Renewable Fuel Standard Program

Congress created the Renewable Fuel Standard ("RFS") Program—codified at Clean Air Act Section 211(o), 42 U.S.C. § 7545(o)—as part of the Energy Policy Act of 2005. Pub. L. No. 109-58, § 1501(a), 119 Stat. 594, 1067-74 (2005). The RFS Program requires renewable fuels, such as ethanol and biodiesel, to be blended into petroleum-based transportation fuels (gasoline and diesel) sold in the United States. Congress set annual volumes for nationwide renewable fuel use from 2006 through 2012. *Id.* at 1069. In the Energy Independence and Security Act of 2007, Congress increased the annual renewable fuel volume requirements and extended the RFS Program through 2022. Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1521-28 (2007).

Congress directed EPA to promulgate regulations "to ensure that transportation fuel sold or introduced into commerce in the United States ... on an annual average basis, contains at least the applicable volume of renewable fuel" set by the statute. 42 U.S.C. § 7545(o)(2)(A)(i). Each year, the Energy Information Administration—a division of the U.S. Department of Energy ("DOE")—must calculate the total volume of transportation fuel projected to be sold in the United States. *Id.* § 7545(o)(3)(A). Based on that

estimate, EPA must set a "renewable fuel obligation" expressed as a "volume percentage of transportation fuel sold or introduced into commerce in the United States," for each of the four categories of renewable fuel. *Id.* § 7545(o)(3)(B)(ii). For example, if the total projected consumption in the United States in a particular year were 100 billion gallons of non-renewable transportation fuel, and if the statute called for the use of 10 billion gallons of renewable fuel, then EPA would set a volume percentage standard of 10 percent. EPA has the authority to reduce the volumes set by Congress, and EPA has exercised this authority in recent years in recognition of the failure of certain categories of renewable fuels to develop to meet Congress's volume targets. *See id.* § 7545(o)(7); 75 Fed. Reg. 76,790, 76,792 (Dec. 9, 2010); 77 Fed. Reg. 1320, 1322 (Jan. 9, 2012); 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013); 80 Fed. Reg. 77,420, 77,420 (Dec. 14, 2015); 81 Fed. Reg. 89,746, 89, 746 (Dec. 12, 2016).

Only "obligated parties" are responsible for ensuring that the volume targets are met each year. *Id.* § 7545(o)(3)(B)(ii)(I); 40 C.F.R. §§ 80.1406, 80.1407. An obligated party must meet its Renewable Volume Obligation ("RVO") each year. 40 C.F.R. § 80.1406(b). To calculate its RVO, an obligated party multiplies EPA's volume percentage for the year by the volume of transportation fuel the company produced or imported. While the

statute defines "obligated parties" as "refineries, blenders, distributors, and importers," *see* 42 U.S.C. §§ 7545(o)(2)(A)(iii)(I), 7545(o)(3)(B)(ii)(I), EPA has imposed compliance obligations exclusively on refiners and importers, *see* 40 C.F.R. § 80.1406(a)(1). "Refiners" produce petroleum-based fuels and other products from crude oil, whereas "blenders" blend renewable fuel into petroleum-based fuels to create the gasoline and diesel products actually sold to consumers.

In placing the regulatory burden on refiners while leaving blenders unobligated, EPA has recognized that it misaligned the obligation and means of compliance, because "refiners and importers do not generally produce or blend renewable fuels at their facilities and so are dependent on the actions of others for the means of compliance." Regulation of Fuels & Fuel Additives: Renewable Fuel Standards Program, 72 Fed. Reg. 23,900, 23,937 (May 1, 2007). In 2010, EPA conceded that imposing RFS obligations on "alternative" points in the fuel-supply chain would "more evenly align a party's access to RINs with that party's [RFS] obligations." Regulation of Fuels & Fuel Additives: Changes to the Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010). Despite acknowledging these shortcomings, EPA has yet to fix the rule. *See Am. Petroleum Institute v. EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013) ("EPA applies pressure to one

industry (the refiners) ... yet it is another ... that enjoys the requisite expertise, plan, capital and ultimate opportunity for profit.").

## II. Renewable Identification Numbers (RINs)

Obligated parties demonstrate their compliance by securing blending credits called Renewable Identification Numbers ("RINs"). *Id.* § 80.1427. A RIN is created when a renewable fuel producer manufactures renewable fuel—ethanol, for example. *Id.* § 80.1426. Until the renewable fuel is blended into petroleum-based transportation fuel, the RIN remains attached to the physical volume of renewable fuel. *Id.* § 80.1428. The RIN is "separated" when the renewable fuel is blended with transportation fuel. *Id.* § 80.1429. Obligated parties use separated RINs to demonstrate RFS compliance. *Id.* § 80.1427.

Obligated parties that do not separate enough RINs to meet their RVOs must buy them in the secondary market. Under the trading system established by EPA, RINs can be traded on a spot market or bought and sold through private contracts. 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010). Since the development of the RFS Program, RIN prices have skyrocketed "from an average of a few cents per RIN ... to over $1.00 per RIN in the summer of 2013," an approximately 4,000 percent increase. JA0146. In

2016, the average price EWV paid for RINs was more than 91 cents. JA0287-88.

The marketplace for RINs is necessary because "[m]any obligated parties"—particularly small refineries—"do not have access to renewable fuels or the ability to blend them, and so must use credits to comply." 72 Fed. Reg. 23,900, 23,904 (May 1, 2007). Buying RINs is the only way for these obligated parties to comply with the RFS Program. Conversely, other obligated parties—and parties with no RFS obligations at all, like blenders—can produce excess RINs, which they sell for "windfall profit[s]." JA0084. Those windfall profits can be substantial; for example, in 2014, EWV's closest competitor—Marathon Petroleum Corporation—reported $74 million in income just from selling excess RINs.[1]

## III. The Small Refinery Exemption

When Congress created the RFS Program, it recognized that small refineries like EWV would face disproportionate economic impacts from the new compliance obligations due to the competitive distortion in favor of blending refineries and exempt (non-refining) blenders. JA0096. Building

[1] Marathon Petroleum Corp., Annual Report (Form 10-K), at 71 (Feb. 26, 2016), available at https://www.marathonpetroleum.com/content/documents/investor_center/annual_reports/2015_MPC_Annual_Report_and_10-K.pdf. The Court may take judicial notice of public securities filings. *In re PEC Solutions, Inc. Securities Litig.*, 418 F.3d 379, 390 n.10 (4th Cir. 2005).

facilities for blending renewable fuels into petroleum products is capital-intensive and may not be feasible for small refineries, meaning they are forced to purchase RINs from larger refiners or non-obligated parties that operate blending facilities. JA0083. Small refineries often sell to limited geographic markets, where acceptance of renewable fuel blends is low. Unlike large, vertically-integrated refiners that can transport their fuels to different markets, small refineries may be forced to limit the extent to which they blend renewable fuels to match what their local markets will accept. *Id.* The upshot is that many small refineries are more reliant on purchasing RINs to comply with the RFS Program. And if the market price for RINs exceeds the cost of purchasing and blending renewable fuels, compliance with the RFS Program advantages large refineries and disadvantages non-blending small refineries. JA0051-52.

Congress did not intend to place small refineries at a permanent competitive disadvantage relative to large refineries, so it took several steps to protect small refineries from the disproportionate costs of complying with the RFS Program. First, Congress exempted all small refineries from RFS compliance through 2011. 42 U.S.C. § 7545(o)(9)(A)(i). Under the statute, refineries with output below 75,000 barrels per day are considered "small

refineries," so EWV easily qualified for the blanket exemption. *See id.* § 7545(o)(1)(K).

Next, Congress required DOE to study whether "compliance" with the RFS Program would impose "disproportionate hardship on small refineries." *Id.* § 7545(o)(9)(A)(ii)(I). If DOE concluded that any small refinery would experience disproportionate hardship, Congress directed EPA to exempt that small refinery from RFS compliance for at least two additional years. *Id.* § 7545(o)(9)(A)(ii)(II). Finally, Congress allowed small refineries to petition EPA for an extension of the statutory exemption from RFS compliance "for the reason of disproportionate economic hardship." *Id.* § 7545(o)(9)(B)(i). Congress directed EPA, "in consultation with the Secretary of Energy," to consider the findings of the DOE Study and "other economic factors" when evaluating small refinery hardship petitions. *Id.* § 7545(o)(9)(B)(ii).

DOE completed its first version of the Small Refinery study in 2009, and it concluded that no small refineries should receive further extensions. JA0046. Displeased with that analysis, Congress directed DOE to conduct a new analysis that took into account several specific factors, including the effect of RFS compliance on small refineries' profitability, and whether the cost of compliance through purchasing RINs was similar to the cost of compliance by purchasing and blending renewable fuels. *See* JA0046-47.

DOE completed the new study in 2011 (the "DOE Study"). JA0040-139. This study recognized that if small refineries were required to "purchase RINs that are far more expensive than those that may be generated through blending, this will lead to disproportionate economic hardship for those effected entities." JA0051. Even with the low RIN prices prevalent in 2011, DOE concluded that 13 of the small refineries it studied would suffer disproportionate economic hardship if they were required to comply with the RFS Program. JA0047. EPA extended the blanket exemption for these 13 small refineries for the minimum additional two-year period required by Congress. 76 Fed. Reg. 38,844, 38,859 (July 1, 2011).

## IV. DOE's Application of the Disproportionate Impacts and Viability Scoring Matrix

In the DOE Study, DOE developed metrics to evaluate whether RFS compliance would impose disproportionate economic hardship on a small refinery. DOE incorporated those metrics into a "scoring matrix," which is divided into two sections. JA0081-86.

The first section of the scoring matrix, reproduced in Figure 1 below, identifies nine metrics that could contribute to a finding of disproportionate economic hardship. A small refinery can score up to 10 points for each metric. *See id.* The first five metrics—the "Disproportionate Structural Impact Metrics"—look at the refinery's access to capital/credit, other

business lines that might smooth cash flows, local market acceptance of renewable fuels, percentage of diesel production, and impact of state regulations. JA0083-84. The last four metrics—the "Disproportionate Economic Impact Metrics"—assess the company's relative refining margin, the degree to which the refiner can actively blend renewable fuels, whether the refiner is in a niche market, and whether RINs are a net cost or a net source of revenue. JA0084.

| | | |
|---|---|---|
| **1** | **Disproportionate Structural Impact Metrics** | |
| a | Access to capital/credit | 0 = Good access (BB- or above credit rating),<br>5 = Moderate access (rating in B's)<br>10 = Poor access (C rating or 50% D/E) |
| b | Other business lines besides refining and marketing | 0 = Other Lines,<br>10 = No Other Lines |
| c | Local market acceptance of Renewables | 0 = Products accepted,<br>10 = Product not accepted |
| | i E10 | 0 = High acceptance,<br>5 = Low acceptance<br>10= No acceptance |
| | ii E85 | Not scored because of small E85 volumes |
| | iii Biodiesel | Not available |
| d | Percentage of diesel production | 0 = D/(G+D) < Industry Avg.<br>5 = D/(G+D) > Ind. Avg<40%.<br>10=D/(G+D) > 40% |
| e | Subject to exceptional state regulations | 0 = not subject,<br>5= Some barriers for compliance<br>10 = subject to exceptional state regulations |
| | | |
| **2** | **Disproportionate Economic Impact Metrics** | |
| a | Relative refining margin measure | 0 = Above 3 year industry average 5 = positive, and below 3 year industry average<br>10= Negative, 3 average, |
| b | Renewable fuel blending (% of production) | |
| | i Ethanol blending | 0 = 75%+, 5 = 25-74%, 10 = <25% |
| | ii Biodiesel blending (not used) | 0 = 1.1% of diesel production,<br>1 = <1.1% |
| | iii Other Advanced Biofuel blending (not used) | 0 = some blending,<br>10 = no blending |
| c | In a niche market | 0 = niche<br>5 = moderate niche impact<br>10 = no niche |
| d | RINs net revenue or cost | 0 = revenue > cost,<br>10 = revenue < cost |
| | Subtotal | |
| | | |

**Figure 1: DOE Disproportionate Impact Metrics.**

Although DOE believed all of the metrics identified in the 2011 DOE Study were relevant to its determination, DOE concluded it lacked sufficient evidence in 2011 to assign scores for one metric in its entirety (2.d, "RINs net revenue or cost") and for components of two other metrics (1.c, "Local market acceptance of Renewables" and 2.b, "Renewable fuel blending").

JA0083-84. As a result, a small refinery initially could receive points under only eight of the nine metrics.

The second section of DOE's scoring matrix, reproduced in Figure 2 below, identifies three "Viability Metrics" that measure the severity of economic hardship imposed by RFS compliance. JA0085. A small refinery can score up to 10 points for each of the three viability metrics.[2]

| 3 | Viability Metrics | |
|---|---|---|
| a | Compliance cost eliminates efficiency gains (impairment) | 0 = no impact on efficiency,<br><br>10 = impact on efficiency |
| b | Individual special events | 0 = no special event,<br><br>10 = special event impacting viability |
| c | Compliance costs likely to lead to shut down | 0 = not likely to shut down,<br><br>10 = likely to shut down |
| | Subtotal | |

**Figure 2: DOE Viability Metrics.**

DOE computes a score for each metric, divides that total by the number of metrics scored to generate an average, and then divides the average by two to reach a final, scaled score. *See* JA0081-86. Historically, DOE has recommended that a refinery receive a hardship exemption if both the disproportionate impact score and viability impact score are greater than one. JA0086. In practice, that means a small refinery must receive a total of

[2] In 2014, DOE amended the viability matrix to modify scoring of factors 3.a and 3.b. Under the amendment, a refinery may receive 5 points if it shows a moderate impact on efficiency under factor 3.a or a moderate effect of an individual special event under 3.b. JA0140-42.

at least 20 points across the disproportionate impact categories (20 ÷ 9 = 2.22; 2.22 ÷ 2 = 1.11), and a total of at least 10 points across the viability categories (10 ÷ 3 = 3.33; 3.33 ÷ 2 = 1.67).

EPA is required to consult with DOE when it considers small refinery hardship petitions. 42 U.S.C. § 7545(o)(9)(B)(ii). [redacted]

Congress has tried to re-direct DOE and EPA with respect to hardship petitions, reminding both agencies that Congress did not intend for small refineries to bear a disproportionate regulatory burden. For example, in an explanatory statement to the Consolidated Appropriations Act of 2016, Congress directed DOE to recommend that any refinery achieving a score of greater than 1 on *either* the disproportionate impacts matrix *or* the viability matrix receive a "50 percent waiver of RFS requirements." JA0188. That directive was based on Congress's concern that a "dramatic rise in RIN prices has amplified RFS compliance and competitive disparities, especially where unique regional factors exist, including high diesel demand, no export access, and limited biodiesel infrastructure and production." *Id.* Congress explained that "[s]mall refinery profitability" alone "does not justify a disproportionate regulatory burden where Congress has explicitly given EPA authority … to reduce or eliminate this burden." *Id.* Thus, a refiner that shows it meets DOE's standard for either component is entitled to at least some relief.

## V. EWV's Escalating Compliance Costs

Before 2013, RINs sold for approximately the marginal cost of procuring and blending renewable fuel, which was "a few cents" per RIN. JA0146. Since 2013, the price of RINs has skyrocketed as EPA has increased the volume of renewable fuel that must be blended each year, creating windfall profits for large integrated oil companies. JA0153.

Refineries' obligations are based on the volume of transportation fuel they produce, rather than the volume of fuel that they blend, control, or sell. Large integrated oil companies generally blend, control, and sell more (often substantially more) fuel than they produce themselves, which means they

can sell their excess RINs for windfall profits to RIN-short, captive small refineries and then use those profits to invest in efficiency improvements at their refineries and offer discounts to customers of their fuels to undercut competition. *See, e.g.*, JA0084. One thing they did not do with their windfall RIN revenues, according to EPA, was offer discounts to increase renewable fuel consumption. JA0174. This competitive distortion in favor of large integrated oil companies is the subject of numerous lawsuits pending in the U.S. Court of Appeals for the District of Columbia Circuit, asking the Court to compel EPA to change the rule. *See e.g.*, *Coffeyville Res. Ref. & Mktg., LLC v. EPA*, No. 17-1044 (D.C. Cir. filed Feb. 9, 2017) (consolidated with Nos. 17-1045, 17-1046, 17-1047, 17-1049, 17-1051, and 17-1052).

Because of the several-thousand-percent increase in the price of RINs, *see* JA01531, EWV's costs to comply with the RFS have multiplied. [redacted]

[redacted]

---

3 [redacted]

## VI. EWV's Hardship Petition to EPA

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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## VII. DOE's Recommendation and EPA's Decision

EPA issued a decision denying EWV's hardship petition, adopting DOE's recommendation. The EPA decision did not attach any analysis from DOE—it simply re-printed DOE's scoring matrices with the scores assigned to EWV filled in. *See* JA0326-27.

[redacted]

There is no indication in EPA's decision that it critically analyzed the conclusions or reasoning DOE or its contractor used to calculate EWV's scores on the disproportionate impacts and viability matrices. And because EWV had no opportunity to review or critique DOE's conclusions or reasoning before EPA issued its decision, EPA lacked the benefit of EWV's perspective when it adopted DOE's recommendation.

## SUMMARY OF ARGUMENT

[redacted] This is a textbook example of the "disproportionate economic hardship" Congress intended to prevent when it created the small refinery exemption from the RFS Program.

EPA's denial of EWV's hardship petition was arbitrary, capricious, and contrary to law. [redacted]

EPA applied a legal standard that is inconsistent with the Clean Air Act.

This interpretation was recently rejected by the U.S. Court of Appeals for the Tenth Circuit and should be similarly rejected here.

## STANDARD OF REVIEW

The Court must set aside an agency's order if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To satisfy that standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation and citation omitted). Moreover, "an agency must adhere to its own rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1982). "*Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned … for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action." *Id.* at 950-51.

When a court reviews an agency's interpretation of a statute, it generally applies the analysis set out by the Supreme Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, *Chevron* applies only where "it appears that Congress delegated authority generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). If

*Chevron* deference does not apply, a court defers to an agency interpretation only to the extent that interpretation is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The U.S. Court of Appeals for the Tenth Circuit recently held that EPA is not entitled to *Chevron* deference on appeal of a denial of a small refinery's petition for hardship relief from the RFS Program. *Sinclair Wyo. Refining Co. v. EPA*, --- F.3d ----, 2017 WL 3481856, at **3-5 (10th Cir. Aug. 15, 2017). First, "Congress specifically authorized the EPA to promulgate regulations on aspects of the RFS Program, but not for the small refinery exemptions. This means the agency did not have the benefit of notice-and-comment about its interpretation of the term 'disproportionate economic hardship.'" *Id.* at *4. Instead, "EPA conducted its interpretation via informal adjudication" and "did not have the benefit of hearing expert testimony on the topic." *Id.* Second, "the decisions were not made by the head of the EPA but instead by a mid-level Agency official." *Id.* at *5. Third, "the decisions have no precedential value even for the *refiner*, since each petition must be resolved on a case-by-case basis," nor "do third parties have access to the decisions, since the EPA does not publicly release" them. *Id.* Finally, EPA's analysis "is not a longstanding practice, but is, instead,

only a few years old." Thus, *Skidmore* deference applies to EPA's decision here. *Id.* at *4.

## ARGUMENT

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13 [redacted]

## CONCLUSION

For the foregoing reasons, EWV respectfully requests that this Court grant the petition for review, vacate EPA's decision, and remand for further action based on the Court's instructions.

Dated: September 13, 2017

Respectfully submitted,

*/s/ Jonathan G. Hardin*

LeAnn M. Johnson
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Washington, DC 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
JHardin@perkinscoie.com

## REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Local Rule 34(a), Appellant respectfully requests oral argument. Given the complexity of the issues presented, Appellants respectfully suggest that oral argument would be helpful to the disposition of this appeal.

Dated: September 13, 2017

Respectfully submitted,

*/s/ Jonathan G. Hardin*

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JHardin@perkinscoie.com

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: September 13, 2017

Respectfully submitted,

*/s/ Jonathan G. Hardin*

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JHardin@perkinscoie.com

## CERTIFICATE OF SERVICE

This is to certify that on September 13, 2017, I electronically filed the foregoing Brief with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, thereby serving via ECM system on all counsel of record.

Dated: September 13, 2017

Respectfully submitted,

*/s/ Jonathan G. Hardin*

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Facsimile: (202) 654-6211
JHardin@perkinscoie.com

Message

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 3/7/2016 8:56:45 PM
**To**: Difiglio, Carmine [Carmine.Difiglio@hq.doe.gov]
**Subject**: RE: Can we speak for a few minutes? RFS Small Refinery Hardships

Perfect. Thanks very much.

I will plan to call you unless you would prefer another approach.

Thanks,

Byron

**********
Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155
Personal Phone / Ex. 6
**********

---

**From:** Difiglio, Carmine [mailto:Carmine.Difiglio@hq.doe.gov]
**Sent:** Monday, March 07, 2016 3:18 PM
**To:** Bunker, Byron <bunker.byron@epa.gov>
**Subject:** RE: Can we speak for a few minutes? RFS Small Refinery Hardships

Byron,

Sure. How about 11:30 am tomorrow (EST), March 8?

Carmine

**Carmine Difiglio, Ph.D.**
**Deputy Director for Energy Security**
**Office of Energy Policy and Systems Analysis**
**U.S. Department of Energy**
**1000 Independence Ave., SW**
**Washington, DC 20585**
**carmine.difiglio@hq.doe.gov**
**202-586-8436**
Personal Phone / Ex. 6

**From:** Bunker, Byron [mailto:bunker.byron@epa.gov]
**Sent:** Monday, March 07, 2016 11:49 AM
**To:** Difiglio, Carmine <Carmine.Difiglio@hq.doe.gov>
**Cc:** Patterson, Susan <Patterson.Susan@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; White, Thomas <Thomas.White@hq.doe.gov>
**Subject:** Can we speak for a few minutes? RFS Small Refinery Hardships

Carmine,

If you can make a few minutes prior to COB Wednesday, I would like to have a short conversation about the RFS Small Refinery Hardship program. We are briefing the impact of the Senate Appropriations language, and I would like to make sure we can articulate the depth of any feeling that DOE may have regarding the new language.

I don't think the conversation should take any more than 10 minutes. Please let me know if you can make the time over the next few days for a short conversation.

Thanks,

Byron

**********
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Phone: (734) 214-4155
Personal Phone / Ex. 6
**********

Appointment

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 3/7/2016 8:56:25 PM
**To**: Carmen Difiglio (Carmine.Difiglio@hq.doe.gov) [Carmine.Difiglio@hq.doe.gov]

**Subject**: RFS Small Refinery Hardship Coordination
**Location**: Byron will call Carmine Personal Phone / Ex. 6

**Start**: 3/8/2016 4:30:00 PM
**End**: 3/8/2016 4:45:00 PM
**Show Time As**: Tentative

Message

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 4/1/2015 5:11:09 PM
**To**: Winslow, Kyle [Kyle.Winslow@EE.Doe.Gov]; Difiglio, Carmine [Carmine.Difiglio@hq.doe.gov]; Whitman, Peter [Peter.Whitman@hq.doe.gov]
**CC**: Grundler, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3be58c2cc8545d88cf74f3896d4460f-Grundler, Christopher]; Levin, Joseph [Joseph.Levin@Hq.Doe.Gov]
**Subject**: RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

I can make either time today work with a slight preference for 4:30. I have a conflict tomorrow at 1:00, but I can work around that if that is the only time that will work for others.

Thanks,

Byron

**********
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**********

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**From:** Winslow, Kyle [mailto:Kyle.Winslow@EE.Doe.Gov]
**Sent:** Wednesday, April 01, 2015 12:40 PM
**To:** Bunker, Byron; Difiglio, Carmine; Whitman, Peter
**Cc:** Grundler, Christopher; Levin, Joseph
**Subject:** RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

+ Peter from EPSA and Joe from CFO to this thread

For a pre-brief call, would today at 3 or 4:30 work, or tomorrow at 1:00?

Best,

Kyle

---

**From:** Bunker, Byron [mailto:bunker.byron@epa.gov]
**Sent:** Monday, March 30, 2015 4:38 PM
**To:** Winslow, Kyle; Difiglio, Carmine
**Cc:** Grundler, Christopher
**Subject:** RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Thanks Kyle. That time works well for me. If we can have a prep call before Thursday, that would be best.

Thanks,

Byron

**********
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Bunker.Byron@epa.gov
Phone: (734) 214-4155
Personal Phone / Ex. 6
**********

---

**From:** Winslow, Kyle [mailto:Kyle.Winslow@EE.Doe.Gov]
**Sent:** Monday, March 30, 2015 3:17 PM
**To:** Bunker, Byron; Difiglio, Carmine
**Cc:** Grundler, Christopher
**Subject:** RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Update:

HEWD and SEWD can do 1:30 on Tues. 4/7 in Rayburn 2362-B. This would be Tyler Perry of SEWD majority and Donna Shahbaz of HEWD majority.

Byron and Carmine, please confirm this works for you, and I will send a calendar invite. I will plan on attending from DOE CFO.

Thanks,

Kyle

---

**From:** Bunker, Byron [mailto:bunker.byron@epa.gov]
**Sent:** Monday, March 30, 2015 2:01 PM
**To:** Winslow, Kyle; Difiglio, Carmine
**Cc:** Grundler, Christopher
**Subject:** RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Kyle,

I am going to be in DC next week Monday and Tuesday (4/6-7) with a return flight at 5:30 PM on Tuesday. Tuesday morning I have meeting with a company on an enforcement matter that I can't move. I can support a meeting in the afternoon assuming it can end by 4:00 PM.

Will you take the lead to schedule a conference call this week to make sure we are on the same page for this briefing and what we hope to accomplish?

Thanks,

Byron

**********
Byron Bunker
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Phone: (734) 214-4155
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**********

---

**From:** Bunker, Byron
**Sent:** Monday, March 30, 2015 11:14 AM
**To:** 'kyle.winslow@ee.doe.gov'; 'Carmine.Difiglio@hq.doe.gov'
**Cc:** Grundler, Christopher
**Subject:** RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Kyle,

Chris forwarded your note to me regarding a potential meeting about small refiners in the RFS program. I haven't yet been able to follow up with Chris to make a recommendation how to best support this potential meeting. I will get back with you on this question as soon as possible.

Thanks,

Byron

**********
Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155
Personal Phone / Ex. 6
**********

---

**From:** Grundler, Christopher
**To:** Bunker, Byron
**Subject:** Fwd: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Begin forwarded message:

> **From:** "Winslow, Kyle" <Kyle.Winslow@EE.Doe.Gov>
> **Date:** March 30, 2015 at 10:11:32 AM EDT
> **To:** "'grundler.christopher@epa.gov'" <grundler.christopher@epa.gov>
> **Cc:** "Difiglio, Carmine" <Carmine.Difiglio@hq.doe.gov>
> **Subject: RE: DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority**
>
> Hello,

I was just following up on this to see if your designee would be interested / able to attending a briefing on RFS small refiners exemption with House and Senate Appropriations majority staff on the afternoon of Apr. 7 or 8?

Thanks for your help,

Kyle

---

**From:** Winslow, Kyle
**Sent:** Thursday, March 26, 2015 11:20 AM
**To:** 'grundler.christopher@epa.gov'
**Subject:** DOE-EPA RFS small refiners meeting wk of April 6 for HEWD and SEWD majority

Chris,

DOE CFO is setting up a briefing at the request of HEWD and SEWD majority staff for the week of April 6 to discuss the Renewable Fuel Standard and the small refiners exemption.

In particular, SEWD/HEWD want to:

- Understand the small refiner issue better,
- Understand what is the profit threshold is, when it was changed or set, and
- Why and whether this is a controversial issue.

Carmine Difiglio of DOE's Office of Energy Policy and Systems Analysis suggested that we reach out to you because EPA participation would be helpful. Carmine mentioned Byron Bunker or another designee might want to attend this briefing.

We'd like to shoot for the afternoon of the Apr. 7th or some time on the 8th. Could you let us know who you'd like to attend, and if these times work? Alternatively, please let us who from EPA we should be working with to make sure you are represented.

Thanks,

Kyle

Message

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 9/4/2014 10:07:50 PM
**To**: Cohen, Janet [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d94b854e69cd4f9e80db946bf9d1c1b2-Cohen, Janet]
**Subject**: FW: DOE/Stillwater evaluations of RFS hardships
**Attachments**: Small Refiner Key Metrics 2014 06 08b.docx; DEH Ranking Table 2014 06 06 SA.XLSX

Hi Janet,

The DOE/Stillwater explanations of their recommendations for each individual refinery rating is included in the attached MS Word document.

Thanks,

Byron

**********
Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155
Mobile: (734) 353-9623
**********

-----Original Message-----
From: McKenna, Chris
Sent: Monday, June 09, 2014 9:52 AM
To: Bunker, Byron; Manners, Mary; Cohen, Janet; Weihrauch, John
Subject: FW: DOE/Stillwater evaluations of RFS hardships

See attachments - password to open the spreadsheet is Personal Privacy - Ex. 6

-----Original Message-----
From: Whitman, Peter [mailto:Peter.Whitman@hq.doe.gov]
Sent: Monday, June 09, 2014 8:57 AM
To: McKenna, Chris
Cc: White, Thomas
Subject: RE: Small refinery exemption data

Consistent with spreadsheet.

CBI

-----Original Message-----
From: Whitman, Peter
Sent: Monday, June 09, 2014 8:42 AM
To: 'McKenna, Chris'
Cc: White, Thomas
Subject: Small refinery exemption data

CBI.

Enclosed our the latest tables and text for your consideration.

Pete

Message

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 4/25/2018 5:51:17 PM
**To**: Cohen, Janet [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d94b854e69cd4f9e80db946bf9d1c1b2-Cohen, Janet]; Stahle, Susan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b25318c6014d4fb985288e15143c8596-SSTAHLE]; Orlin, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=aa64dad518d64c5f9801eb9bb15b7ec3-DORLIN]
**CC**: Hengst, Benjamin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c414e2bf04a246bb987d88498eefff06-Hengst, Benjamin]
**Subject**: RE: updated small refinery comments
**Attachments**: RFS Decision History.docx

Thanks Janet, Sue and supporting team. I am sorry for doing this so late in the game, but I have redrafted this in the form of a note from Chris to Bill. **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Thanks,

Byron

**********

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155
**Deliberative Process / Ex. 5**
**********

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**From:** Cohen, Janet
**Sent:** Wednesday, April 25, 2018 9:31 AM
**To:** Stahle, Susan <Stahle.Susan@epa.gov>; Tom White <Thomas.White@hq.doe.gov>
**Cc:** Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
**Subject:** RE: updated small refinery comments

Understood. Thanks Sue. – j. -

---

**From:** Stahle, Susan
**Sent:** Wednesday, April 25, 2018 9:13 AM
**To:** Cohen, Janet <cohen.janet@epa.gov>; Tom White <Thomas.White@hq.doe.gov>
**Cc:** Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
**Subject:** RE: updated small refinery comments

As mentioned below, I'd like a chance to look at this paragraph one more time. And then I'd like to give David Orlin a chance to look at it. Just noting that here so folks know this does not have complete OGC review/approval at this point. Thanks.

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

---

**From:** Cohen, Janet
**Sent:** Wednesday, April 25, 2018 7:16 AM
**To:** Stahle, Susan <Stahle.Susan@epa.gov>; Tom White <Thomas.White@hq.doe.gov>
**Cc:** Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
**Subject:** updated small refinery comments

Tom and Sue –

**Deliberative Process / Ex. 5**

- J. -

.....

**Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

**From:** Stahle, Susan
**Sent:** Tuesday, April 24, 2018 5:15 PM
**To:** Tom White <Thomas.White@hq.doe.gov>; Cohen, Janet <cohen.janet@epa.gov>
**Subject:** RE: small refinery comments

Here are my thoughts on the paragraph below. I will look at the paper separately.

Deliberative Process / Ex. 5

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

**From:** White, Thomas [mailto:Thomas.White@hq.doe.gov]
**Sent:** Tuesday, April 24, 2018 3:38 PM
**To:** Cohen, Janet <cohen.janet@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
**Subject:** RE: small refinery comments

How about this?

Thomas White
U.S. Department of Energy
Office of Policy
202-586-1393
thomas.white@hq.doe.gov

**From:** Cohen, Janet [mailto:cohen.janet@epa.gov]
**Sent:** Tuesday, April 24, 2018 3:16 PM
**To:** White, Thomas <Thomas.White@hq.doe.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
**Subject:** RE: small refinery comments

Thanks Tom, this is helpful. You went way beyond what I was asking for and I appreciate that. I had repeated verbatim what our press office is saying, and then attempted to correct inaccuracies, but your markup does that job better I

think. What I also specifically wanted to know from you though is whether the statement below is accurate from your perspective. – j. –

**Deliberative Process / Ex. 5**

**From:** White, Thomas [mailto:Thomas.White@hq.doe.gov]
**Sent:** Tuesday, April 24, 2018 2:55 PM
**To:** Cohen, Janet <cohen.janet@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
**Subject:** RE: small refinery comments

Janet,

I have edited the first two pages of this document. Let me know if this is what you are looking for or if you have comments.

Thanks,
Tom

Thomas White
U.S. Department of Energy
Office of Policy
202-586-1393
thomas.white@hq.doe.gov

**From:** Cohen, Janet [mailto:cohen.janet@epa.gov]
**Sent:** Tuesday, April 24, 2018 2:16 PM
**To:** White, Thomas <Thomas.White@hq.doe.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
**Subject:** FW: small refinery comments

Tom and Sue, this is the extra paragraph I mentioned on the call this morning. Can you please take a look, make sure this is accurate, and add anything you like to make it better (but if possible not longer).

Sue, I've also attached the current version of the longer response for your review. I highlighted a few lines in the attachments Deliberative Process / Ex. 5 – do you think that is helpful or not? Byron hasn't seen it yet so may still have some changes.

- J. -

**From:** Cohen, Janet
**Sent:** Tuesday, April 24, 2018 1:57 PM
**To:** Bunker, Byron <bunker.byron@epa.gov>
**Cc:** Hengst, Benjamin <Hengst.Benjamin@epa.gov>
**Subject:** RE: small refinery comments

Byron – this is more detailed than your version Deliberative Process / Ex. 5 Deliberative Process / Ex. 5. I will now send him and OGC versions to review. – j. –

.....

Deliberative Process / Ex. 5

**From:** Bunker, Byron
**Sent:** Tuesday, April 24, 2018 8:32 AM

**To:** Cohen, Janet <cohen.janet@epa.gov>
**Cc:** Hengst, Benjamin <Hengst.Benjamin@epa.gov>
**Subject:** RE: small refinery comments

Hi Janet,

I am sorry to make additional work, but can you also draft a single paragraph that rebuts the key points?

I think it would say something like –

**Deliberative Process / Ex. 5**

Thanks,

Byron

**********
Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155
Personal Phone / Ex. 6
**********

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**From:** Cohen, Janet
**Sent:** Monday, April 23, 2018 12:26 PM
**To:** Bunker, Byron <bunker.byron@epa.gov>
**Subject:** small refinery comments

Byron, please take a look, when you are ready I will ask OGC to review. – j. -

Message

**From**: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
**Sent**: 2/12/2018 11:16:54 PM
**To**: Grundler, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3be58c2cc8545d88cf74f3896d4460f-Grundler, Christopher]
**CC**: Hengst, Benjamin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c414e2bf04a246bb987d88498eefff06-Hengst, Benjamin]
**Subject**: FW: DOE's RFS small refinery disproportionate economic hardship assessments

See below. I assume there is a backstory to this. I will see if Janet knows.

---

**From:** White, Thomas [mailto:Thomas.White@hq.doe.gov]
**Sent:** Monday, February 12, 2018 5:58 PM
**To:** Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>
**Subject:** RE: DOE's RFS small refinery disproportionate economic hardship assessments

Byron and Janet,

Stillwater has resumed evaluating the RFS small refinery petitions for DOE. I apologize for the delay.

Best,
Tom

Thomas White
Office of Policy
U.S. Department of Energy
202-586-1393

---

**From:** White, Thomas <Thomas.White@hq.doe.gov>
**Date:** Thursday, Feb 08, 2018, 10:23 AM
**To:** Cohen, Janet <cohen.janet@epa.gov>, Bunker, Byron <bunker.byron@epa.gov>
**Subject:** DOE's RFS small refinery disproportionate economic hardship assessments

Hi Janet and Byron,

**Deliberative Process / Ex. 5**

Thank you,
Tom

Thomas White
U.S. Department of Energy
Office of Policy
202-586-1393

thomas.white@hq.doe.gov

**Subject:** Fw: Update on DOE's Small Refineries Exemption Study
**To:** simon.karl@epa.gov John Weihrauch/DC/USEPA/US@EPA
**Cc:** CN=Paul Machiele/OU=AA/O=USEPA/C=US@EPA
**From:** CN=Paul Argyropoulos/OU=DC/O=USEPA/C=US
**Submit Time:** 9/20/2010 11:25:25

Thought you'd be interested in this. This follows suit with what OMB has been spouting off about last go round on RFS2 review as well. Anyway, if the fuel is going to be ethanol, and we don't have waivers, then you can't really dispute the point.

Paul N. Argyropoulos
Senior Policy Advisor
Office of Transportation & Air Quality
US Environmental Protection Agency
Office Phone: 1-202-564-1123
Mobile: Personal Phone / Ex. 6
Email: argyropoulos.paul@epa.gov
Website: www.epa.gov/otaq

----- Forwarded by Paul Argyropoulos/DC/USEPA/US on 09/20/2010 07:22 AM -----

From: Margo Oge/DC/USEPA/US

To: Paul Argyropoulos/DC/USEPA/US, Paul Machiele/AA/USEPA/US, Chet France/AA/USEPA/US@EPA

Date: 09/19/2010 09:11 PM

Subject: Fw: Update on DOE's Small Refineries Exemption Study

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Let's discuss

----- Original Message -----
From: "Difiglio, Carmen" [Carmen.Difiglio@hq.doe.gov]
Sent: 09/19/2010 03:58 PM AST
To: Margo Oge
Cc: Paul Machiele; Chet France; Paul Argyropoulos; "Sandalow, David" <David.Sandalow@hq.doe.gov>; "Whitman, Peter" <Peter.Whitman@hq.doe.gov>; "White, Thomas" <Thomas.White@hq.doe.gov>; "Cobb, Al" <Al.Cobb@hq.doe.gov>
Subject: Update on DOE's Small Refineries Exemption Study

Dear Margo,

**Ex. 5 - Deliberative Process**

# Ex. 5 - Deliberative Process

Carmen

Carmen Difiglio, Ph.D.
Deputy Assistant Secretary for Policy Analysis
Office of Policy and International Affairs
U.S. Department of Energy