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RINs "Hardship Waivers" Get Day In (Supreme) Court

A hot button topic for AD projects may finally be resolved after the Supreme Court hears oral arguments April 27.

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BioCycle's February 1, 2021 update on small refinery "economic hardship" exemptions from the Renewable Fuel Standard (RFS) traced the hairpin path to where "hardship waivers" then stood. It ended with the Supreme Court's surprise grant of review (in *HollyFrontierCheyenne Refining et al v. RFA et al*) of Tenth Circuit rulings that would, if final, invalidate any "extensions" of waivers unless an underlying exemption has been continuously maintained. The *BioCycle* update concluded that "with some 60 petitions still pending, the Biden Administration is positioned to avert" more waivers, and "an early signal may come when the Biden Department of Justice (DoJ) files its Supreme Court brief on behalf of the new EPA. Many expect it will concede error and decline to defend the [flood of Trump-era] waivers."

Three weeks later the Biden EPA did concede error, though not the way observers expected. But it also deferred decisions on pending waivers until the Supreme Court decides *HollyFrontier*. Seeking to balance pandemic impacts on both renewable fuel producers and blue collar refinery workers, it finalized a Trump proposal extending refiners' RFS compliance dates.

Meanwhile the avalanche of small refiner waiver requests halted, with one in February and none in March. The Ninth Circuit ordered EPA promptly to justify a 2018-year waiver for Kern Oil "regardless of what the Supreme Court decides." The Biden White House was predictably deluged by competing pleas from oil and agricultural interests, with the Renewable Fuels Association (RFA) noting that even if RINs costs might squeeze some small refineries, they "have several options for complying with biofuel quotas, including tapping their [record-large] surplus carryover credits."

This update reviews key developments, including the legal maneuvering in some dozen briefs filed in the run-up to Supreme Court oral argument on April 27.

SoCalGas fueling station in California that dispenses RNG. Photo courtesy of SoCalGas

EPA Changes Course

The Trump Administration initially defended in the Tenth Circuit its grant of three broad "hardship" waivers. Then, caught between oil and farm constituents, it chose silence and declined to join those refineries' unsuccessful requests for rehearing. It also declined to join the refineries' requests last summer for Supreme Court review. These actions made it virtually impossible for EPA to switch gears and support broad waivers before the Court. Still, in a post-election case where EPA was no longer the lead appellee, one question was whether the new Administration might not file a Supreme Court brief or might make a pro forma filing, leaving defense of "narrow waivers" to RFA. Such actions might have signaled to the Court the government's belief that the Tenth Circuit results were questionable.

The Biden team did not wait till its March 21 Supreme Court brief. In a February 22 announcement EPA endorsed "narrow waivers" across-the-board. It noted the "surge in small refinery petitions granted [over the] past four years," e.g., that 2017 compliance year exemptions were "more than quadruple the number issued for the 2015 compliance year," increasing non-retired RINs from 290 million (2015) to over 1.8 billion (2017). Its announcement stated such results undercut the RFS' intent to "transition" small refineries to 100% compliance by progressively reducing waivers. It agreed waiver applicants must show both "an existing exemption" to be "extended" and "hardship caused [solely] by RFS compliance," not general business conditions. It indicated such "hardship" should be rare since refineries "pass through most or all of their RINs purchase costs to their customers," that "the exemption was intended to operate as a temporary measure," and that "the plain meaning of 'extension' is continuing an exemption already in existence."

This announcement went far beyond then Administrator Wheeler's pre-election denial of 54 retroactive "gap-filling" waiver requests (which merely disputed the existence of "hardship" during past RFS years when petitioning refineries already had complied). It also framed the numerous Supreme Court briefs.

The Briefs

HollyFrontier insisted "broad" hardship waivers are permissible because the RFS authorizes small refineries to seek an "extension of an exemption *at any time*" and this provision is not "temporally limited." It also suggested it could "re-acquire" extension status though its previous gap-filling petitions, indirectly challenging the Wheeler denials.

The Biden DoJ replied that only "narrow waivers" are permissible. It noted RFS' "sweeping intent" to force blending of increased volumes of renewable fuels, including through progressively reduced waivers. Nevertheless, it rested mainly on close analysis of RFS provisions. It explained that refineries' ability to seek waivers "at any time" did not mean such requests must be *granted* at any time. It conceded HollyFrontier had "some support" in post-RFS Congressional statements that "hardship" was to be liberally remedied, but countered with statutory contextualism meant to appeal to conservative Justices. It concluded that "more than a decade into the RFS program," it far better implements the statute "to require continued compliance by small refineries than allow a resumption of a 'temporary

exemption' that lapsed years ago" and would "shift the compliance obligation to other (non-exempt) refineries or leave exempted volumes of renewable fuels out of the RFS program entirely."

RFA's brief (with the American Coalition for Ethanol, National Corn Growers, and National Farmers Union) attacked head-on HollyFrontier's argument that "may petition at any time" means "may *receive an exemption grant* at any time," noting this would make adjacent references to "grant" meaningless and make RFS waiver provisions circular.

RFA also pointed out that:

> "At any time" does not address *who is eligible* to file extension requests.
>
> That clause has independent content because it allows small refineries *who are eligible,* to petition before or after their annual compliance obligations are set.
>
> Nothing in the RFS suggests EPA can create a "free-standing permanent exemption" for small refiners who lack current extensions.
>
> Despite refiners' "imminent bankruptcy" claims, all but about 7 of 60 small refiners originally exempted more than a decade ago have since complied, even when RINs prices were high.
>
> EPA already is authorized to adjust industry-wide compliance obligations downward, nationally or regionally, in event of general "economic harm."

Indeed, RFA added, that HollyFrontier's Cheyenne facility just announced it was converting to renewable fuel production did not show small refiners were being bankrupted by RINs obligations. Instead this showed the RFS was working as designed — to enhance U.S. energy security by encouraging production of domestic renewable fuels.

Amicus ("friend of the court") briefs for National Biodiesel Board, Advanced Biofuels Association, Growth Energy, RNG producers, and Iowa (plus seven other "ag states") added examples showing the counterproductive effects of a broad "stand-alone" small refiner exemption. They noted the unfairness of "secret" EPA exemption grants cloaked by confidential business information claims. They pointed out that small refiners' RINs costs average less than one percent of their annual sales. Moreover, they said, reversing the Tenth Circuit on the only question presented — whether valid "extensions" may be non-continuous — would not change that court's result, which also invalidated those waivers on two independent "arbitrary and capricious" grounds: that EPA granted the waivers based on general (not RINs-specific) conditions, and never explained why its repeated "pass-through" findings did not continue to apply. Even if the Court held freestanding exemptions valid, they continued, the HollyFrontier waivers would remain struck down.

Amicus briefs for the American Fuel & Petrochemical Mfrs., Countrymark Refining, the Small Refineries Coalition, and Wyoming (plus six other "oil" states) generally echoed HollyFrontier, adding predictions of

catastrophe if EPA cannot grant exemptions whenever “hardship” is shown. They also asserted (e.g.) that Congress meant to preserve all small refineries whether or not they comply, that without “freestanding exemptions” they cannot respond to shifting economic conditions, and that RFS blending mandates *by their very existence* impose “disproportionate hardship” on small refiners — a stance that would seem to entitle them to automatic permanent exemption as a class.

Bottom Lines

The Court could affirm or reverse the Tenth Circuit, in whole or part, before its current term ends in June. It could dismiss the case. It might issue irreconcilable opinions, or go sideways on grounds like “standing” or “*Chevron* deference“ which do not provide further RFS guidance.

Still, two additional items seem worth noting. In October 2019, RFA separately challenged in the D.C. Circuit the Trump EPA’s blanket grant of some 30 small refiner exemptions. That case remains pending as a potential wild card favoring anaerobic digestion projects, whether or not “the Supremes” allow “free-standing” non-continuous waivers — such waivers still may be “arbitrary” on “pattern and practice” or case-specific grounds. That seems particularly true where the Trump “blanket-grant” memorandum challenged by RFA — EPA’s only public waiver-decision document to date — relied on all the grounds the Tenth Circuit discretely invalidated as arbitrary.

In February, a bipartisan Congressional group reintroduced its RFS Integrity Act (H.R. 1113), parts of which passed the House in 2020. That bill, if adopted, would require small refinery exemption petitions to be filed by each June preceding the November announced compliance year, enabling EPA to offset any exemption-related RINs reductions by increased blending mandates. It also would require public disclosure of data supporting extension requests. It would seem to imply either that noncontinuous “extensions” are not allowed, or that any refinery volumes exempted from RINs by extensions must be added back into annual blending mandates to enhance the production of renewable fuel.

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