

June 9, 2020

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W. Mail Code: 1101A
Washington, D.C. 20460

Dear Administrator Wheeler,

We are writing to request further information about petitions reportedly received by the U.S. Environmental Protection Agency (EPA) from small refiners seeking exemption from the Renewable Fuel Standard (RFS) under 42 U.S.C. § 7545(o)(9)(B) for past compliance years.

The petitions in question were discussed during your testimony before the Senate Environment and Public Works Committee on May 20, 2020. On the same day, U.S. Department of Energy (DOE) Under Secretary Mark Menezes confirmed that EPA is “send[ing] over” past-year petitions for DOE review. Mr. Menezes described the petitions as “gap filings” intended to reconstitute after-the-fact a continuous string of exemptions for select oil companies “to be consistent with the Tenth Circuit decision.”

This attempt to circumvent the courts and the RFS should be rejected out of hand. Even if EPA granted retroactive “gap” exemptions without simultaneously returning the number of RINs associated with the exemption to the petitioner, such exemptions would be inconsistent with EPA’s own policies and regulations, legal precedent, and Congressional intent.

These “gap filings” appear to be little more than the latest in a string of oil industry tactics designed to subvert the law and sidestep a court order to uphold the RFS. Rural America endured years of massive RFS demand destruction and market instability while forced to challenge EPA’s issuance of small refinery exemptions (SREs) in court. Those exemptions were ultimately reversed by the U.S. Court of Appeals for the Tenth Circuit. Yet, instead of enforcing the Court’s decision in *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020), EPA appears to be entertaining a new round of backfill petitions intended to sidestep limits imposed by the courts and augment profits for select oil companies at the expense of America’s farmers and biofuel producers.

A year ago, you stated EPA had “changed tack” by “putting [EPA] information out in real-time on the small refinery waivers program and ... being more upfront about what we’re doing and why we’re doing it.” EPA’s intent in creating the RFS dashboard was to ensure “refineries ... and other interested parties receive the same RIN market information at the same time.” However, the dashboard does not disclose any SRE “gap filings.” Without further clarification, EPA appears to be reverting to a secretive pattern in the management of RFS refinery waiver petitions.

It is difficult to give EPA the benefit of the doubt on SREs. EPA issued SREs in secrecy for years. The agency has yet to reject the oil industry’s recent attempt to capitalize on the Covid-19 pandemic to secure broader exemption from the RFS, despite the fact that RFS blending obligations fall automatically in proportion to reduced fuel consumption. Moreover, EPA has neither addressed a 2017 court order to

restore 500 million gallons of blending requirements illegally waived by EPA in 2016, nor applied the January 2020 Tenth Circuit decision that EPA “abused its discretion” in massively increasing the number of SREs granted. For our businesses and American farmers, this pattern of RFS abuse must end.

In the interests of transparency and full disclosure of pertinent market information, we request answers to the following questions:

1. For what compliance years do the “gap filing” petitions apply?
2. To date, how many “gap filing” petitions have been submitted for each compliance year, and how many RINs are under review?
3. Is EPA reviewing, or recommending review of, “gap filing” petitions applying to years in which the applicant did not originally file a petition or already received a full/partial rejection?
4. Has EPA received any “gap filing” petitions back from DOE; and if so, what were DOE’s recommendations?
5. Under what legal basis and authority does EPA believe it may consider “gap filing” petitions?
6. Why aren’t these “gap filing” petitions included on EPA’s dashboard?

The biofuels industry has been hit especially hard by the sharp decline in fuel demand across the country, as residents follow local, state, and federal guidance to practice social distancing and minimize travel. Over 100 biofuel plants fully idled or cut production, with ripple effects negatively impacting agricultural commodity prices, farmers, and the food supply chain. EPA inaction on court orders and prolonged SRE uncertainty continue to stifle investment in American biofuels and destabilize agricultural markets. Backfilling SREs to circumvent a court decision would exacerbate market uncertainty at a time when rural communities already face unprecedented economic challenges.

We look forward to your response and would be happy to address any further questions.

Sincerely,

