AD Update: RINs "Hardship Waivers"

Published on May 27, 2020
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The Tenth Circuit's decision invalidating most "small refinery" waivers triggers familiar tidal waves

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Since 2005 U.S. EPA's Renewable Fuel Standard (RFS) has been a lightning rod for fierce sectoral / regional battles between oil refineries seeking to limit RFS mandates that they blend increasing volumes of renewable fuel or acquire covering RINs credits, and corn-ethanol plus AD and other biofuels producers seeking to preserve or enhance these mandates. Those battles escalated when the Trump EPA doubled, then quadrupled, historical levels of "economic hardship waivers" [see text box] exempting so-called "small refineries" from RFS obligations — granting nearly 90% of waiver requests for compliance years 2017-18 (/www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions).

They reached new heights when a panel of the U.S Court of Appeals for the Tenth Circuit struck down three of these waivers on broad statutory grounds. RFA v. EPA (Jan. 24, 2020) (www.biocycle.net/2020/02/18/potential-game-changer-rins-waivers).
The panel's decision potentially invalidated most past waiver grants and over two dozen waiver requests submitted to EPA for compliance year 2019. It clamped the Trump Administration in a vise between oil and farm-state constituencies.

What Are "Hardship" Waivers?

Under the Renewable Fuels Act ("RFA"), the U.S. EPA sets yearly Renewable Volume Obligations ("RVOs") that determine nationwide demand for renewable fuels. RVOs then are allocated to individual refiners, who must blend the allocated amounts or meet their obligations by acquiring RINs. Details are explained in "State of Play In Renewable Fuels Market" by Mike Levin.

The RFA has long authorized "undue economic hardship" waivers for "small refiners" processing less than 75,000 barrels/day of crude oil. But waivers not only depress demand for RINs and lower RINs prices by exempting their recipients from having to acquire "covering" RINs — they also can distort the Act's scheme by depressing renewable fuel production, resulting in issuance of artificially low RVOs

by EPA. Thus their use was meant to be strictly limited. Under criteria set in 2011 by the U.S. Department of Energy (DoE), no waiver should be granted by EPA unless a refinery applicant receives passing scores in two separate categories: 1) "structural" hardships related to (e.g.) its sector's access to credit or capital and to other lines of business that might cushion RINs economic impacts; and 2) "firm-specific viability impacts" of having to acquire covering RINs.

Previous EPA waivers followed DoE's dual criteria, generally were supported by more than a dozen pages of Federal Register analysis, and were granted to small refineries at an average of roughly 3/year. Beginning in May 2017, EPA dramatically accelerated this pace by granting two-page waivers based solely on structural factors, without reference to refinery-specific RINs impacts or those refineries' ability to pass RINs costs to their customers.

That vise grew tighter when both groups claimed devastating "demand destruction" from Trump tariffs, the Saudi-Russia oil-price war, and COVID-19 market collapses. It raised uncomfortable questions for the Administration about how EPA should proceed. The government waffled on each of them.

Petition for Rehearing?

Urged on by Attorney General William Barr, refiners, and oil-state Republican senators, the Administration first signaled it would ask the full Tenth Circuit to revisit the panel's opinion despite its closely-reasoned holdings that only extensions to existing waivers were available after 2013; "economic hardship" only existed if directly caused by costs of RFS compliance, not general "hard times"; and RFS statutes meant refinery-specific "hardship" waivers to be rare and eventually disappear.

Then a bipartisan group of 24 senators pressed the government to sit out this fight, noting long odds of success, potentially embarrassing failure, negative impacts on the farmers and jobs RFS supports, and the 186 ethanol-plant counties which overwhelmingly voted for Trump in 2016. The issue became a hot-button topic at the March 11 confirmation hearings for EPA Deputy Administrator Douglas Benevento, where senators from both sides demanded the agency commit not to grant pending waivers "until the legal action is settled" or "if you're not going to appeal the ruling, then . . . [not] grant any more waivers."

The government requested a 15-day extension until March 24 to file for rehearing. Then it quietly let this date pass, leaving the three "small refineries" to seek rehearing on their own.

Administration silence decreased the already-slim chance the court might revisit its panel's unanimous opinion. On April 7 — a mere two weeks after the refineries filed — the full Tenth Circuit rejected their petitions, stating that "As no member of the panel and no … other judge in regular active service requested that the court be polled, the requests for rehearing en banc are denied." Not a single Circuit judge thought the "anti-waivers" decision questionable enough even to ask whether any other Circuit judge did.

Limited Options

This crushing result left waiver proponents few options, at least in the litigation sphere. *Refineries* technically had 90 days to petition the U.S. Supreme Court for "certiorari" review. But the Court accepts less than 1% of such petitions, especially where they involve what clerks to the Justices have called "these horrible environmental cases." Moreover, the case did not seem "cert. worthy" it featured no dissenting opinion, no clear split between Circuits on the merits (despite the refineries' efforts to manufacture one), no question requiring federal-law determination to ensure national uniformity. Indeed, as outlined below, the "Supremes" could advance federal uniformity just by letting the decision stand. On May 18, it did precisely that in a parallel case, declining to review claims by refiners that independent downstream blenders should be RFS "obligated parties" required to obtain RINs (news.bloomberglaw.com/environment-and-energy/justices-wont- review-valero-energys-renewable-fuels-challenge).

For similar reasons *the government* could not credibly seek Supreme Court review — EPA was the waiver-granting party challenged below, but had opted out by not joining the refineries' rehearing requests.

The Administration could (a) concede defeat and apply the Tenth Circuit's ruling nationwide, or (b) attempt to limit that ruling to the six Tenth Circuit states — Colorado, Utah, Wyoming, Kansas, Oklahoma and New Mexico. However, (b) would leave waivers generally unavailable to the third of U.S. small-refining capacity located in those states, creating new hotly contested disparities. It also would risk other Circuits adopting the Tenth Circuit's result later on. Meanwhile (a) — without further regulatory steps — would leave only an estimated two to seven "small refineries" eligible even to seek future waivers, with no assurance their asserted "hardship" would qualify for RINs relief.

The government, scrambling to find middle ground, floated variants of both options even before or because — it decided to punt on rehearing. These mostly offered trial balloon sops to the oil sector. On March 4 EPA Administrator Andrew Wheeler testified "We are looking at other avenues to provide some stability in the [RFS] program and to try to make sure we don't have the wild fluctuations in the RIN market," whose prices predictably had spiked at the prospect of billions of previously exempted refinery RINs obligations being revived.On March 21 "Trump Administration officials" said they "will look for ways to blunt the economic blowback for refiners, though specific plans haven't been prepared." Industry analysts suggested vague "partial waivers" as a compromise, notwithstanding biofuel organizations' position that less than full compliance with the Tenth Circuit decision would "betray" hard-hit farm country and resurrect waivers' "ripple effect of negative consequences for our energy security. . . and the rural economy."

On March 27 an EPA press release indicated the agency would "suspend at this [time]" future waiver decisions, but "intends to extend the RFS compliance date for small refineries" and "develop an appropriate implementation and enforcement response … once appeals have been resolved." EPA also declared it would not "unilaterally revisit or rescind any previously granted small refinery exemptions" because "investigating small refineries that were previously subject to an exemption is a low [enforcement] priority [in a pandemic]" (www.epa.gov/newsreleases/epa-announces-steps-protect-availability-gasoline-during-covid-19-pandemic).

This ignored the fact that no "enforcement investigations" were needed. EPA had complete records and simply could revoke in one categorical action any waiver (most of them) that did not meet the Tenth Circuit's tests. Such wholesale revocation would revive billions of RINs obligations that most past "hardship" waivers had erased. It also would rectify EPA's past refusals to "add back" those exempted volumes to blending mandates. Thus the press release offered scant relief to AD or other biofuels producers whose ability to sell RINs might otherwise be enhanced.

In addition, while the press release attempted to claim government "enforcement discretion," its use of "unilaterally" conceded that the Renewable Fuels Association or other citizen groups still could sue EPA for across-the-board revocations under the Tenth Circuit's ruling. Moreover, if formally adopted, EPA's "press release resolution" risked the agency being held in contempt by that Circuit for non-compliance with the court's mandate.

Pursue Backstop Fixes?

Oil-state senators, still pushing EPA, have threatened legislation to reverse the Tenth Circuit or sharply reduce current blending obligations. In mid-April, five Republican governors demanded that EPA indefinitely waive blending obligations for all refineries — small and large — until normal gasoline demand is restored. EPA has suggested revisiting agency proposals to "reduce RINs volatility" or combat alleged "market manipulation" by imposing caps on RINs prices or the volume of RINs a company may hold, though it abandoned these proposals less than a year ago (www.biocycle.net/2019/07/10/state-play-renewable-fuels-market).

On May 20, in an apparent bid to revive past waiver applications so as to create the "extension continuity" required by the Tenth Circuit, EPA Administrator Wheeler indicated that "EPA will reconsider prior-year applications from refineries whose previous waiver applications were ...wrongly denied" (news.bloomberglaw.com/environment-and-energy/epa-weighing-help-for-small-refineries-amid-fuel-demand-drop). While this most recent trial balloon seemed to contemplate waivers "found by a court" to have been wrongly denied by EPA but not pursued by those refineries, it could cover many other instances.

In a national health crisis with Congress once again gridlocked, such proposals amount to press notices for constituent consumption looking towards the November elections. If meaningfully pursued, they would have to address inconvenient facts — for example the need to explain or explain away the following:

• RFS statutes' intent that high RINs prices appropriately should drive refiners to sidestep RINs purchases by acquiring their own biofuels capacity.

• Past EPA findings that the RFS minimally impacts refineries, who pass most RINs costs to their customers.

• Why refiners' business interruption insurance or force majeure contract clauses do not protect them in pandemic situations that involve genuine unmitigable hardship.

• Why blending obligations based on percentages of fuel sold can't easily self-adjust (or be adjusted) to decreased gasoline demand.

• More awkwardly, why refineries that not only benefited from massive 2017 tax cuts -- but recently received multi-billion-dollar CARES Act windfalls allowing them to write off more interest on their debt, and claim this year all their past "book" Net Operating Losses back to 2015 -- would be "existentially endangered" without RFS waivers.

Nevertheless, the saga goes on.

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A version of this article previously appeared in *BioCycle Connect* (May 26, 2020):

- www.biocycle.net/resources/biocycle-connect
- www.biocycle.net/ad-update-rins-hardship-waivers