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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460 *Submitted Via:* ***https://www.regulations.gov***

RE: EPA-HQ-OAR-2021–0566 – Notice of Opportunity To Comment on Proposed Denial of Petitions for Small Refinery Exemptions; Notice Regarding Remand of 2018 RFS Small Refinery Exemption Decision

The American Fuel & Petrochemical Manufacturers[1] ("AFPM") submits these comments in response to the Environmental Protection Agency's ("EPA" or the "Agency") proposal to include 36 small refinery exemptions ("SREs" or "exemptions") from 2018[2] in its denial of petitions for SREs under the Clean Air Act's ("CAA") Renewable Fuel Standard ("RFS") program.[3]

EPA has a duty to evaluate each small refinery petition on its own merits and AFPM strongly opposes including 36 SREs from 2018—on voluntary remand from *Renewable Fuels Association v. EPA*, No. 19-1220 (D.C. Cir.)—in its proposed blanket denial of 65 pending SRE petitions. AFPM raised significant concerns with EPA's proposed broad-brush denial of 65 pending SRE petitions in separate comments filed in this docket[4] that apply equally to any decision on remanded 2018 SREs. Additionally, revoking 2018 SREs granted years ago raises significant concerns regarding retroactivity, reliance interests, the RIN bank, and RIN price volatility, which EPA's Federal Register proposal has failed to address. These issues are of central relevance to this matter and EPA must consider them in any action it takes on each of the remanded 2018 SREs—EPA should propose for public comment its resolution to these concerns and its rationale

[1] AFPM is a national trade association whose members own and operate most of the United States' refining and petrochemical manufacturing capacity. AFPM members are directly regulated as obligated parties under the RFS and will be substantially affected by the outcome of EPA's decision on remanded 2018 SRE petitions.
[2] "Notice Regarding Remand of 2018 RFS Small Refinery Exemption Decision," Email from Karen Nelson, Office of Transportation and Air Quality, Compliance Division (Jan. 3, 2022). *But see* U.S. EPA, RFS Small Refinery Exemptions Tbl. 2 (last updated Dec. 16, 2021), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (noting that there are 31 grants of 2018 SREs, and 5 denials).
[3] 86 Fed. Reg. 70,999 (Dec. 14, 2021).
[4] American Fuel & Petrochemical Manufacturers, Comment Letter on Proposed Notice of Opportunity To Comment on Proposed Denial of Petitions for Small Refinery Exemptions (Feb. 7, 2022). AFPM hereby fully incorporates by reference its comments on EPA's proposed denial of 65 SRE petitions.

for including the remanded 2018 SREs in the blanket denial, as interested parties like AFPM cannot provide informed comment when EPA fails to provide a rationale.[5]

EPA CANNOT AND SHOULD NOT REVOKE GRANTED 2018 SRES, AND HAS FAILED TO ADDRESS IMPORTANT ASPECTS OF THE PROBLEM

First, the remanded 2018 SREs were issued on or about August 9, 2019.[6] Two and a half years have passed since they were issued. These refineries have a vested property interest in their approved SREs, which EPA cannot take away without due process of law.[7] Any revocation of these already-granted SREs would operate retroactively by imposing unduly burdensome[8] new legal consequences for past conduct. As the Supreme Court has stated, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[9] Hence, "courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity."[10] Nowhere in the CAA's RFS provisions does Congress clearly grant EPA authority to retroactively revoke SREs. Revoking and denying already-issued SREs, therefore, violates the Due Process Clause.[11]

Second, and relatedly, small refineries with 2018 SREs have reasonably relied on their SREs, in which they've had a vested property right for nearly three years. EPA is required to consider

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[5] After all, EPA asked for remand for an opportunity "to provide a more robust explanation of its action." EPA's Motion for Voluntary Remand without Vacatur at 7-15, Renewable Fuels Ass'n v. EPA, 19-1220 (D.C. Cir. Aug. 25, 2021), Doc. No. 1911608.

[6] "Decision on 2018 Small Refinery Exemption Petitions," Memorandum from Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation to Sarah Dunham, Director, Office of Transportation and Air Quality. August 9, 2019 [hereinafter "Idsal Memorandum"].

[7] The Supreme Court has explained that governmental benefits constitute property that is protected by the Due Process Clause. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978) (gas and electric service); *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976) (disability benefits); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975) (public school attendance); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972) (government employment); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (welfare benefits).

[8] EPA has previously stated that "any approach that requires additional volumes of renewable fuel use would impose a significant burden on obligated parties, without any corresponding benefit as any additional standard cannot result in additional renewable fuel use in [a previous year]." 84 Fed. Reg. 36,762, 36,788 (July 29, 2019).

[9] *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

[10] *Vartelas v. Holder*, 566 U.S. 257, 266 (2012); *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority." (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.))). *See also Brimstone R. Co.* v. *United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words."); Scalia & Garner, Reading Law: The Interpretation of Legal Texts 261 (2012) (describing the presumption against retroactivity as an "almost invariable rule").

[11] U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

small refineries' reliance interests in their SREs,[12] as this is an important aspect of a decision whether to revoke them.[13] Small refineries, in reliance of their exempted RFS obligations, have made innumerable business decisions affecting their finances that could be upended by a sudden, new obligation to purchase and retire RINs, such as decisions regarding loans, capital expenditures, turnaround and maintenance, and other decisions committing financial and other resources based on the assumption they had a valid SRE for 2018. SREs were designed specifically to *avoid* disproportionate economic hardship ("DEH") from the RFS. Nothing could be better designed to *impose* DEH on small refineries than retroactively revoking an SRE and requiring them, altogether, to purchase 1.43 billion RINs.[14]

Third, revoking 2018 SREs will have enormous programmatic consequences, as there simply are not 1.43 billion 2018 RINs available for compliance.[15] If EPA allows obligated parties to use later RIN vintages to address revoked SREs,[16] this action would deplete the RIN bank, which already is below the levels EPA sought to correct in its re-opening of the 2020 compliance year. After 2019 RFS compliance, EPA projects there will be approximately 1.85 billion total carryover RINs available.[17] As explained in AFPM's comments[18] to the proposed 2020-2022 RFS Annual Rules, and acknowledged by EPA,[19] insufficient RINs could threaten program liquidity and adversely impact the ability of obligated parties to comply with the future renewable volume obligations. Reducing the already low 1.85 billion total RIN bank to less than 500 million RINs would reduce it to one third of the lowest level of the RIN bank since 2011.[20] The retroactive denial of the 2018 SREs may also result in these small refineries entering the RIN market at the same time, resulting in increased RIN demand that is likely to increase the

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[12] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." (quotation marks omitted) (citations omitted)).

[13] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (citing *SEC* v. *Chenery Corp*., 332 U.S. 194, 196 (1947)).

[14] *See* U.S. EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (*last accessed* January 9, 2022).

[15] 42 U.S.C. § 7545(o)(5)(C) ("A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.").

[16] AFPM does not concede that EPA has the authority to authorize RINs generated in future years to be used for compliance with 2018 under these circumstances.

[17] *See* 86 Fed. Reg. 72,436, 72,449/1 (Dec. 21, 2021).

[18] American Fuel & Petrochemical Manufacturers, Comment Letter on Proposed Renewable Fuel Standard (RFS) Program: RFS Annual Rules (Feb. 4, 2021).

[19] *See id*. at 20 n. 79.

[20] *See id*. at 22.

price of RINs precipitously, all without producing any more 2018 biofuel. As EPA explains in its proposal for 2020, 2021, and 2022 obligations, on which these retroactive requirements would be additive, marginal compliance even for those lesser requirements will be filled by imports or drawing down the RIN bank, hardly increasing energy independence.

Fourth, DOE has scored each of these 2018 SRE petitions. In the RFS final rule for 2020, the estimated renewable volume obligation exempted for 2018, using the DOE recommendations, was 840 million RINs,[21] indicating that DOE's analyses found DEH in many cases. Blanket departures from DOE's recommendations raise concerns that EPA is acting arbitrarily by disagreeing with DOE on every single DOE recommendation that a small refinery is experiencing DEH.[22]

Fifth, some of these SRE decisions for 2018 have already been litigated on an individual basis. EPA must take note of these judicial decisions and act consistently with their holdings.

Sixth, if EPA revokes already-granted 2018 SREs and forces these small refiners to retire current-year RINs to satisfy 2018 RFS obligations, it would be inconsistent with EPA's approach to constrain SRE relief to the applicable compliance year. For example, when EPA grants an exemption petition to a small refinery after the compliance deadline, it returns the RINs the refinery used to demonstrate compliance even if those RINs have expired.[23] In EPA's view, small refineries are not entitled to relief in the form of new or unexpired RINs for previous compliance years when they retired them unnecessarily while awaiting EPA's decision on their pending petition. EPA cannot now maintain that such small refineries must retire new or unexpired RINs for previous compliance years simply because EPA has had a change of heart in 2021 following the grant of 2018 SREs. This contradictory rationale is plainly arbitrary and capricious.

Finally, the D.C. Circuit granted EPA's motion submitted last August for a voluntary remand without vacatur.[24] The Court neither mandated that EPA reconsider or revoke the 2018 SREs,

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[21] While DOE's totaled 840 million RINs, the actual figures of 1.43 billion RINs exempted results in part from EPA's decision to grant full exemptions for small refineries that DOE recommended fifty percent exemptions. *See* Idsal Memorandum, *supra*.
[22] *See* 85 Fed. Reg, 7016, 7052, Tbl. VII.B-1 (Feb. 6, 2020).
[23] *See* Opening Brief of Wynnewood Refining Co. at 13-14, Wynnewood Refining Co. v. EPA, No. 20-1099 (9th Cir. Dec. 7, 2020), Doc No. 1874752 (citing Letter from Anne Idsal, EPA (Dec. 19, 2019)); Petitioner's Opening Brief at 60-61, Kern Oil & Refining Co. v. EPA No. 21-71246 (9th Cir. Jan. 3, 2022), Doc. No. 12329993 (citing Grant of Request for Small Refinery Temporary Exemption Under the Renewable Fuel Standard Program For Kern Oil and Refining Company's Bakersfield, California Refinery (June 14, 2021)).
[24] Renewable Fuels Association v. EPA, No. 19-1220 (D.C. Cir.), Doc. No. 1925942 (Dec. 8, 2021) ("ORDERED that the motion to voluntary remand without vacatur be granted.").

nor did it rule that the SREs were unlawfully granted. Additionally, the CAA fails to grant EPA clear authority to revoke granted SREs, which suggests EPA cannot regulate retroactively.[25] Therefore, EPA cannot revoke the 2018 SREs in response to the voluntary remand.

Conclusion

AFPM appreciates the opportunity to provide its perspective on this critical issue. AFPM opposes the inclusion of the 36 remanded 2018 SREs in the blanket denial of the 65 pending SREs, as EPA lacks authority to revoke SREs and EPA has failed to consider several pressing legal, policy, and programmatic issues raised by revoking already-issued SREs.

Respectfully submitted,

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[25] *See* page 2, *supra*; *id.* n.7.