Potential Game-Changer For RINs "Waivers"

Avalanche of RFS small refinery economic-hardship "waivers" may be coming to an end after court ruling

Michael H. Levin

Notwithstanding litigation, Congressional probes, and simmering farm-state fury, the cascade of EPA "waivers" exempting so-called "small refineries" from Renewable Volume Obligation (RVO) compliance under the federal Renewable Fuel Standard (RFS) has accelerated. EPA granted nearly 90% of 75 small refinery exemption petitions for compliance years 2017-18, with 21 petitions already pending for compliance year 2019. Exempted volumes of gasoline and diesel fuel that otherwise would have been required to blend renewable biofuels or purchase covering RINs (Renewable Identification Numbers) soared from 2 billion gallons in 2013 (the first year "waivers" by individual petition were available) to 30 billion gallons in 2017-18, with related RINs exemptions rising from 190 million to 3.2 billion RINs.

Then last month, in *Renewable Fuels Ass'n. et al. v. EPA* (Jan. 24, 2020), a 3-judge panel of the U.S. Court of Appeals for the Tenth Circuit issued a unanimous 99-page opinion striking down 3 small refinery hardship "exemptions" that EPA granted despite Department of Energy recommendations. The ruling's implications go far beyond those petitions.

Among other things the panel held that:

• *EPA has no statutory power to grant refineries stand-alone hardship waivers.* Under the Renewable Fuels Acts (RFAs—the 2005 Energy Policy Act and the 2007 Energy Independence Act), EPA only may issue *hardship "extensions" to small refineries that already have a valid ongoing "exemption.*" Since blanket initial exemptions for some 24 refineries expired in 2012 and none of the 3 refineries had exemptions in the years just before their 2017 "hardship" petitions, any purported extension of those expired exemptions went beyond EPA's authority. As the panel put it, "there was nothing for EPA to 'extend.'"

For business confidentiality reasons, EPA does not publish individual hardship decisions; it only lists aggregate outcomes (see https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions). Thus it's difficult to know how many past RINs "waivers" may be invalidated by the decision, though observers believe their number is substantial.

• *EPA's power to grant waivers must be narrowly construed.* Due to the RFAs' "market-forcing"/energy-security goals (to ramp up volumes of domestic biofuels required to be blended by refineries, eventually by billions of gallons year-over-year), as well as the potential of "exemptions" to undercut those goals, EPA's power to grant waivers should be narrowly construed and its exercise vigorously scrutinized. This is particularly true, the panel said, because the RFAs expressly labeled their early "blanket" exemptions "temporary" — meant merely to give affected small refineries enough time "to figure out how to comply or exit the industry"—

not create permanent exemptions. Accordingly, the decision concluded, any individual extensions granted by EPA should progressively have "tapered off" rather than expanded.

• *EPA misinterpreted "economic hardship."* The panel ruled that EPA erred by reading "disproportionate economic hardship" to include adverse small refinery impacts caused by "a bad year for the refining industry," general market conditions, or *anything other than the cost of complying with the RFS by blending renewable fuels or acquiring RINs*. The panel stopped just short of agreeing with the Renewable Fuels Association that EPA's broad-brush approach wrote "economic hardship" completely out of the statute. It also confirmed that "disproportionate economic hardship" may exist without a small refinery's financial viability being imperiled — for example, by large compliance costs versus those of competing refineries, plus limited local markets for renewable fuels.

But it pointedly noted that the 3 refineries' compliance costs-to-sales ratios were less than 1%. It also noted that one of the "exempted" refineries recently absorbed a $650 million write-down, while another had invested $65 million in plant improvements. And it was clear that cognizable "hardship" must be caused by costs of RFS compliance.

• *EPA must address refineries' ability to pass through RINs costs.* The panel ruled that EPA acted "arbitrarily and capriciously" by not addressing *at all* the refineries' ability to pass RFS compliance costs to their customers. Previous Agency analyses had concluded these costs generally were a wash to refiners because they routinely implemented such pass-throughs. The decision treated those analyses as precedential, confirming that EPA bears a greater burden to justify outcomes when it's shown to have changed its mind -- here, about the relevance of pass-throughs -- even by implication.

Green Light To Challenge RINs Waivers

Finally, the panel rejected assertions by EPA and the refineries that biofuels challengers lacked "standing" to challenge the "exemptions" because they were not cognizably "harmed" by them. Similar threshold defenses had successfully blocked other challenges to RINs "waivers." The *RFA* decision dismantled each thread of these defenses. It held, among other things, that:

• Sufficient "harm" exists from even one dollar of probable damages due to reduced RINs prices, reduced blending, or increased competition from non-blended fossil fuels, regardless of whether such damages can be quantified. The biofuel challengers' affidavits, the panel concluded, amply demonstrated such threshold harm.

• EPA's "exemptions" retroactively reinstated past RINs that the refineries had retired. This reinstatement independently showed sufficient "harm," the panel said, because those resurrected "zombie" RINs could be used by refineries to avoid new incremental blending. Put differently, absent the reinstated RINs, markets for biofuels would have expanded.

• It was irrelevant that the RINs at stake were tiny compared to total RINs volumes. It also was irrelevant that no individual members of the Renewable Fuels Association or other challenging

associations were shown to be harmed directly by grant of the waivers, or those challengers might have mitigated such harm. If a decision can redress even a small part of an asserted injury to biofuels producers *as a class*, the panel ruled, courts have jurisdiction to issue it. Complete relief is not required: "the evidence presented is sufficient to show for standing purposes that Biofuels Coalition members who produce . . . feedstocks suffered some injury . . . fairly traceable to increasing the number of unretired RINs." Moreover, the panel noted, some 23 million RINs were involved — a nontrivial figure.

• The biofuels challengers were not required to "exhaust their administrative remedies" by first objecting to EPA. The panel acerbically noted that this stance would make RINs waivers totally unreviewable because waivers are not published in the *Federal Register*. Thus biofuels challengers had no notice allowing them to participate -- they only discovered the waivers were granted through press reports or SEC filings.

• The waivers were sufficiently "final" for judicial review though they never were published. The biofuels associations apparently secured EPA's three waiver decisions by discovery motions (subject to confidentiality review by the panel and continued confidentiality respecting other third parties). The panel ruled that these EPA decisions provided a record to review, that they determined affected parties' rights, and that EPA did not intend to take any further action on them.

• EPA was not entitled to *Chevron* deference because it did not issue the waivers through notice-and-comment rulemaking (or any other public process). See https://www.biocycle.net/2019/09/18/epa-rule-not-great-clean-power/). Instead EPA was entitled only to whatever weight the waivers' intrinsic persuasiveness might command — which was not much, the panel implied.

The decision also provides a comprehensive summary of the RFS, its history, and its recent implementation. It did not have to address a related RFS issue — whether a refiner is "small" when owned by a vertically integrated large parent. However, it highlighted EPA concessions that vertically integrated refineries which "own fuel blending infrastructure" have more depth to mitigate RFS compliance costs. Those passages could affect both future determinations of "hardship," and future determinations of when refiners legitimately are "small."

Further review seems unlikely given lack of any dissent and the strength of the opinion's reasoning.

For more background, see https://www.biocycle.net/2019/07/10/state-play-renewable-fuels-market/.

***

Published Feb. 19, 2020 (https://www.linkedin.com/pulse/potential-game-changer-rins-waivers-mike-levin/). A version of this article previously appeared in *BioCycle Connect* (Feb. 18, 2020).

Mike Levin, a BioCycle Contributing Editor, is managing member of the virtual law firm Michael H. Levin Law Group, PLLC (Washington DC) and a principal in NLGC LLC, Carbon Finance Strategies LLC, and Solar Shield LLC, which respectively focus on capital formation for renewable energy projects and optimization/development of ground-mounted solar PV facilities in MA and roof-top PV systems in the District of Columbia. From 1979-1988 he was National Regulatory Reform Director at the U.S. EPA. See https://www.linkedin.com/in/mike-levin-16ab15b/