ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SINCLAIR WYOMING REFINING COMPANY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1196 (consol. with 19-1197)
KERN OIL & REFINING COMPANY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1216
RENEWABLE FUELS ASSOCIATION, ET AL., *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1220
WYNNEWOOD REFINING COMPANY, LLC, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 20-1099

EPA'S MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

TABLE OF CONTENTS

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27, Respondent Environmental Protection Agency ("EPA" or the "Agency") moves the Court for a voluntary remand, without vacatur, of its final agency action challenged by Petitioners in these coordinated petitions for review.[1] Petitioners challenge EPA's August 9, 2019 Memorandum Decision (the "Decision") granting and denying thirty-six petitions for extensions of the small refinery exemption from the requirements of the Clean Air Act's Renewable Fuel Standard ("RFS") annual volume obligations for compliance year 2018.[2] Since EPA issued the Decision, the Tenth Circuit issued an opinion in *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020), that includes three holdings that address some of the issues now raised in Petitioners' merits briefs, and, on June 25, 2021, the Supreme Court reversed one of the Tenth Circuit's holdings in *HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.*, 141 S. Ct. 2172

[1] This motion reflects EPA's views on how the Court should resolve these petitions for review and is accordingly being filed in lieu of a motion to govern further proceedings. *See* Doc. 1908808. If the Court does not grant this motion, EPA respectfully requests that the Court reset the deadline for motions to govern further proceedings in the above-identified cases.

[2] No party challenges the aspect of the Decision in which EPA denied the requests for extensions of the small refinery exemption for three refineries not owned or operated by Sinclair Wyoming Refining Co. ("Sinclair") and Big West Oil, LLC ("Big West"). As such, those adjudications are not properly before the Court.

(2021). Thus, voluntary remand without vacatur will allow EPA the opportunity to reconsider its action in light of these intervening decisions. In light of Petitioners' arguments in their merits briefs regarding the sufficiency of the administrative record for the Decision, EPA also seeks an opportunity to consider whether to provide a more robust explanation for any action that it takes on remand. Granting this motion will therefore conserve the Court's and the parties' resources by avoiding the need for further briefing, oral argument, or Court decision in these proceedings.

The other parties' positions are as follows:

Sinclair and Big West, Petitioners in consolidated Nos. 19-1196 and 19-1197, do not oppose voluntary remand without vacatur but request that the Court require EPA to take action on the two challenged denials of petitions for extensions of the small refinery exemption within ninety days for reasons to be explained in a responsive filing.

Kern Oil & Refining Co. ("Kern"), Petitioner in No. 19-1216 and Intervenor-Respondent in No. 19-1220, and Wynnewood Refining Company, LLC ("Wynnewood"), Petitioner in No. 20-1099, do not oppose EPA's request for voluntary remand without vacatur but request that the Court require EPA to take certain actions on remand within ninety days, which they will explain in responsive filings.

The Biofuels Petitioners[3] in No. 19-1220 oppose EPA's request for remand without vacatur.

HollyFrontier Refining & Marketing, LLC, HollyFrontier Cheyenne Refining, LLC, HollyFrontier Woods Cross Refining, LLC, and the Small Refiners Coalition,[4] Intervenor-Respondents in No. 19-1220, take no position on EPA's request.

Producers of Renewables United for Integrity Truth and Transparency, Intervenor-Respondent in Nos. 19-1216 and 20-1099, and American Fuel & Petrochemical Manufacturers, Intervenor-Respondent in No. 19-1220, reserve their positions and right to file a response until they have reviewed this motion.

[3] Renewable Fuels Association, American Coalition for Ethanol, National Biodiesel Board, National Corn Growers Association, National Farmers Union, and Growth Energy.

[4] Alon Refining Krotz Springs, Inc.; Alon USA, LP; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Delek Refining, Ltd.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Par Hawaii Refining, LLC; Sinclair Casper Refining Company; Sinclair Wyoming Refining Company; U.S. Oil & Refining Company; and Wyoming Refining Company.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Renewable Fuel Standard Program

The Clean Air Act's RFS program specifies increasing annual "applicable volumes" of four categories of renewable fuel to be used in the transportation sector—total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. 42 U.S.C. § 7545(*o*)(2)(B)(i)(I)-(IV). Congress directed EPA to establish a compliance program and annual percentage standards to ensure that the applicable volumes are used each year. *Id.* §§ 7545(*o*)(2)(A)(i), (iii), 7545(*o*)(3)(B)(i). To calculate these standards, EPA divides the applicable volume for each type of renewable fuel established in the Act or determined by EPA, *id.* § 7545(*o*)(2)(B), (7)(A), (7)(D)–(F), by the Energy Information Administration's estimate of the national volume of transportation fuel that will be sold or introduced into commerce in that year, *id.* § 7545(*o*)(3)(A).

Congress placed the obligation to satisfy the applicable volumes on "refineries, blenders, and importers, as appropriate." *Id.* § 7545(*o*)(3)(B)(ii)(I). By regulation, EPA determined that refiners and importers of gasoline and diesel fuel must fulfill the requirements of the RFS program as "obligated parties." 72 Fed. Reg. 23,900 (May 1, 2007); 75 Fed. Reg. 14,670 (Mar. 26, 2010). These obligated parties apply the percentage standards to their own annual production or

importation of gasoline and diesel fuel to calculate their individual annual renewable volume obligations for each type of renewable fuel. Obligated parties need not actually blend renewable fuel themselves. They may alternatively purchase credits, known as "Renewable Identification Numbers," or "RINs," that reflect a quantity of renewable fuel that has been blended into conventional fuel by another entity. *See* 40 C.F.R. §§ 80.1425–29.

B. Temporary Small Refinery Exemptions

Congress created a temporary exemption for obligated parties that qualify as "small refineries," which may be extended in specified circumstances. 42 U.S.C. § 7545(*o*)(9). As relevant here, Congress provided that a small refinery "may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* § 7545(*o*)(9)(B)(i). Congress directed that, "[i]n evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors." 42 U.S.C. § 7545(*o*)(9)(B)(ii). In other words, EPA requests a recommendation from the U.S. Department of Energy ("DOE") to inform EPA's evaluation of any petition for an extension of the small refinery exemption. *See Hermes Consol., LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015).

II. FACTUAL AND PROCEDURAL BACKGROUND

Many small refineries located across the United States petitioned EPA for extensions of the small refinery exemption for their individual 2018 RFS compliance year obligations. On August 9, 2019, EPA acted on thirty-six of these petitions in a two-page Decision, granting thirty-one of the petitions and denying five. Att. A to Declaration of Byron Bunker ("Bunker Decl."). EPA filed a certified index for the administrative record in these petitions. Docs. 1843340 (No. 20-1099), 1856813 (Nos. 19-1196, 19-1197), 1856817 (No. 19-1220), 1858832 (No. 19-1216).[5]

After issuing the Decision, EPA returned RINs previously used for compliance to those small refineries that received an extension of the small refinery exemption for RFS compliance year 2018 in the Decision. The administrative record for the Decision does not include materials regarding this restoration of RINs. *See* Docs. 1843340, 1856813, 1856817, 1858832. Nor does the Decision itself mention or explain the restoration. *See* Att. A to Bunker Decl.

[5] Although each index was the same in substance, EPA filed the index in the four separate actions on three separate days between May 18, 2020 and August 28, 2020. Each index was filed under seal, with a redacted copy filed on the public docket.

ARGUMENT

I. VOLUNTARY REMAND WILL ALLOW EPA THE OPPORTUNITY TO RECONSIDER ITS DECISION IN LIGHT OF INTERVENING JUDICIAL DECISIONS AND TO PROVIDE A MORE ROBUST EXPLANATION OF ITS ACTION AFTER RECONSIDERATION.

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal initial actions. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). An agency's authority includes the right to seek voluntary remand of a challenged agency decision without confessing error as to the merits of its decision. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). While the reviewing court has discretion over whether to remand, voluntary remand is appropriate where the request is reasonable and timely. *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *see also Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004) ("[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate.").

When an agency seeks to reconsider its action, "it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency." *Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962). And courts frequently grant voluntary remand requests to permit an agency to reevaluate its decision in light of intervening events, such as new legal decisions,

new information, or changes in agency policies. *E.g.*, *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regul. Comm'n*, 899 F.2d 1244, 1248–50 (D.C. Cir. 1990). These grants reflect that an agency's motion for remand to allow for reconsideration serves the interests of judicial economy: "Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)).

Thus, to obtain voluntary remand, the agency need only convey an "intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Limnia, Inc. v. Dep't. of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017). Remand is particularly appropriate where intervening events, such as a subsequent judicial decision, may require further consideration of the agency action at issue. *See, e.g.*, *Ethyl Corp.*, 989 F.2d at 523 (concluding that voluntary remand was appropriate when an agency acknowledged that new evidence impacted agency decision and asked that the court "remand the matter to the Agency for further consideration"); *Nat'l Fuel Gas Supply*, 899 F.2d at 1249 (D.C. Cir. 1990) (granting Commission's request for remand following new legal decision); *SKF USA*, 254 F.3d at 1028 (recognizing that an agency legitimately

seeks remand when it intends to "reconsider its decision because of intervening events outside of the agency's control").

In light of these authorities, the Court should grant EPA's request for a voluntary remand for two reasons. First, remand will allow EPA the opportunity to reconsider the Decision in light of the Tenth Circuit's intervening decision in *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206, 1244–49 (10th Cir. 2020), *rev'd in part sub nom. HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.*, 141 S. Ct. 2172 (2021). Second, remand will allow EPA to consider and address Petitioners' allegations regarding the sufficiency of the administrative record for the Decision as part of the reconsideration process, and, if warranted, allow EPA the opportunity to provide a new record and explanation for any actions that the Agency takes on remand.

A. EPA Seeks the Opportunity to Timely Reconsider Its Decision in Light of the Tenth Circuit's and Supreme Court's Intervening Decisions.

EPA has good cause to file this motion now,[6] and remand is appropriate to allow EPA to reconsider its Decision in light of the Tenth Circuit's decision in *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206, 1244–49 (10th Cir. 2020), *rev'd in part sub nom. HollyFrontier Cheyenne Refining, LLC, et al. v.*

[6] Under D.C. Cir. Rule 27(g)(1), dispositive motions are due within 45 days of docketing, absent a showing of good cause.

Renewable Fuels Association, et al., 141 S. Ct. 2172 (2021). After Petitioners filed their opening briefs in December 2020, EPA filed a consent motion on February 2, 2021, to hold the petitions in abeyance pending a decision from the Supreme Court in *HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.*, No. 20-472, due to an overlapping issue raised in these cases and before the Supreme Court. *See* Doc No. 1883335. The Court granted the motion and ordered that the parties file motions to govern further proceedings within thirty days of the Supreme Court's decision in *HollyFrontier*. Doc. No. 1885774. On June 25, 2021, the Supreme Court issued its decision. *HollyFrontier Cheyenne Refin., LLC, et al. v. Renewable Fuels Ass'n, et al.*, 141 S. Ct. 2172 (2021).

In *HollyFrontier*, the Supreme Court decided that the language "extension of the exemption" in 42 U.S.C. § 7545(*o*)(9)(B)(i) permits EPA to grant a small refinery's petition even if the small refinery had not sought and received continuous prior exemptions, reversing the Tenth Circuit's decision only "[t]o the extent the court of appeals vacated EPA's orders on th[at] ground." *HollyFrontier*, 141 S. Ct. at 2180–81, 2183. But the Tenth Circuit decision underlying the Supreme Court's *HollyFrontier* case had two alternative holdings that were not the subject of Supreme Court review. First, the Tenth Circuit held that there is another limitation on the scope of EPA's authority: EPA may grant an extension of the small refinery exemption only where compliance with the RFS program is the

cause of any disproportionate economic hardship for the small refinery. *Renewable Fuels Ass'n*, 948 F.3d at 1253–54. The Tenth Circuit also held that EPA failed to adequately explain how the exemptions at issue were consistent with EPA's findings that refineries fully recover the RIN-related costs of compliance with the RFS program through higher sales prices of gasoline and diesel. *Id.* at 1255–57.

Following the Supreme Court's decision, EPA plans to consider what, if any, impact the remaining holdings in the Tenth Circuit's decision may have on EPA's implementation of the small refinery exemption provision generally, and what, if any, resulting impact that may have on the small refinery petitions adjudicated in the Decision and challenged here.[7] Bunker Decl. ¶ 13. It would have been premature for EPA to consider these issues prior to the Supreme Court's decision in *HollyFrontier*. Most small refineries that have applied for an extension of the small refinery exemption have not received continuous extensions of the exemption. Therefore, had the Supreme Court upheld the Tenth Circuit's decision, most small refineries would have been statutorily ineligible to receive a further

[7] While EPA acknowledges that the Tenth Circuit's alternative holdings are not binding authority on this Court's review of the nationally-applicable Decision, EPA is now faced with the complicated task of considering its approach to small refineries nationwide going forward, and many small refineries are located within the jurisdiction of the Tenth Circuit.

extension of the exemption. In that case, it would have been unnecessary for EPA to further consider whether the alternative holdings in the Tenth Circuit's decision affected those small refineries' entitlement to relief in almost any setting. *See* Bunker Decl. ¶ 14.

Following *HollyFrontier*, EPA seeks the opportunity to reconsider the underlying adjudications in its Decision in light of *HollyFrontier* and the surviving alternative Tenth Circuit holdings for specific and general purposes. Bunker Decl. ¶ 13; *see also, e.g.*, *Limnia,* 857 F.3d at 387 (recognizing reconsideration as a basis for remand). In particular, the Biofuels Petitioners raise the substance of one of the alternative holdings of the Tenth Circuit in their merits brief. *See* Doc. 1874746 at 34–37. More broadly, EPA should not be forced to litigate those issues here while it simultaneously reconsiders whether and how to address the holdings in multiple settings, ranging from decisions on petitions for extensions of the small refinery exemption to the setting of the EPA's annual rule and volume obligations.

EPA is filing this motion at the earliest date practicable following resolution of *HollyFrontier*. EPA is unaware of any prejudice to a party resulting from filing this motion today, as the Court has not yet entered a schedule for responsive briefing, replies, or oral argument. *See Sw. Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) (noting that the court granted an agency's voluntary remand motion filed after petitioner had filed its opening merits brief). Therefore, the

Court should grant EPA's reasonable and timely request for voluntary remand. *Macktal*, 286 F.3d at 826.

B. Voluntary Remand Will Allow EPA to Provide a More Robust Explanation of Its Action After Reconsideration.

EPA has reviewed Petitioners' merits briefs, including their various arguments that EPA's Decision does not provide a reasoned basis for the underlying adjudications of petitions for extensions of the small refinery exemption. As discussed above, EPA wishes to reconsider its Decision and, in doing so, also seeks an opportunity to consider whether to provide a more robust explanation for the adjudications underlying the Decision, should those adjudications remain undisturbed, or for any new decisions rendered on reconsideration. *See* Bunker Decl. ¶¶ 13–15. While EPA does not confess error, EPA acknowledges that a more robust analysis and explanation of its rationale for any action taken on remand would make any judicial review more efficient.

Petitioners make varying arguments that EPA's record in undertaking the Decision is not sufficient. *See* Doc. 1874746 at 30–32 (arguing for Biofuels Petitioners in No. 19-1220 that the record for the Decision is deficient in its challenge to the thirty-one grants), Doc. 1874754 at 27 (arguing that EPA has not provided "a reasoned basis for" the two challenged denials for Sinclair in No. 19-

1196 and Big West in No. 19-1197).[8] While EPA reserves its rights with regard to the sufficiency of the record, the Agency does acknowledge that its stated rationale for the thirty-six adjudications that underlie the Decision is abbreviated and could benefit from further explanation on remand if those adjudications remain in place. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (recognizing remand as the "usual administrative avenue" for further explaining an agency's rationale for complicated decisions).

Likewise, Wynnewood and Kern challenge EPA's restoration of RINs that they retired for RFS 2018 compliance prior to EPA granting their exemption requests. *See* Docs. 1874752 at 18–36 (arguing that EPA's practice of unretiring the 2018 vintage RINs retired in Wynnewood's compliance demonstration does not provide Wynnewood with the full exemption granted in the Decision in No. 20-1099), 1877014 at 39–58 (similar for Kern in No. 19-1216). Setting aside whether the restoration of RINs is an issue properly before the Court, EPA acknowledges that the Decision before the Court does not reference or explain the restoration of RINs. Bunker Decl. ¶ 10.

[8] Remand would also allow EPA to consider and possibly cure the record error that Sinclair alleges resulted from EPA and DOE's failure to consider a document that Sinclair submitted, if necessary. *See* Doc. 1874754 at 39.

Accordingly, in light of Petitioners' arguments, EPA believes that the Court and the parties would benefit from allowing EPA to provide additional explanation during reconsideration on remand. Specifically, voluntary remand would save the parties from having to spend any more time litigating over the current record for the adjudications that EPA seeks to reconsider. On remand, EPA could supplement the record or modify its Decision in ways that could potentially moot some of Petitioners' challenges or at least narrow the issues for judicial review. And, if litigation continues after remand, a supplemented record would make it easier for the Court to assess the Agency's rationale.

II. THE COURT SHOULD REMAND THE DECISION WITHOUT VACATUR.

The Court should not vacate the Decision because doing so would be disruptive without any immediate benefit for any of the parties. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (concluding that agency actions need not be vacated where the vacatur itself would have disruptive consequences). EPA seeks the opportunity to reconsider the Decision in light of the Tenth Circuit holdings in *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206, 1244–49 (10th Cir. 2020), *rev'd in part sub nom. HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.*, 141 S. Ct. 2172 (2021). Bunker Decl. ¶ 13. And on reconsideration, EPA will consider whether to supplement the existing record in light of Petitioners'

arguments. *See id.* ¶ 15. Remand without vacatur is therefore appropriate here to maintain the status quo, while allowing EPA sufficient time to reconsider the challenged adjudications underlying the Decision and to consider whether to provide more explanation for any actions taken on remand.

As discussed below, Petitioners urge opposing interpretations of EPA discretion to issue small refinery exemptions and advocate for different relief. Some seek to overturn the thirty-one exemptions granted by EPA's decision, some seek to overturn two of the exemptions denied, and some attempt to have the Court direct EPA's future administrative action on remand with regard to EPA's unretiring RINs retired for 2018 RFS compliance. Given that EPA wishes to reconsider its Decision, remanding to EPA without vacatur would serve important jurisprudential interests by allowing EPA the first opportunity to address the varying arguments advanced by Petitioners and the appropriate administrative remedy. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) (citation omitted) ("In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference in an ongoing decision-making process."); *B.J. Alan*, 897 F.2d at 562 n.1 (citation omitted) ("Administrative reconsideration is a more expeditious and efficient

means of achieving an adjustment of agency policy than is resort to the federal courts.").

For instance, if the Court were to vacate the grants in the Decision as requested by the Biofuels Petitioners, thirty-one small refineries currently exempted from RFS compliance for 2018 would suddenly be non-compliant with their 2018 RFS obligations. Leaving the decision in place pending remand would be the least disruptive outcome because it would allow EPA to address such issues administratively in accordance with whatever decision it makes on remand, while vacating the decision would severely disrupt the status quo.

Likewise, vacating the two challenged denials in the Decision as requested by Sinclair and Big West would have no benefit for those refineries because they would still receive no immediate relief without further agency action. These small refineries have already complied with their 2018 RFS obligations, and vacatur of the Decision would not suddenly return the RINs they retired for 2018 RFS compliance. EPA would have to undertake further action on remand to determine Petitioners' entitlement to an exemption and any appropriate administrative relief. Because vacatur of the two challenged denials would not immediately benefit any party, the Court should preserve the status quo while EPA reconsiders these adjudications.

Wynnewood and Kern request an order from this Court instructing EPA to issue new current-year RINs by a date certain and various additional injunctive relief. Docs. 1874752 at 40–41, 1877014 at 58–61. To the extent that the restoration of RINs is even properly before the Court, none of these is an appropriate remedy to be ordered by this Court. Even if the Court were to rule in Petitioners' favor on this issue, the proper remedy is remand to EPA. *See* 5 U.S.C. § 706(2) (providing that the court may "set aside" agency action); *see also Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("the function of the reviewing court ends when an error of law is laid bare," and "the matter once more goes to the [agency] for reconsideration"). Indeed, the Fourth Circuit has rejected similar requests for relief. *See Ergon-W. Va. v. EPA*, 980 F.3d 403, 422 n.6 (4th Cir. 2020) (rejecting petitioner's requests for an award of a small refinery exemption and an order that EPA issue petitioner RINs equaling the monetary value of the amount it spent on RINs for RFS compliance, and remanding to EPA).[9]

[9] Nor is there any justification for the Court to set deadlines on remand in this initial challenge to the Decision. *Compare, e.g.*, *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627–29 (D.C. Cir. 1987) (setting a deadline after agency failed to act for years despite earlier court-ordered deadline) (per curiam), *with North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (declining to impose deadline for completion of remand), and *Env't Def. Fund, Inc. v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) (same).

More importantly, EPA intends to reconsider the exemptions granted to Wynnewood and Kern on remand. Because it cannot be known now what decision EPA will make on remand, the Court should allow the administrative process to play out before ordering any relief. *Am. Petroleum Inst.*, 683 F.3d at 386; *B.J. Alan*, 897 F.2d at 562 n.1.

CONCLUSION

For the reasons discussed, the Court should remand the challenged aspects of the August 9, 2019 Memorandum Decision[10] to allow EPA the opportunity to reconsider in light of *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206, 1244–49 (10th Cir. 2020), *rev'd in part sub nom. HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Association, et al.*, 141 S. Ct. 2172 (2021), and to allow EPA to consider whether to provide further explanation for any actions it may take after reconsideration. In light of the disruptive effects of vacatur and other requested remedies, the Court's remand should be without vacatur, injunctive relief, or any other limitations.

[10] *See supra* note 2 (establishing that three of EPA's denials of requests for extensions of the small refinery exemption underlying the Decision are not properly before the Court).

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/ *Patrick R. Jacobi*
PATRICK R. JACOBI
Environmental Defense Section
Environment and Natural Resources Div.
U.S. Department of Justice
Denver Place Building
999 18th Street
Suite 370 – South Terrace
Denver, CO 80202
(303) 844-1348
(303) 844-1350 (Fax)
patrick.r.jacobi@usdoj.gov

Of Counsel:
SUSAN STAHLE
Office of the General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dated: August 25, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Fed. R. App. P. 27(d)(2) and Cir. R. 27(c) because, excluding the parts listed in Fed. R. App. 32(f), it contains 4,283 words as counted by Microsoft Word.

This document also complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: August 25, 2021

/s/ *Patrick R. Jacobi*
PATRICK R. JACOBI

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, I electronically filed the above EPA's Motion for Voluntary Remand Without Vacatur in all of the above-referenced cases using the Court's CM/ECF system. The participants in these cases are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Patrick R. Jacobi*
PATRICK R. JACOBI

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SINCLAIR WYOMING REFINING COMPANY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1196 (and consol. case)
KERN OIL & REFINING COMPANY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1216
RENEWABLE FUELS ASSOCIATION, ET AL., *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1220
WYNNEWOOD REFINING COMPANY, LLC, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 20-1099

DECLARATION OF BYRON BUNKER

1. I, Byron Bunker, Director of the Compliance Division (the "CD") of the Office of Transportation and Air Quality ("OTAQ"), within the Office of Air and Radiation of the United States Environmental Protection Agency ("EPA" or "Agency") declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information supplied to me by employees under my supervision.

2. I have served as the Director of the CD since October 2011. The CD's primary function is to implement and oversee compliance with established regulatory requirements, including the Clean Air Act's Renewable Fuel Standard Program (the "RFS Program"), that relate to transportation fuels and vehicles. Among the specific tasks performed by the CD are: providing guidance to the regulated community, issuing certificates of conformity with vehicle and engine emissions standards, registering participants in the fuels and motor vehicle programs, managing companies' participation in the RFS Program, reviewing company reports and other submissions to monitor compliance, acting on petitions seeking waivers or exemptions from regulatory provisions, and alerting EPA's enforcement office of violations.

3. Prior to serving as Director of the CD, I was employed at EPA in a number of functions, including directing the group that develops emissions

standards applicable to heavy-duty nonroad and highway vehicles and engines. My professional training is as a mechanical engineer.

4. I am aware of the petitions for review filed by Petitioners in the above-captioned matters. I understand that Petitioner in *Sinclair Wyoming Refining Co. v. EPA*, No. 19-1196 (D.C. Cir., filed Sept. 20, 2019) ("Sinclair"), challenges EPA's denial of Sinclair's petition for an extension of the small refinery exemption for the 2018 compliance year. I understand that Petitioner in *Big West Oil, LLC v. EPA*, No. 19-1197 (D.C. Cir., filed Sept. 23, 2019) ("Big West"), challenges EPA's denial of Big West's petition for an extension of the small refinery exemption for the 2018 compliance year. I understand that Petitioners in *Kern Oil & Refining Co. v. EPA*, No. 19-1216 (D.C. Cir., filed Oct. 21, 2019) ("Kern") and *Wynnewood Refining Co. v. EPA,* No. 20-1099 (D.C. Cir., transferred from the 10th Cir. Mar. 26, 2020) ("Wynnewood") challenge EPA's restoration of Renewable Identification Numbers ("RINs") following the Agency's grants of their petitions for an extension of the small refinery exemption for the 2018 compliance year. I understand that Petitioners in *Renewable Fuels Association, et al. v. EPA*, No. 19-1220 (D.C. Cir., filed Oct. 22, 2019) ("Biofuels Petitioners"), challenge EPA's grants of thirty-one petitions for extensions of the small refinery exemption for the 2018 compliance year. In support of EPA's request for a remand without vacatur, I was asked by counsel to discuss the EPA action that

includes these grants and denials, EPA's plans in light of recent judicial decisions, and some of Petitioners' arguments presented to date.

5. Under the RFS Program, EPA annually determines the applicable volume of four categories of renewable fuel for the transportation sector—total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. EPA then converts this to a "percentage standard." Certain obligated parties, including refineries, are required to apply the percentage standards to their own annual production or importation of gasoline and diesel to calculate their individual renewable volume obligation for each type of renewable fuel. These obligated parties generate or purchase RINs and then retire them to demonstrate compliance.

6. Congress also created a statutory exemption from the RFS Program for "small refineries," defined as refineries with annual average aggregate daily crude oil throughput not exceeding 75,000 barrels. As relevant to this matter, Congress provided that a small refinery "may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(*o*)(9)(B)(i). In considering such a petition, "the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors." 42 U.S.C. § 7545(*o*)(9)(B)(ii).

7. EPA received forty-two petitions from small refineries seeking to be exempted from their 2018 RFS requirements for the reason of disproportionate economic hardship. Three of those petitions were subsequently withdrawn. Two of those petitions were deemed ineligible by the Agency. EPA shared the petitions and supporting information for the petitions that were not withdrawn or deemed ineligible with the Department of Energy ("DOE"). DOE then provided EPA with its recommendation regarding each petitioning small refinery.

8. On August 9, 2019, EPA issued a memorandum entitled "Decision on 2018 Small Refinery Exemption Petitions." *See* Attachment A. The memorandum was signed by Anne Idsal who was the Acting Assistant Administrator for the EPA Office of Air and Radiation at the time.

9. The August 9, 2019 memorandum adjudicated thirty-six small refinery exemption petitions, including the petitions submitted by Sinclair, Big West, Kern, and Wynnewood, granting thirty-one petitions and denying five petitions. EPA also issued its decision on the remaining 2018 small refinery exemption petition on August 9, 2019 but did so in a separate document.

10. After the August 9, 2019 memorandum was issued, EPA restored RINs used for 2018 RFS compliance to those small refineries who received exemptions in separate transactions, including restoring retired RINs to Kern and Wynnewood. Neither the August 9, 2019 memorandum nor the administrative

record contain any explanation or documentation concerning these RIN restorations.

11. On January 24, 2020, the U.S. Court of Appeals for the Tenth Circuit issued its decision in *Renewable Fuels Association et al. v. EPA,* 948 F.3d 1206 (10th Cir. 2020) (the "*RFA* decision"), vacating three small refinery exemptions granted by EPA on three merits grounds. Specifically, the court held that:

(a) EPA exceeded its authority under the Clean Air Act provision authorizing EPA to grant an extension of a small refinery's exemption, 42 U.S.C. § 7545(*o*)(9)(B), to small refineries that did not seek or receive exemptions in all prior years;

(b) EPA exceeded its statutory authority in granting extensions of exemptions based at least in part on hardships not caused by RFS compliance; and

(c) EPA failed to consider an important aspect of the problem by declining to address the issue of small refineries' pass-through of the RIN costs for RFS compliance.

For these reasons, the Tenth Circuit vacated the orders under review and remanded them to EPA for further proceedings consistent with the opinion.

12. On January 8, 2021, the Supreme Court granted a petition for certiorari to review the Tenth Circuit's holding in the *RFA* decision that 42 U.S.C.

§ 7545(*o*)(9)(B) authorized EPA to grant an extension of the exemption in 42 U.S.C. § 7545(*o*)(9)(A) only to qualifying small refineries that have continuously maintained the exemption since 2011. The Supreme Court issued its decision on June 25, 2021, reversing only that particular holding of the *RFA* decision. *HollyFrontier Cheyenne Refin., LLC, et al. v. Renewable Fuels Ass'n, et al.*, 141 S. Ct. 2172 (2021) ("*HollyFrontier* decision").

13. The Agency intends to reconsider its August 9, 2019 memorandum and the underlying adjudications of the 2018 small refinery exemption petitions in light of the *HollyFrontier* decision and, in doing so, intends to consider the impact of the other two merits holdings of the Tenth Circuit in the *RFA* decision, which were not reviewed by the Supreme Court. Although EPA's August 9, 2019 memorandum adjudicated petitions from across the United States, some of the petitions adjudicated in the August 9, 2019 memorandum were submitted by small refineries located within the jurisdiction of the Tenth Circuit. These holdings may alter some aspects of the adjudications underlying EPA's August 9, 2019 memorandum or lead EPA to request further information from the petitioning small refineries. EPA also will consider the impact of these holdings in its overall administration of the RFS Program, including the setting of the EPA's annual rule and volume obligations.

14. Conducting this evaluation now is timely given that nearly all small refineries in the United States would have been ineligible to petition for an extension of the small refinery exemption had the Supreme Court affirmed the Tenth Circuit's holding in the *RFA* decision requiring a continuous exemption in all prior years.

15. EPA has also reviewed Petitioners' opening briefs in these cases. All Petitioners allege that the administrative record for the August 9, 2019 memorandum is deficient in some form. Whatever the outcome of EPA's reconsideration of the August 9, 2019 memorandum and underlying decisions, the Agency expects to provide a robust explanation and supporting documentation for its action on remand.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 25, 2021, at Ann Arbor, Michigan.

Byron Bunker Digitally signed by Byron Bunker
Date: 2021.08.25 16:37:34 -04'00'

BYRON BUNKER
Director of the Compliance Division
Office of Transportation and Air Quality
Office of Air and Radiation
United States Environmental Protection Agency

ATTACHMENT A TO DECLARATION OF BYRON BUNKER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Decision on 2018 Small Refinery Exemption Petitions

OFFICE OF AIR AND RADIATION

FROM: Anne Idsal, Acting Assistant Administrator
Office of Air and Radiation

TO: Sarah Dunham, Director
Office of Transportation and Air Quality

Section 211(*o*)(9)(B) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the RFS program "for the reason of disproportionate economic hardship" (DEH). The Act instructs EPA, in consultation with the Department of Energy (DOE), to consider the DOE Small Refinery Study[1] and "other economic factors" in evaluating small refinery exemption (SRE) petitions. The statute does not define "disproportionate economic hardship," leaving for EPA's discretion how it implements this exemption provision.[2]

As part of EPA's process for evaluating SRE petitions, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from its RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately impact the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA considered that DEH exists only when a small refinery experiences *both* disproportionate impacts *and* viability impairment. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the

[1] "Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).
[2] *Hermes v. Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."[3] Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.[4]

Based on DOE's recommendations for the 2018 petitions, I am today granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because these refineries will face a DEH. I am denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a DEH.

I am also granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief. This decision is appropriate under the Act and is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny RFS small refinery petitions.[5] DOE's recommendations recognize an economic impact on these small refineries, and I conclude these small refineries will face a DEH meriting relief. I have concluded that the best interpretation of Section 211(*o*)(9)(B) is that EPA shall either grant or deny petitions for small refinery hardship relief in full, and not grant partial relief. The exemption available under Section 211(*o*)(9)(B) is explicitly described as an "extension of the exemption under subparagraph (A)." In turn, subparagraph (A) provides that the requirements of the RFS program "shall not apply to small refineries until calendar year 2011." It is evident that the original exemption under subparagraph (A) was a full exemption, and therefore I conclude that when Congress authorized the Administrator to provide an "extension" of that exemption for the reason of DEH, Congress intended that extension to be a full, and not partial, exemption. This approach is also consistent with congressional direction since enactment of the provision, which states: "The Agency is reminded that, regardless of the Department of Energy's recommendation, additional relief may be granted if the Agency believes it is warranted."[6]

Dated: 8/9/2019

Anne Idsal
Acting Assistant Administrator
Office of Air and Radiation

---

[3] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: https://rules.house.gov/bill/114/hr-2029-sa.

[4] Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

[5] *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.* 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

[6] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6 (2019), *see* H.Rept. 116-9 at 741 (February 13, 2019).