



## ENVIRONMENTAL PROTECTION AGENCY

[FRL-10686-01-OAR]

### Notice of July 2023 Denial of Petitions for Small Refinery Exemptions under the Renewable Fuel Standard Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Denial of petitions.

**SUMMARY:** The Environmental Protection Agency (EPA) is providing notice of its final action entitled July 2023 Denial of Petitions for RFS Small Refinery Exemptions (“July 2023 SRE Denial Action”) in which EPA denied 26 small refinery exemption (SRE) petitions under the Renewable Fuel Standard (RFS) program. EPA is providing this notice for public awareness of, and the basis for, EPA’s decision announced on July 14, 2023.

**DATES:** [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Benjamin Sarver, Office of Transportation and Air Quality, Compliance Division, Environmental Protection Agency, 1200 Pennsylvania Avenue N.W., Washington, DC 20004; telephone number: 202-564-1881; email address: [sarver.benjamin@epa.gov](mailto:sarver.benjamin@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Clean Air Act (CAA) provides that a small refinery<sup>1</sup> may at any time petition EPA for an extension of the exemption from the obligations of the RFS program for the reason of disproportionate economic hardship (DEH).<sup>2</sup> In evaluating such petitions, the EPA

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<sup>1</sup> The CAA defines a small refinery as “a refinery for which the average aggregate daily crude oil throughput for a calendar year ... does not exceed 75,000 barrels.” CAA section 211(o)(1)(K).

<sup>2</sup> CAA section 211(o)(9)(B)(i).

Administrator, in consultation with the Secretary of Energy, will consider the findings of a Department of Energy (DOE) study and other economic factors.<sup>3</sup>

## **II. Decision**

The July 2023 SRE Denial Action<sup>4</sup> relies on the same approach and the same analyses described in the April 2022 SRE Denial Action<sup>5</sup> and the June 2022 SRE Denial Action.<sup>6</sup> In those actions, we conducted an extensive analysis and review of information provided to EPA by small refineries in their SRE petitions and we found that all refineries face the same costs to acquire RINs regardless of whether the RINs are created through the act of blending renewable fuels or are purchased on the open market. This happens because the market price for these fuels increases to reflect the cost of the RIN, much as it would increase in response to higher crude prices. In other words, this increased price for gasoline and diesel fuel allows obligated parties to recover their RIN costs through the market price of the fuel they produce. Because the market behaves this way for all parties subject to the RFS program, there is no disproportionate cost to any party, including small refineries, and no hardship given that the costs are recovered. As a result, we continue to conclude that small refineries do not face DEH. Given this conclusion and the other reasons described in the July 2023 SRE Denial Action, we have denied 26 SRE petitions for the 2016–2018 and 2021–2023 compliance years by finding the petitioning small refineries do not face DEH caused by compliance with their RFS obligations.

## **III. Judicial Review**

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed only in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of “any other nationally applicable...final action taken by the Administrator,” or (ii) when a final action is

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<sup>3</sup> CAA section 211(o)(9)(B)(ii).

<sup>4</sup> “July 2023 Denial of Petitions for RFS Small Refinery Exemptions,” EPA-420-R-23-007, July 2023.

<sup>5</sup> “April 2022 Denial of Petitions for RFS Small Refinery Exemptions,” EPA-420-R-22-005, April 2022.

<sup>6</sup> “June 2022 Denial of Petitions for RFS Small Refinery Exemptions,” EPA-420-R-22-011, June 2022.

locally or regionally applicable but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” The CAA reserves to EPA the complete discretion to decide whether to invoke the exception in (ii) described in the preceding sentence.<sup>7</sup>

This final action is “nationally applicable” within the meaning of CAA section 307(b)(1). Whether an action is “nationally applicable” is a narrow inquiry based only on the “face” of the action.<sup>8</sup> The question is whether the action itself is nationally applicable, not whether the nature and scope of the arguments raised or relief sought by a petitioner challenging the action are nationally applicable.<sup>9</sup> On its face, this final action is nationally applicable because it denies 26 SRE petitions for 15 small refineries across the country located within 14 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits. This final action is based on EPA’s consistent nationwide application of its revised interpretation of the relevant CAA provisions and using its “common, nationwide analytical method” of RIN discount and RIN cost passthrough principles for evaluating all SRE petitions, no matter the location or market in which the small refineries operate.<sup>10</sup>

To the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1).<sup>11</sup> In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations,

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<sup>7</sup> *Sierra Club v. EPA*, 47 F.4th 738, 745 (D.C. Cir. 2022) (“EPA’s decision whether to make and publish a finding of nationwide scope or effect is committed to the agency’s discretion and thus is unreviewable”); *Texas v. EPA*, 983 F.3d 826, 834-35 (5th Cir. 2020).

<sup>8</sup> *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015).

<sup>9</sup> *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670-71 (7th Cir. 2017); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1198-1199 (10th Cir. 2011); *RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1372-1373 (11th Cir. 2023).

<sup>10</sup> *S. Ill. Power*, 863 F.3d at 671; *ATK Launch Sys.*, 651 F.3d at 1197.

<sup>11</sup> In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator’s determination that the “nationwide scope or effect” exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources. The substance of the Administrator’s determination is entitled to deference.<sup>12</sup> In addition to applying a common analytical method, this action decides SRE petitions for 26 small refineries across the country located within 14 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits. Where, as here, the Administrator “unambiguously determine[s] that [a] final action . . . has nationwide scope and effect” and publishes that finding, “all petitions for review of th[e] action belong in [the D.C.] Circuit” under CAA section 307(b)(1).<sup>13</sup> This outcome promotes the principles underlying CAA section 307(b)(1) and ensures that petitions for review are consolidated in the D.C. Circuit where Congress designated them to be heard, avoiding piecemeal litigation, furthering judicial economy, and eliminating the risk of inconsistent judgments.<sup>14</sup>

For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the *Federal Register*.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**Alejandra Nunez,**

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<sup>12</sup> The Administrator’s determination is akin to other determinations that Congress leaves to an agency’s broad discretion, such as the denial of a rulemaking petition, and merits considerable deference. *Cf., e.g., WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (discussing *Massachusetts v. EPA*, 549 U.S. 497 (2007)); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (absent constitutional or statutory limitations or otherwise “extremely compelling circumstances,” agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties”); *NAACP v. FPC*, 425 U.S. 662, 668 (1976) (reiterating the “general proposition” that agencies have discretion to determine how to shape their regulatory and adjudicatory actions).

<sup>13</sup> *Alcoa, Inc. v. EPA*, No. 04-1189, 2004 WL 2713116, at \*1 (D.C. Cir. Nov. 24, 2004); *see also ATK Launch Sys., Inc.*, 651 F.3d at 1199 n.4 (acknowledging *Alcoa*).

<sup>14</sup> *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at \*4 (5th Cir. Feb. 24, 2011).

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