May 1, 2020

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
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Re: American Petroleum Institute's Petition for Reconsideration of the RFS 2020 Rule, EPA–HQ–OAR–2019–0136

Dear Administrator Wheeler:

The Petitioners in the Tenth Circuit decision, *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020) write in response to the petition for reconsideration filed on April 6, 2020, by the American Petroleum Institute ("API").

In its petition, API requests that EPA reconsider its final rule entitled *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021* ("2020 RFS Rule"), published at 85 Fed. Reg. 7,016 (Feb. 6, 2020). Specifically, API asks the Agency to commence a new rulemaking to revisit the provisions of the 2020 RFS Rule that estimate future small refinery exemption extensions based on EPA's recent record of granting such extensions. API's stated grounds for its request is the Tenth Circuit decision, which, according to API, "dramatically narrows EPA's small refinery exemption program, and thus bears directly on EPA's decision in the RFS 2020 Rule to reallocate projected small-refinery-exempt volumes to other obligated parties."

Fundamentally, EPA should not be reconsidering the 2020 RFS Rule unless and until it first acknowledges the Tenth Circuit's holding as having national application. Although API argues that the Tenth Circuit's decision "demolishes the foundations of EPA's [small refinery] projections," there is no basis for revisiting or modifying EPA's current approach until EPA acknowledges that the central tenets of the Tenth Circuit's decision are appropriately applied throughout the country. Those tenets include, at a minimum:

1. That small refineries are entitled to an extension of their exemption only if that exemption remained continuously in effect;
2. That any finding of disproportionate economic hardship had to be caused only by compliance with the RFS program; and
3. That EPA will reconcile any proposed finding of disproportionate economic hardship with its longstanding view that RFS compliance costs are ultimately passed through to end users and ultimately recovered by refineries.

Even after acknowledging the appropriateness of applying the Tenth Circuit's decision nationally, however, we do not agree it necessarily follows that the 2020 RFS Rule must be reduced. As noted by the Court, EPA's recent abuse of its small refinery exemption authority has significantly harmed the U.S. ethanol industry. Indeed, nationally, more than four billion gallons of 2016-2018 renewable fuel volume requirements were lost due to EPA's illegally issued small refinery waivers. Applying the Tenth Circuit decision nationally while leaving the 2020 RFS Rule intact would begin to restore a

small amount of the renewable fuel volume requirements lost to past small refinery exemptions; still, doing so would come nowhere near fully redressing the demand destruction wrought by the exemptions.

Moreover, it is unclear whether API even satisfies the requirements for reconsideration under Section 307(d)(7)(B) of the Clean Air Act. That provision provides that only objections "raised . . . during the period for public comment" may be "raised during judicial review," but if a party "can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule," then EPA must "convene a proceeding for reconsideration of the rule." Clearly, API's objection is not "of central relevance to the outcome of the rule" because EPA consistently has taken the position that, once annual volume standards are finalized, modifying those standards "would not be consistent with the statutory requirement that EPA set the standards by November 30" and doing so "would inappropriately render the standards a moving target." *See* EPA Br. 59, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. filed Feb. 4, 2019); EPA Br. 68, *American Fuel & Petrochemical Mftrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019). This position has been held by API as well. *See* AFPM & API Br. 11, *American Fuel & Petrochemical Mftrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019).

Even if API were to satisfy the procedural prerequisites for reconsideration and alter its long-held position on modifying finalized annual volume standards, convening a new notice and comment rulemaking on the 2020 RFS Rule would be futile. By the time EPA were to propose a new rule, receive and consider public comment, and finalize an amended rule, the 2020 compliance year will likely have passed.

We agree with API that the Tenth Circuit decision warrants immediate national application, but since reconsideration of the 2020 RFS Rule is neither practical nor legally defensible, we encourage EPA to confirm the wisdom of that conclusion in its upcoming proposal to set annual standards for 2021.

We would welcome the opportunity to meet with you to discuss this further.

Sincerely,

Geoff Cooper
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Renewable Fuels Association

Kevin Ross
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National Corn Growers Association

Rob Larew
President
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Brian Jennings
CEO
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cc (via electronic mail):

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