

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

SINCLAIR WYOMING REFINING  
COMPANY, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

No. 21-9528

**MOTION FOR VACATUR AND VOLUNTARY REMAND**

Petitioners Sinclair Wyoming Refining Company and Sinclair Casper Refining Company (jointly, “Sinclair”) challenge EPA’s January 2021 grant of Sinclair’s three administrative petitions for extensions of the small refinery exemption from the Renewable Fuel Standard (“RFS”) program (the “Sinclair Action”).<sup>1</sup> In the Sinclair Action, EPA did not analyze determinative legal questions regarding whether Sinclair’s refineries qualified to receive extensions of the small refinery exemption under controlling case law established by this Court in *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (“*RFA*”),

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<sup>1</sup> The Sinclair Action is attachment A to Exhibit 1, the Declaration of Joseph Goffman. EPA’s then-Administrator Andrew Wheeler signed the Sinclair Action on January 14, 2021, but EPA did not issue the document until January 19, 2021. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 9.

*cert. granted sub nom., HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, No. 20-472 (S. Ct.) and there is substantial uncertainty whether, if EPA performed such an analysis, it could grant the petitions submitted by Sinclair. Accordingly, EPA respectfully files this motion to vacate the Sinclair Action and to remand to EPA for further administrative proceedings. *See* 10th Cir. Rule 27.3(A)(1)(c). In the alternative, EPA moves for remand without vacatur. Counsel for Sinclair has advised undersigned counsel for EPA that Sinclair reserves the right to file a response to this motion for remand, either with or without vacatur.

Pursuant to 10th Cir. Rule 27.3(A)(3)(a), EPA has good cause to file this motion more than 14 days after the petition for review was filed on March 15, 2021. The additional time was required by EPA to develop its position and ensure that the relevant EPA and DOJ personnel had sufficient time to review this motion. Additional time was also needed for EPA to coordinate its position in this case with its position in *HollyFrontier*. EPA is unaware of any prejudice to a party resulting from filing this motion today, rather than within 14 days after the petition was filed, as the Court has not yet entered a schedule for briefing or oral argument.

## **BACKGROUND**

### **I. PRIOR AND RELATED APPEALS**

As described in more detail below, *Renewable Fuels Ass'n v. EPA*, No. 21-9518, also seeks judicial review of the Sinclair Action.

## II. STATUTORY AND REGULATORY BACKGROUND

### A. The Renewable Fuel Standard Program

In 2005 and again in 2007, Congress amended the Clean Air Act (the “Act”) to establish the RFS program, now codified at 42 U.S.C. § 7545(o). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007, Pub. L. No. 110–140, 121 Stat. 1492 (2007). Congress specified increasing annual “applicable volumes” of four categories of renewable fuel to be used in the transportation sector—total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, 42 U.S.C. § 7545(o)(2)(B)(i)(I)-(IV). The Act specifies applicable volumes for renewable fuel, advanced biofuel, and cellulosic biofuel for each year through 2022, and for biomass-based diesel through 2012; EPA must determine the applicable volumes for subsequent years. *Id.* § 7545(o)(2)(B)(i), (ii); *see also id.* § 7545(o)(2)(B)(i)(IV).

Congress directed EPA to establish a compliance program and annual percentage standards to ensure that the applicable volumes are used each year. *Id.* §§ 7545(o)(2)(A)(i), (iii), 7545(o)(3)(B)(i). To calculate these standards, EPA divides the applicable volume for each type of renewable fuel established in the Act or determined by EPA, *id.* § 7545(o)(2)(B), (7)(A), (7)(D)-(F), by the Energy Information Administration’s estimate of the national volume of transportation fuel

that will be sold or introduced into commerce in that year. *Id.* § 7545(o)(3)(A).

Congress explicitly prohibited EPA from applying different percentage standards to different refiners based on geographic location or other factors. *Id.* § 7545(o)(3)(B)(ii)(III).

Congress placed the obligation to satisfy the applicable volumes on “refineries, blenders, and importers, as appropriate.” *Id.* § 7545(o)(3)(B)(ii)(I). By regulation, EPA determined that refiners and importers of gasoline and diesel fuel must fulfill the requirements of the RFS program as “obligated parties”. 72 Fed. Reg. 23,900 (May 1, 2007); 75 Fed. Reg. 14,670 (Mar. 26, 2010). These obligated parties apply the percentage standards to their own annual production or importation of gasoline and diesel fuel to calculate their individual annual renewable volume obligations for each type of renewable fuel. So, for example, if EPA set the percentage standard for total renewable fuel at 10 percent, an obligated party that produced 1,000,000 gallons of gasoline in one year would need to ensure that 100,000 gallons of renewable fuel was introduced into the market in that year. However, obligated parties need not actually blend renewable fuel themselves. They may alternatively purchase credits, known as “Renewable Identification Numbers,” or “RINs,” that reflect a quantity of renewable fuel that has been blended into conventional fuel by another entity. *See* 40 C.F.R. §§ 80.1425-29.

## **B. Temporary Small Refinery Exemptions**

Congress created a temporary exemption for obligated parties that qualify as “small refineries,” which may be extended in specified circumstances. 42 U.S.C. § 7545(o)(9). First, Congress granted all small refineries a blanket exemption from the requirements of the RFS program until 2011. *Id.* § 7545(o)(9)(A)(i). All small refineries thus had from 2006 through 2010 to gradually develop a compliance strategy to meet their RFS obligations.

Second, Congress directed that the Secretary of the United States Department of Energy (“DOE”) conduct a study “to determine whether compliance with the [RFS] requirements ... would impose a disproportionate economic hardship on small refineries.” *Id.* § 7545(o)(9)(A)(ii)(I). For any small refinery that DOE determined “would be subject to a disproportionate economic hardship if required to comply with” its RFS obligations, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.” *Id.* § 7545(o)(9)(A)(ii)(II).

Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.” *Id.* § 7545(o)(9)(B)(i). Congress directed that “[i]n evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study

under subparagraph (A)(ii) and other economic factors.” *Id.* § 7545(o)(9)(B)(ii).

Therefore, EPA requests a recommendation from DOE to inform its evaluation of any small refinery’s petition for an extension of the small refinery exemption. *See generally Sinclair v. EPA*, 887 F.3d 986, 993-94 (10<sup>th</sup> Cir. 2017).

In formulating its recommendation, DOE uses a two-part scoring matrix. One part assesses the disproportionate structural and economic impacts of the RFS program on the small refinery and the other scores the refinery’s “viability” metrics, including whether the cost of compliance would reduce the profitability of the firm enough to impair future efficiency improvements and the likelihood that the costs of RFS compliance could lead to shutdown of the refinery. *Id.*; *see also RFA*, 948 F.3d at 1223.

Although EPA takes DOE’s recommendations into consideration, EPA conducts its own analysis and makes its own independent decision regarding each small refinery’s qualifications to receive an extension of the small refinery exemption and whether to grant or deny requests to extend exemptions. *See Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159, 1166 (10<sup>th</sup> Cir. 2017).

### III. FACTUAL AND PROCEDURAL BACKGROUND

#### A. Sinclair's Petitions for Small Refinery Exemptions for 2018 and 2019 and EPA's Response

On December 21, 2018, Sinclair submitted a petition to EPA for an extension of the small refinery exemption for the Sinclair Wyoming Refinery in Rawlins, Wyoming, for the 2018 RFS compliance year. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 7. On March 29, 2019, Sinclair retired the RINs necessary to satisfy its 2018 RFS obligations before the applicable March 31, 2019, compliance deadline. *Id.* On August 9, 2019, EPA issued a memorandum that resolved most of the 2018 petitions and which denied the 2018 Sinclair Wyoming Refinery petition. Following that decision, Sinclair called EPA's attention to information that Sinclair asserted EPA and DOE had not considered; EPA asked DOE to re-score the 2018 Sinclair Wyoming Refinery petition taking that information into account, which DOE did. EPA granted the petition for the Sinclair Wyoming Refinery for 2018 in the Sinclair Action. *Id.* at ¶ 9.

On October 12, 2020, Sinclair submitted two petitions for the 2019 compliance year: one for the Sinclair Wyoming Refinery and one for the Sinclair Casper Refinery in Casper, Wyoming. *Id.* at ¶ 8. These petitions were submitted despite the fact that Sinclair had already retired the RINs needed to satisfy its 2019 RFS obligations for both of these refineries in advance of the applicable deadline.

*Id.*<sup>2</sup> After receiving DOE’s recommendations, EPA granted both petitions for 2019 in the Sinclair Action. *Id.* at ¶ 9.

## **B. The Present Litigation**

Without knowing the identities of the small refineries that had received extensions of the small refinery exemption in January 2021, the Renewable Fuels Association initially challenged the Sinclair Action in the D.C. Circuit, and also filed an emergency motion for stay pending appeal and a request for administrative stay pending consideration of the emergency motion. *Renewable Fuels Ass’n v. EPA*, No. 21-1032 (D.C. Cir.) (filed January 19, 2021). The D.C. Circuit granted an administrative stay on January 21. After Sinclair intervened in the D.C. Circuit and made clear that Sinclair’s two small refineries had received the challenged exemptions, the Renewable Fuels Association filed a new petition in this Court along with a new emergency motion for stay pending appeal and a request for this Court to enter an administrative stay pending consideration of the emergency motion, captioned *Renewable Fuels Ass’n v. EPA*, No. 21-9518. *See* 42 U.S.C. § 7607(b)(1) (challenges to actions “locally or regionally applicable may be filed

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<sup>2</sup> At the time Sinclair retired these RINs, the compliance date for small refineries to demonstrate compliance with their 2019 RFS obligations was March 31, 2020. Given the uncertainty caused by pending small refinery exemption petitions, EPA revised the 2019 RFS compliance deadline to November 30, 2021. 86 Fed. Reg. 17,073 (Apr. 1, 2021).



only in the United States Court of Appeals for the appropriate circuit”). This Court entered a temporary stay of the Sinclair Action on February 10, and on February 20 the D.C. Circuit dissolved its temporary stay and placed No. 21-1032 in abeyance. The parties briefed the emergency motion for stay pending appeal in this Court and on March 5, this Court denied that motion, vacated the temporary stay and placed No. 21-9518 in abeyance.<sup>3</sup>

On March 15, 2021, Sinclair filed this new petition for review of the Sinclair Action, No. 21-9528. Sinclair lodged the Sinclair Action under seal, along with a redacted public version. On March 29, Sinclair filed a supplemental motion to seal along with an amended public version of the Sinclair Action with fewer redactions.

### **ARGUMENT**

In issuing the Sinclair Action, EPA failed to adequately address determinative legal questions regarding whether the two Sinclair small refineries qualified for extensions of the small refinery exemption under controlling case law established by this Court. *See* Ex. 1, Decl. of Joseph Goffman at ¶¶ 13-14. In *RFA*, this Court vacated and remanded three EPA decisions granting petitions for extensions of the small refinery exemption for the 2016 and 2017 RFS compliance

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<sup>3</sup> Because this case and No. 21-9518 seek review of the same agency action but have not been consolidated, once the Court rules on EPA’s motion for remand and vacatur, EPA intends to confer with the parties and file a motion for appropriate relief in No. 21-9518.

years. The Court held that a small refinery’s petition can be granted only if the refinery demonstrates disproportionate economic hardship “caused by compliance with statutory renewable fuel obligations.” *RFA*, 948 F.3d at 1253. The Court also held that EPA had acted arbitrarily and capriciously by deviating, without acknowledgment or a stated reason, from its position that refineries generally do not incur disproportionate economic hardship from purchasing RINs on the open market because the refineries “pass through most or all of their RIN purchase costs” to their customers. *Id.* at 1256, 1257.<sup>4</sup>

In issuing the Sinclair Action, EPA did not meaningfully analyze either of these factors. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 13. EPA provided even less explanation in the 2021 Sinclair Action than it did when issuing the decisions reviewed by this Court in *RFA* as to how the refineries were suffering disproportionate economic hardship “caused by compliance with statutory renewable fuel obligations.” *RFA*, 948 F.3d at 1253-54. With this omission, EPA

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<sup>4</sup> This Court in *RFA* also held that a small refinery must demonstrate an existing and continuing exemption to qualify for an extension under § 7545(o)(9)(B). *RFA*, 948 F.3d at 1250. In the Sinclair Action, EPA acknowledged that neither of the Sinclair refineries have a continuous record of exemptions because their petitions for the 2013 RFS compliance year were denied, and cited “equitable reasons” to treat the refineries as if they had complied with the controlling law in this Circuit. Sinclair Action at 3 (attachment A to Ex. 1, Decl. of Joseph Goffman). This aspect of the Sinclair Action is not addressed here because it is the issue on which the Supreme Court granted *certiorari*.

thus repeated its mistake of “fail[ing] to consider an important aspect of the problem.” *Id.* at 1257 (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As such, the Sinclair Action should be vacated and remanded to EPA.

## **I. STANDARD FOR GRANTING VACATUR AND A VOLUNTARY REMAND**

An administrative agency has the inherent authority to reconsider its decisions, because the “power to decide in the first instance carries with it the power to reconsider.” *Rutherford v. United States*, 806 F.2d 1455, 1460 (10th Cir. 1986) (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)); *see also Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (noting that courts “have recognized an implied authority ... to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration”); *Belville Min. Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993) (noting “the general rule ... that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision”); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001) (listing cases that “have sustained an agency’s inherent power to correct errors in an adjudication”).

An agency’s authority to reconsider includes the ability to seek voluntary remand if the agency decision is already the subject of a judicial challenge.

Although an agency need not confess error to seek remand, the agency may request a remand “because it believes that its original decision was incorrect on the merits and it wishes to change the result.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001); *see also Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) (“when an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons”).

While this Court has not imposed any restrictions on an agency’s ability to reconsider, most courts have adopted the general rule that reconsideration must occur “within a reasonable time after the first decision,” *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002).

In determining whether to remand with or without vacatur, courts consider “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation and internal quotation marks omitted); *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (same).

## II. THE COURT SHOULD GRANT EPA'S MOTION FOR VACATUR AND VOLUNTARY REMAND

EPA acknowledges that the absence of analysis regarding whether the Sinclair Action comports with the *RFA* decision, which is controlling law in this Circuit, is an error warranting remand with vacatur. *See* Ex. 1, Decl. of Joseph Goffman at ¶¶ 12-14. There is significant uncertainty whether the Sinclair Action can be sustained if an appropriate analysis is undertaken. *Id.* at ¶ 15. The Sinclair Action provides no explanation regarding whether any disproportionate economic hardship was caused by RFS compliance (or how such a conclusion would be consistent with EPA's consistent position that RFS costs of compliance do not fall on refineries but are recovered in the cost of goods sold). *Id.* at ¶ 13; Sinclair Action at 3 (attachment A to Ex. 1, Decl. of Joseph Goffman). The Sinclair Action therefore does not comply with controlling case law.

EPA's then-Administrator Andrew Wheeler stated in the Sinclair Action only that "DOE's recommendations recognize [REDACTED] on the SWR in 2018, and [REDACTED] on both Sinclair refineries in 2019, and I conclude that these represent [disproportionate economic hardship] meriting relief." Sinclair Action at 2-3 (attachment A to Ex. 1, Decl. of Joseph Goffman). EPA now confesses error in its adoption of DOE's recommendation without meaningfully evaluating those recommendations. EPA did not analyze

whether the refineries' disproportionate economic hardship was caused by compliance with the refineries' RFS obligations. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 13. Furthermore, EPA lacks the confidence to say that, if it undertook the careful examination of Sinclair's petitions called for by this Court's decision in *RFA*, it would conclude that any hardship experienced by the Sinclair refineries was caused by RFS compliance. *Id.* at ¶ 15. The information before EPA at the time it issued the Sinclair Action indicates that DOE's recommendations are "based at least in part on hardships not caused by RFS compliance," placing the Sinclair Action "outside the scope of the EPA's statutory authority." *RFA*, 948 F.3d at 1254.<sup>5</sup> In addition, EPA acknowledges that it

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<sup>5</sup> Specifically, DOE stated the following regarding its scoring for the Sinclair refineries in 2019 on one of the metrics that analyzes the impact of RFS compliance costs:

[REDACTED]

*See* Ex. 1, Decl. of Joseph Goffman, attachment C (DOE Application of the Small Refinery Scoring Matrix for the Sinclair Casper Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard) at 10; *id.* at attachment D (DOE Application of the Small Refinery Scoring Matrix for the Sinclair Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard) at 10. EPA believes that demand reductions caused by COVID-19 (that did not start in the United States until March 2020) should not be imputed to RFS compliance costs incurred by the Sinclair refineries for the previous year. *Id.*, Decl. of Joseph Goffman at ¶ 15.

completely failed to evaluate the Sinclair petitions in light of EPA's position on RIN cost pass-through, as expressly required by this Court's holding in *RFA*. EPA in no way considered whether the costs of Sinclair's RFS compliance were passed on in the price of its product, thereby offsetting any costs of compliance to the small refineries. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 13. Because EPA now has reason to believe "that its original decision was incorrect on the merits and it wishes to change the result," *SKF USA*, 254 F.3d at 1028, this matter should be remanded to the agency for further administrative proceedings.

This remand motion comes 13 weeks after EPA signed the Sinclair Action. The agency has therefore acted within a reasonable time after its initial decision, *i.e.*, within weeks, not years. *Macktal*, 286 F.3d at 826; *Belville Min. Co.*, 999 F.2d at 1000. The Court should therefore remand the Sinclair Action for EPA "to take further action consistent with correct legal standards." *Mineta*, 375 F.3d at 416.

The Court should also vacate the Sinclair Action. In *RFA*, this Court vacated "EPA orders granting the exemption extension petitions" and remanded "for further proceedings consistent with this opinion." 948 F.3d at 1258. EPA requests the Court to take the same action in this case. The "seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" is clear. *Allied-Signal*, 988 F.2d at 150-51. As explained above, the Sinclair Action granted exemption extensions that EPA now believes are "outside

the scope of the EPA’s statutory authority.” *RFA*, 948 F.3d at 1254. Because the Sinclair Action is devoid of support for its legal authority and compliance with the controlling case law—*i.e.*, EPA’s independent evaluation of whether the Sinclair small refineries demonstrated disproportionate economic hardship caused by compliance with their RFS obligations and application of the RIN cost pass-through position as required by this Court’s *RFA* holding—EPA requests that the decisions be vacated. Vacatur is appropriate because EPA is now uncertain that the Sinclair Action can be sustained once the questions regarding whether Sinclair’s refineries qualified to receive extensions of the small refinery exemption under the controlling case law are analyzed. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 15.

The requested vacatur will not have disruptive consequences. *Allied-Signal*, 988 F.2d at 150-51. To the contrary, remanding EPA’s decision with vacatur would preserve the status quo ante by ensuring that the RINs that Sinclair already retired to demonstrate its small refineries’ compliance with their 2018 and 2019 compliance obligations remain retired while EPA reconsiders Sinclair’s exemption petitions. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 16. Vacatur would thus preserve the equity between Sinclair and other small refineries that complied with



their 2019 obligations by retiring RINs while their petitions for extension of the small refinery exemption for 2019 were still pending.<sup>6</sup>

Although some courts do not consider assertions of detrimental reliance, others have held that “detrimental reliance on the previous [adjudication]” might justify a court’s refusal to grant a voluntary remand. *Compare Belville Mining Co.*, 999 F.2d at 999 (declining to consider a claim of detrimental reliance claim where the initial adjudication was legally erroneous) *with Mineta*, 375 F.3d at 418 (suggesting that detrimental reliance might outweigh an agency’s inherent power to reconsider). Here, even if detrimental reliance were a relevant consideration, Sinclair retired RINs sufficient to comply with its 2018 and 2019 RFS obligations *before* its petitions for an extension of the small refinery exemption were granted in the Sinclair Action.

## CONCLUSION

For the foregoing reasons, the Court should grant this motion, vacate the Sinclair Action, and remand to EPA for further administrative proceedings consistent with this Court’s ruling in *RFA*.

Dated: April 30, 2021

Respectfully submitted,

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<sup>6</sup> The Sinclair refineries are two of 32 refineries that submitted petitions for extensions of the small refinery exemption from their 2019 RFS requirements, but only Sinclair’s petitions were decided. *See* Ex. 1, Decl. of Joseph Goffman at ¶ 10.

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*/s/ Daniel R. Dertke*

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender (latest protection update April 30, 2021), and according to the program are free of viruses; and

(4) the pleading complies with applicable type-volume limits of Fed. R. App. P. 27(d)(2)(A), Fed. R. App. P. 32(a)(5), and Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and contains 3856 words according to the count of Microsoft Word.

/s/ Daniel R. Dertke  
DANIEL R. DERTKE

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2021, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Daniel R. Dertke  
DANIEL R. DERTKE

# Exhibit 1

Decl. of Joseph Goffman

**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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SINCLAIR WYOMING REFINING COMPANY	)	
and SINCLAIR CASPER REFINING COMPANY	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 21-9528
U.S. ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
Respondent.	)	
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**DECLARATION OF JOSEPH GOFFMAN**

1. I, JOSEPH GOFFMAN, pursuant to 28 U.S.C. § 1746, declare, under penalty of perjury, that the following statements are true and correct based upon my personal knowledge or upon information provided to me by persons under my supervision.

2. I am Principal Deputy Assistant Administrator and Acting Assistant Administrator for the United States Environmental Protection Agency (“EPA” or the “Agency”) Office of Air and Radiation (“OAR”), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

3. OAR is the EPA headquarters-based unit with primary responsibility for administration of the Clean Air Act (“CAA”). As the Principal Deputy Assistant

Administrator and Acting Assistant Administrator for OAR, I serve as the principal advisor to the Administrator of EPA on matters pertaining to air and radiation programs, and I am responsible for managing these programs. These duties include overseeing program policy development and evaluation; development of emissions standards; program policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

4. This declaration is filed in support of EPA’s motion for voluntary vacatur and remand in *Sinclair Refining et al. v. U.S. EPA*, No. 21-9528 (10th Cir.). My Office develops all regulations, policy, and guidance associated with Clean Air Act (“CAA”) Section 7545(*o*), 42 U.S.C. § 7545(*o*). As part of my duties as Principal Deputy Assistant and Acting Assistant Administrator of OAR, I oversee the development and implementation of these Section 7545(*o*) regulations, policy, and guidance. In this capacity, I have been responsible for overseeing the implementation of the small refinery exemptions, 42 U.S.C. § 7545(*o*)(9), and the action at issue in the above-captioned litigation, the “Decision on the Small Refinery Exemption Petitions from the Sinclair Wyoming Refinery for 2018 and 2019 and the Sinclair Casper Refinery for 2019,” (Jan. 14, 2021) (“Sinclair Action”).

5. In 2005 and 2007, Congress amended the CAA to establish the Renewable Fuel Standard (RFS) program. CAA section 211(*o*). The CAA prescribes applicable volumes for renewable fuel, advanced biofuel, and cellulosic biofuel for each year through 2022, and for biomass-based diesel through 2012. Obligated

parties, who include refiners and importers of gasoline and diesel fuel, must include a specified percentage of renewable fuel, advanced biofuel, and cellulosic biofuel in the transportation fuel they introduce into commerce. Obligated parties such as the Sinclair refineries achieve compliance with the RFS by blending renewable fuels into transportation fuel or by obtaining credits (called “Renewable Identification Numbers”, or RINs) to meet EPA-specified Renewable Volume Obligations each year. RINs are the “currency” of the RFS program.

6. Congress created an exemption from the RFS program for certain obligated parties that qualify as “small refineries,” 42 U.S.C. § 7545(o)(9), which by definition have an annual average aggregate throughput not exceeding 75,000 barrels of crude oil per day “for a calendar year,” *id.* § 7545(o)(1)(K). First, Congress granted all small refineries a temporary blanket exemption from the requirements of the RFS program until 2011. *Id.* § 7545(o)(9)(A)(i). Second, Congress directed the Department of Energy (DOE) to conduct a study “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.” *Id.* § 7545(o)(9)(A)(ii)(I). For any small refinery that DOE determined would be subject to disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.” *Id.* § 7545(o)(9)(A)(ii)(II). Third, Congress provided that a small refinery “may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) for the reason of



disproportionate economic hardship.” *Id.* § 7545(o)(9)(B)(i); 40 C.F.R. § 80.1441(e)(2) (“A refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.”). In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.” 42 U.S.C. § 7545(o)(9)(B)(ii).

7. On December 21, 2018, Sinclair submitted a petition requesting an extension of the small refinery exemption for its Sinclair Wyoming Refinery for the 2018 RFS compliance year. On March 29, 2019, Sinclair retired the RINs needed to demonstrate compliance with its 2018 RFS obligations at this refinery. On August 9, 2019, EPA issued a memorandum deciding all the 2018 small refinery exemption extension petitions that the Agency had received at that time, including the Sinclair Wyoming petition (“August 2019 memorandum”). EPA’s decision on Sinclair Wyoming Refinery’s 2018 petition was to deny it.

8. On March 29 and March 31, 2020, Sinclair retired the RINs needed to demonstrate compliance with its 2019 RFS obligations at the Sinclair Wyoming and Sinclair Casper Refineries. On October 12, 2020, Sinclair submitted small refinery exemption extension petitions for the 2019 compliance year for both of these refineries.

9. Then-Administrator Wheeler signed the Sinclair Action on January 14, 2021, and issued the document on January 19, 2021, granting Sinclair Wyoming

Refining Company's petition for an extension of the small refinery exemption for RFS compliance years 2018 and 2019 (thereby reversing the decision for 2018 made in August 2019 based on "information that EPA and DOE had not considered in their original evaluations") and also granting Sinclair Casper Refining Company's petitions for the 2019 RFS compliance year. Attachment A.

10. At the time the Sinclair Action was issued, there were 32 other petitions for extensions of the small refinery exemption pending before the Agency. Only Sinclair's petitions were decided at that time.

11. On January 24, 2020, the Tenth Circuit Court of Appeals issued its opinion in *Renewable Fuels Association, et al., v. EPA, et al.*, 948 F.3d 1206 (10th Cir. 2020) (*RFA*), by remanding to EPA three similar small refinery exemptions for the 2016 and 2017 RFS compliance years to three refineries in that jurisdiction: HollyFrontier Woods Cross Refining LLC in Utah, HollyFrontier Cheyenne Refining LLC in Wyoming, and Wynnewood Refining Company LLC in Oklahoma. The Tenth Circuit vacated the grants on two grounds. First, the court held that EPA could not grant "an extension of the exemption under subparagraph (A)," 42 U.S.C. 7545(o)(9)(B)(i), to any small refinery that was not currently exempt from RFS annual volume requirements; *i.e.*, a small refinery must have continuously received extensions of its exemption in prior years to be eligible to receive a small refinery exemption. 948 F.3d at 1250. This holding is currently under review by the Supreme Court. *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *cert. granted sub nom.*,

*HollyFrontier Cheyenne Refining Co. v. Renewable Fuels Ass'n*, No. 20-472 (S. Ct.). Second, the court held that EPA had improperly granted the petitions for extensions of the small refinery exemption under Section 7545(o)(9)(B)(i) based on disproportionate economic hardship for two reasons: (a) in these cases, the refineries' hardship resulted from "something other than" required compliance with the RFS obligations, and (b) EPA failed to address its position that small refineries "pass through" most or all of their RFS compliance costs and therefore do not suffer economic hardship because of RFS compliance. 948 F.3d at 1253-57.

12. The two Sinclair refineries are located in Wyoming, where this Court's *RFA* decision is controlling case law.

13. In the Sinclair Action, then-Administrator Wheeler stated that DOE's recommendations demonstrated disproportionate economic harm that warranted granting the petitions. Attachment A at 2-3. However, EPA did not meaningfully analyze either Sinclair's petitions and supporting materials or DOE's recommendations. EPA did not analyze whether the refineries faced disproportionate economic hardship despite recovering the costs of RINs in the price of their products, nor did EPA analyze whether any economic hardship was itself attributable to compliance with RFS obligations.

14. Given that EPA failed to meaningfully analyze the legal questions regarding whether Sinclair's refineries qualified to receive extensions of the small

refinery exemption under the controlling case law, my Office intends to reconsider the Sinclair Action.

15. My Office is not certain that the Sinclair Action can be sustained once the legal questions regarding whether Sinclair's refineries are qualified to receive extensions of the small refinery exemption under the controlling case law are analyzed, particularly the requirements regarding the disproportionate economic hardship standard as articulated in *RFA*. For example, EPA disagrees with a conclusion made by DOE in its review of the Sinclair petitions that fuel demand reductions caused by COVID-19 (that did not start until March 2020 in the United States) can be imputed to RFS compliance costs incurred by the Sinclair refineries for the previous year. If, as EPA believes, Sinclair's claimed economic hardship was not caused by RFS compliance, the Sinclair Action was taken outside the scope of EPA's statutory authority.

16. Vacatur of the Sinclair Action will not negatively impact public health or the environment. Nor will vacatur disrupt implementation of the RFS program for 2018 and 2019—the years for which Sinclair has sought extension of the exemption from their compliance obligations—because those years have already passed and those gasoline and renewable volumes produced and consumed cannot be retroactively adjusted. Rather, vacatur would preserve the status quo by ensuring that the RINs that Sinclair already retired to demonstrate the Wyoming refineries'

compliance with their 2018 and 2019 compliance obligations remain retired while  
EPA reconsiders its decisions.

April 29, 2021



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JOSEPH GOFFMAN

# Decl. of Joseph Goffman

## Attachment A

### (Sinclair Action)



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

THE ADMINISTRATOR

### MEMORANDUM

**SUBJECT:** Decision on the Small Refinery Exemption Petitions from the Sinclair Wyoming Refinery for 2018 and 2019 and the Sinclair Casper Refinery for 2019

**FROM:** Andrew R. Wheeler  
Administrator

**TO:** The Sinclair Oil Corporation Small Refineries Located in Rawlins, Wyoming and Casper, Wyoming

Section 211(o)(9)(B) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard ("RFS") program "for the reason of disproportionate economic hardship" ("DEH"). The Act instructs EPA, in consultation with the Department of Energy ("DOE"), to consider the DOE Small Refinery Study<sup>1</sup> and "other economic factors" in evaluating small refinery exemption ("SRE") petitions. The statute does not define "disproportionate economic hardship," leaving for EPA's discretion how it implements this exemption provision.<sup>2</sup>

As part of EPA's process for evaluating SRE petitions, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from its RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately impact the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA considered that DEH exists only when a small refinery experiences both disproportionate impacts and viability impairment. In response to concerns that

<sup>1</sup> "Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

<sup>2</sup> *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015).

the two agencies' threshold for establishing DEH was too stringent, Congress clarified to DOE that DEH can exist if DOE finds that a small refinery is experiencing either disproportionate impacts or viability impairment. If so, Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in language included in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."<sup>3</sup> Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.<sup>4</sup>

On December 21, 2018, the Sinclair Oil Corporation ("Sinclair") submitted a petition to EPA for an SRE for its Sinclair Wyoming Refinery ("SWR") in Rawlins, Wyoming, for the 2018 RFS compliance year. On August 9, 2019, EPA issued a memorandum deciding all the 2018 SRE petitions that the Agency had received at that time, including the SWR petition ("August 9 Memo"), consistent with DOE's recommendation to EPA. Through this memo and based on DOE's recommendation, EPA denied Sinclair's 2018 petition for the SWR. Subsequent to the August 9 Memo, Sinclair called attention to information that EPA and DOE had not considered in their original evaluations. EPA requested that DOE reconsider and rescore the SWR petition in light of the additional information. The new information changed DOE's evaluation and scoring such that DOE has recommended [REDACTED] for the SWR for the 2018 compliance year. Accordingly, and consistent with the August 9 Memo and DOE's revised score for the SWR, EPA is taking a new action on SWR's 2018 SRE petition to grant the requested relief in full.

On October 12, 2020, Sinclair submitted two SRE petitions for the 2019 compliance year, one for the SWR and one for the Sinclair Casper Refinery ("SCR") in Casper, Wyoming. EPA transmitted Sinclair's 2019 SRE petitions to DOE on October 13, 2020. DOE has recommended [REDACTED] for the SWR and SCR for the 2019 RFS compliance year.

Based on DOE's recommendation of [REDACTED] for the SWR 2018 SRE petition, and consistent with the August 9 memo, I am today granting a full exemption for the SWR for 2018. Based on DOE's recommendations of [REDACTED] for both the SWR and SCR 2019 SRE petitions, and consistent with EPA's stated approach in the 2020 RFS Rule, I am today granting [REDACTED] exemptions for the SWR and SCR for 2019.<sup>5</sup> This decision is appropriate under the Act and is consistent with the case law recognizing EPA's independent authority in deciding whether to grant or deny SRE petitions.<sup>6</sup> DOE's recommendations recognize [REDACTED]

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<sup>3</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

<sup>4</sup> Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

<sup>5</sup> See 85 FR 7016 (February 6, 2020).

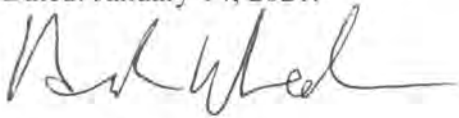
<sup>6</sup> *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); See also *Hermes Consol.* 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-83 (8th Cir. 2015).



██████████ on the SWR in 2018, and ██████████ on both Sinclair refineries in 2019, and I conclude that these represent DEH meriting relief.

In making this decision, EPA is bound by the decision of the U.S. Court of Appeals for the Tenth Circuit in *RFA et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA Decision*)<sup>7</sup>, which establishes that in order to be granted an exemption from its RFS obligations for the year in question, a small refinery such as SWR must have a continuous history of exemptions. *Id.* at 1245-46. Although SWR did not receive a small refinery exemption in 2013, this one-year lapse was the result of a negotiated settlement between Sinclair and EPA which included, in part, Sinclair choosing to withdraw its judicial challenge of EPA's denial of its SWR's 2013 petition and submitting a new SWR 2014 petition. At that time, Sinclair could not have anticipated the Tenth Circuit's *RFA Decision* that would interpret the statute to require a continuous exemption for eligibility for petitioning for SREs. Since Sinclair filed a SWR 2013 petition, successfully challenged EPA's denial of its new SWR 2014 petition and was subsequently granted relief for 2014, for equitable reasons, we believe SWR should be treated as effectively having a continuous history of exemptions from its RFS obligations.

Dated: January 14, 2021.



Andrew R. Wheeler  
Administrator

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<sup>7</sup> On January 8, 2021, the Supreme Court issued a writ of *certiorari* for appeal of this decision. *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, Case No. 20-472.

# Decl. of Joseph Goffman

## Attachment B

(DOE Application of the Small Refinery Scoring Matrix for the Sinclair Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard, 2018)

## DOE Application of the Small Refinery Scoring Matrix for the Sinclair Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard

### Background

Section 211(o)(9)(A)(ii) of the CAA required that DOE conduct a study assessing whether the Renewable Fuel Standard (RFS) would impose a “disproportionate economic hardship” on small refineries<sup>1</sup>. This study was required to determine whether the blanket exemption for small refineries as obligated parties under the RFS should be extended for two years after 2010, the year that the blanket exemption expired. EPA was required to grant the continued exemption to all small refineries that were determined by DOE to experience “disproportionate economic hardship” if they became obligated parties after 2010.

In order to comply with the CAA, DOE developed a methodology to determine whether specific refineries would experience “disproportionate economic hardship.” The methodology required business information for the small refineries. This was acquired through a survey of all small refineries. This survey was sent to the owners of 59 refineries. DOE received data for 25 refineries but only analyzed the data for 18 of these refineries<sup>2</sup>. After completing the *Small Refinery Exemption Study* it was provided by the Secretary of Energy to the EPA Administrator.

The CAA also requires that EPA consult with DOE concerning individual applications by small refineries for an exemption from RFS requirements.<sup>3</sup> In order to fulfill this requirement, DOE has applied the scoring matrix, developed for the Small Refinery Exemption Study, to refineries requesting an exemption. DOE employs information provided by EPA from the applicants’ request to see whether this refinery would have received an exemption based on the criteria used in the *Small Refinery Exemption Study*. This scoring matrix includes two general categories; a structural and economic metric and a viability metric that together are used to evaluate whether a refinery faced disproportionate economic hardship.

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<sup>1</sup> Small refineries are defined as those facilities with aggregate crude oil throughput that does not exceed 75,000 barrels per calendar day.

<sup>2</sup> Seven survey responses were not analyzed because the refineries for which the survey response was provided did not meet the CAA definition of a small refinery or because the survey response was incomplete.

<sup>3</sup> The CAA states “(B) Petitions based on disproportionate economic hardship; (i) Extension of exemption. A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.; (ii) Evaluation of petitions In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.; (iii) Deadline for action on petitions The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

### **Sinclair Rawlings, Wyoming Refinery**

EPA consulted with DOE to aid in their assessment of whether the Sinclair Rawlings Wyoming refinery should receive a RFS exemption for 2018. DOE is responding to EPA's request by providing values and an explanation for the scoring matrix for this refinery. This evaluation replaces the score provided to EPA in 2019. Sinclair provided additional information concerning volumes of fuel sales in other markets to clarify data provided in their initial petition. This new data was provided to EPA in October of 2019. Additionally Sinclair provided even more information to DOE in January of 2020.

Based on the results from the DOE RFS small refinery exemption scoring matrix, described above, the Sinclair refinery received a score of [REDACTED].

Since the Sinclair Rawlings Wyoming refinery scored [REDACTED], DOE findings are that EPA [REDACTED].

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<sup>4</sup> This is in accordance with DOE's fiscal year 2016 appropriations bill that directs the Secretary of Energy to recommend to the EPA Administrator a 50 percent exemption of the RFS requirements for the petitioner that scores above a 1.0 on either the structural and economic metric or viability metric used in evaluating disproportionate economic hardship.

Terms:	Scoring	Weighting	2018 Sinclair Wyoming Refining - REVISED	
1 Structural	<div style="background-color: black; width: 100%; height: 100%;"></div>	█	█	
a Access to capital/credit		█	█	
b Other business lines besides refining & marketing		█	█	
c Market acceptance of renewables (Local)		█	█	
i E10		█	█	
ii E85		█	█	
iii Biodiesel	█	█		
d Percentage of diesel production	█	█	█	
e Subject to exceptional state regulations	█	█	█	
2 Economic	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
a Relative refining margin ranking		█	█	
b Renewable fuel blending (% of production)	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
i Ethanol blending		█	█	
ii Biodiesel blending (not used)		█	█	
iii Other Advanced Biofuel blending (not used)	█	█	█	
c In a niche market	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
d RINs net revenue or cost		█	█	
Subtotal	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
Average Subtotal		█	50%	█
3 Viability	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
a Compliance cost eliminates efficiency gains (impairment)		█	█	
b Individual special events		█	█	
c Compliance costs likely to lead to shut down	█	█	█	
Subtotal	<div style="background-color: black; width: 100%; height: 100%;"></div>		█	
Average Subtotal		█	50%	█
Total			█	

# Confidential Business Information

## Scoring Petitions for Small Refinery Exemption

### Sinclair Wyoming Refinery 2018

#### *Section 1(a) Access to Capital/Credit*

This section is scored with consideration of the credit rating of the refinery and the corporate entity. The purpose of this metric is to determine if a refinery has the ability to borrow and invest as may be needed to meet RFS requirements.

DOE scores companies with poor access to capital a ten, as demonstrated by an S&P (or equivalent) long-term credit rating of C's or below or a debt to equity ratio of 50 percent or above. If a company's credit rating in the B's below BB-, it is scored a five, or a zero if BB- or above.

#### **Refinery Score Explained**



#### *Section 1(b) Other Lines of Business Besides Refining and Marketing*

Other lines of business are intended to help determine if a refiner has a portfolio of businesses that will lower the volatility of the refiner's earnings or if the refiner's profitability is solely dependent on transportation fuel margins. Much as diversifying a stock portfolio reduces the exposure to a single stock, diversifying business lines will reduce the exposure to a single revenue source (transportation fuels margins) for a refiner.

This section considers both the refinery level and the corporate level businesses. Consistent with the 2011 Study, DOE has always considered an applicant's additional lines of business, in particular upstream operations such as exploration and development that are less correlated with refining, that tend to smooth the firm's cash flows and improve its ability to borrow money at closer to investment grade rates.<sup>1</sup> Typically, exploration and production are not operated within the refinery level entity, but rather with an affiliated corporation, compelling inclusion of the affiliated businesses in the other business line analysis. Refineries with other lines of business score a zero, and those refineries without other lines of business score a ten.

#### **Refinery Score Explained**



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<sup>1</sup> 2011 Study at 34.

*Section 1(c) Local Acceptance of Renewables*

Section 1(c) was intended to address the local market consumer acceptance of a renewable fuel versus the national acceptance of that fuel. Consumer acceptance is indicated by retail sales, not by wholesales of products.<sup>2</sup> Thus, retail sales volumes are needed to show the consumer market acceptance of a fuel. Of the three fuels addressed in this section (E10, E85, and biodiesel), only the consumer market acceptance of E10 (subsection 1(c)(i)) is scored for any refinery under the 2011 Study because volumetric data for retail sales is not available at the local level or at the national level for E85 or biodiesel. Consequently, the narrative text on page 34 of the 2011 Study explained that metrics were only fully developed for E10, and specifically noted that scoring for E85 and Biodiesel was “Reserved for later evaluation.”

Subsection 1(c)(i): As described in the 2011 Study for E10 gasoline, refiners in high acceptance states (with 75 percent or greater E10 blending) score a zero, refiners who reside in states with less than 75 percent E10 blending receive a five, and those with less than 25 percent blending receive a ten. Currently, E10 is widely accepted in the retail gasoline market.<sup>3</sup>

**Refinery Score Explained**

[REDACTED]

*Section 1(d) – Percentage of Diesel Production*

This metric is intended to credit a refiner that makes a high percentage of its transportation fuel as diesel fuel. Compliance with the RFS requirements is more difficult than gasoline compliance. As noted in the 2011 Study, refineries that produce less than or equal to the industry average of approximately 32 percent diesel production receive a score of zero, those with greater than the industry average but less than 40 percent receive a score of five, and those at 40 percent diesel or above score a ten.

**Refinery Score Explained**

[REDACTED]

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<sup>2</sup> See 2011 Study at 15.

<sup>3</sup> *Id.* (“Blends of petroleum-based gasoline with 10% ethanol, commonly referred to as E10, account for more than 95% of the fuel consumed in motor vehicles with gasoline engines.”).

*Section 1(e) - Subject to Exceptional State Regulations*

This metric is intended to credit those refineries that are located in states that impose restrictive regulations that inhibit the ability of a refiner to meet RFS requirements. According to the 2011 Study,<sup>4</sup> certain states require refiners to sell unblended fuel. Refiners are required to purchase RINs to meet their obligations even though they have no blending opportunities with this fuel. Also, under certain unusual circumstances, the interplay between the State regulations (such as the California Low Carbon Fuel Standard) and the Federal RFS may increase compliance costs.

Those refiners subject to exceptional regulations receive a ten, those with some barriers for compliance are scored a five, and those not subject to exceptional state requirements are scored a zero.

**Refinery Score Explained**

[REDACTED]

*Section 2(a) Relative Refining Margin*

As noted in the 2011 Study, refining margins differ from refiner to refiner for many reasons. To eliminate market volatility, a three-year average margin for all products is calculated for the petitioning refinery. This three-year average, supplied to DOE by EPA on an annual basis, is compared to the national three-year average margin for all products. Refineries with a negative net average margin are scored a ten, those below the industry average but with a non-negative net average margin are scored a five, and those at or above the industry average are scored a zero.

**Refinery Score Explained**

[REDACTED]

*Section 2(b) Renewable Fuel Blending*

Section 2(b) is intended to measure an individual refinery's renewable fuel blending by examining the percentage of refinery production of a fuel type (gasoline or diesel) that is blended with a biofuel. The higher percentage of a fuel a refiner blends with renewables, the easier it will be for the refiner to meet RFS requirements. Of the three fuel types addressed in this section (Ethanol, Biodiesel, and Advanced Biofuels), only Ethanol is scored (subsection 2(b)(i)) and has ever been scored for any refinery under the 2011 Study. Although the 2011 Study provided a scoring level for metrics 2(b)(ii) (Biodiesel) and 2(b)(iii) (Other Advanced

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<sup>4</sup> 2011 Study at 34.



Biofuel), the study notes that it was “reserved for later evaluation” and, in contrast to the Ethanol metric, did not provide explanatory text to inform the evaluation for these two metrics.<sup>5</sup> Because there is still little or no data collected on biodiesel and advanced biofuel blending at refineries needed for a comparison to determine if there is a disproportionate economic impact, these two metrics still are not scored.

Subsection 2(b)(i): This metric examines the percentage of the gasoline pool that is blended with ethanol. The 2011 Study provides that refineries with 75 percent or more of their gasoline blended to E10 were scored a zero, those with 25 to 74 percent of their gasoline blended to E10 were scored a five, those with less than 25 percent blended were scored a ten.<sup>6</sup>

#### **Refinery Score Explained**

[REDACTED]

#### *Section 2(c) – In a Niche Market*

This metric is intended to examine the ability of a refiner to enhance refining margins through either the lack of transportation fuel competition, low cost feedstock, or production of non-transportation fuel products.

As noted in the explanatory text on page 35 of the 2011 Study,<sup>7</sup> this metric was intended to determine if a refinery was in a “niche” market in that it has access to specific geographical markets with limited alternative finished product supply or access to distressed crude oil supply, thus creating potential for higher than industry refining margins for the niche refiner. Similarly, refineries classified as “niche” also are those that “produce a specialty slate of products (lube oils, greases, asphalt, etc.) in addition to gasoline and diesel.” The sale of these types of products will also result in the potential for higher than industry refining margins.

The scoring levels for this metric are: Refineries in a niche market are scored a zero; those with a “moderate niche impact” are scored a five; and those without a niche market are scored a ten. The explanatory text also states that landlocked refiners whose immediate market does not have access to a refined product pipeline are scored a zero as are those whose primary products are not transportation fuels. Landlocked refiners with direct access to single pipeline are scored a five, and refiners with access to more than one pipeline are scored a ten.

#### **Refinery Score Explained**

[REDACTED]

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<sup>5</sup> 2011 Study at 35.

<sup>6</sup> 2011 Study at 33.

<sup>7</sup> 2011 Study at 35.

### Section 2(d) – RINs net revenue or cost

This metric was intended to determine whether RIN purchases or sales constitute a net revenue or cost, and a score of ten is awarded if RINs are a net cost or a score of zero if a net revenue generator. However, this metric was not scored in the 2011 Study because there was a “lack of consistency” among the responders to the DOE small refiner survey that was designed to evaluate this metric.<sup>8</sup> Because there was no information available to compare a refinery’s RIN cost/revenue with an industry average obtained from study of refineries’ data (rather than a study of national price data) to determine disproportionate economic hardship, this metric is not scored.

### Section 3

Although the 2011 Study only awarded potential scores of zero or ten for the section 3, DOE adopted an addendum to the study in May 2014, adding an intermediate score for metrics 3(a)<sup>9</sup> and 3(b)<sup>10</sup> in the viability index and reasoning that circumstances have changed since the 2011 study was completed. Generally, there is an improved business climate for refineries that is associated with the country’s economic recovery. In addition, refiners have now had many years since the initiation of the RFS program in 2007 to develop business practices to meet RFS obligations. In assisting EPA in evaluating petitions for small refinery RFS exemptions for 2013, DOE has found that some small refineries should be scored an intermediate level of 5 for metric 3a [whether compliance costs eliminate efficiency gains]. This intermediate score acknowledges an impact of RFS compliance costs on efficiency gains, but at a level lower than would justify a score of 10. DOE also has concluded that an intermediate score of 5 may be appropriate for viability metric 3b [individual special events causing a temporary negative impact] in certain circumstances. Both of these viability metrics address impacts that may occur across a continuum, and providing for the possibility of an intermediate score allows DOE to more accurately assess an individual refinery’s economic situation.<sup>11</sup>

### *Section 3(a) – Compliance Costs Eliminate Efficiency Gains (Impairment)*

As described in the 2011 Study, this metric evaluates whether the totality of factors, including both survey results and public information, would reduce the profitability of the firm enough to impair future efficiency improvements. While this would not lead to immediate shutdown, given the increasingly competitive refining market, significant constraints on efficiency improvements would eventually leave many small refineries at risk.

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<sup>8</sup> 2011 Study at 35.

<sup>9</sup> The 2011 Study provided for a score of zero if “no impact on efficiency” or ten if “impact on efficiency”. *Id.* at 36.

<sup>10</sup> The 2011 Study provided for a score of zero if “no special event” or ten if “special event impacting viability”. *Id.*

<sup>11</sup> Office of Energy Policy and Systems Analysis, U.S. Dept. of Energy, *Addendum to the Small Refinery Study: An Investigation into Disproportionate Economic Hardship*, Available at: <https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf> (May 2014) at 1.

**Refinery Score Explained**

[REDACTED]

*Section 3(b) – Individual Special Events*

This metric evaluates whether refinery-specific events (such as a shutdown due to an accident, and subsequent loss of revenue) in the recent past have a temporary negative impact on the ability of the refinery to comply with the RFS. If an event occurs that affects multiple refineries, it would not constitute a refinery-specific event that would have a *disproportionate* economic impact.

**Refinery Score Explained**

[REDACTED]

*Section 3 (c) - Compliance Costs Likely to Lead to Shut-Down*

Some refineries have a unique vulnerability such as a weak competitive position and any significant additional burden could cause bankruptcy or closure. This metric covers those refineries indicating that compliance may lead to such an outcome. A score of ten is awarded if the refinery is “likely to shut down” or a score of zero if not.

**Refinery Score Explained**

[REDACTED]

# Decl. of Joseph Goffman

## Attachment C

(DOE Application of the Small Refinery Scoring Matrix for the Sinclair Casper Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard, 2019)

**DOE Application of the Small Refinery Scoring Matrix for the Sinclair Casper Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard**

**Background**

Section 211(o)(9)(A)(ii) of the CAA required that DOE conduct a study assessing whether the Renewable Fuel Standard (RFS) would impose a “disproportionate economic hardship” on small refineries<sup>1</sup>. This study was required to determine whether the blanket exemption for small refineries as obligated parties under the RFS should be extended for two years after 2010, the year that the blanket exemption expired. EPA was required to grant the continued exemption to all small refineries that were determined by DOE to experience “disproportionate economic hardship” if they became obligated parties after 2010.

In order to comply with the CAA, DOE developed a methodology to determine whether specific refineries would experience “disproportionate economic hardship.” The methodology required business information for the small refineries. This was acquired through a survey of all small refineries. This survey was sent to the owners of 59 refineries. DOE received data for 25 refineries but only analyzed the data for 18 of these refineries<sup>2</sup>. After completing the *Small Refinery Exemption Study* it was provided by the Secretary of Energy to the EPA Administrator.

The CAA also requires that EPA consult with DOE concerning individual applications by small refineries for an exemption from RFS requirements.<sup>3</sup> In order to fulfill this requirement, DOE has applied the scoring matrix, developed for the Small Refinery Exemption Study, to refineries requesting an exemption. DOE employs information provided by EPA from the applicants’ request to see whether this refinery would have received an exemption based on the criteria used in the *Small Refinery Exemption Study*. This scoring matrix includes two general categories; a structural and economic metric and a viability metric that together are used to evaluate whether a refinery faced disproportionate economic hardship.

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<sup>1</sup> Small refineries are defined as those facilities with aggregate crude oil throughput that does not exceed 75,000 barrels per calendar day.

<sup>2</sup> Seven survey responses were not analyzed because the refineries for which the survey response was provided did not meet the CAA definition of a small refinery or because the survey response was incomplete.

<sup>3</sup> The CAA states “(B) Petitions based on disproportionate economic hardship; (i) Extension of exemption. A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.; (ii) Evaluation of petitions In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.; (iii) Deadline for action on petitions The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

### **Sinclair Casper, Wyoming Refinery**

EPA consulted with DOE to aid in their assessment of whether the Sinclair Casper Wyoming refinery should receive a RFS exemption for 2019. DOE is responding to EPA's request by providing values and an explanation for the scoring matrix for this refinery.

Based on the results from the DOE RFS small refinery exemption scoring matrix, described above, the Sinclair refinery received a score of [REDACTED]

Since the Sinclair Casper Wyoming refinery scored [REDACTED], DOE findings are that EPA [REDACTED].<sup>4</sup>

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<sup>4</sup> This is in accordance with DOE's fiscal year 2016 appropriations bill that directs the Secretary of Energy to recommend to the EPA Administrator a 50 percent exemption of the RFS requirements for the petitioner that scores above a 1.0 on either the structural and economic metric or viability metric used in evaluating disproportionate economic hardship.

2019 Sinclair  
Casper  
Refining  
Company -  
Evansville,  
WY

**Terms:**

**Scoring**

**Weighting**

Terms:	Scoring	Weighting
1 Structural		
a Access to capital/credit		
b Other business lines besides refining & marketing		
c Market acceptance of renewables (Local)		
i E10		
ii E85		
iii Biodiesel		
d Percentage of diesel production		
e Subject to exceptional state regulations		
2 Economic		
a Relative refining margin ranking		
b Renewable fuel blending (% of production)		
i Ethanol blending		
ii Biodiesel blending		
iii Other Advanced Biofuel blending		
c In a niche market		
d RINs net revenue or cost		
Subtotal		
Average Subtotal		
Structural/Economic Index		
3 Viability		
a Compliance cost eliminates efficiency gains (impairment)		
b Individual special events		
c Compliance costs likely to lead to shut down		
Subtotal		
Average Subtotal		
Viability Index		

# Confidential Business Information

## Scoring Petitions for Small Refinery Exemption

### Sinclair Casper Refining Company – Evansville, WY 2019

#### *Section 1(a) Access to Capital/Credit*

This section is scored with consideration of the credit rating of the refinery and the corporate entity. The purpose of this metric is to determine if a refinery has the ability to borrow and invest as may be needed to meet RFS requirements.

DOE scores companies with poor access to capital a ten, as demonstrated by an S&P (or equivalent) long-term credit rating of C's or below or a debt to equity ratio of 50 percent or above. If a company's credit rating in the B's below BB-, it is scored a five, or a zero if BB- or above.

#### **Refinery Score Explained**



#### *Section 1(b) Other Lines of Business Besides Refining and Marketing*

Other lines of business are intended to help determine if a refiner has a portfolio of businesses that will lower the volatility of the refiner's earnings or if the refiner's profitability is solely dependent on transportation fuel margins. Much as diversifying a stock portfolio reduces the exposure to a single stock, diversifying business lines will reduce the exposure to a single revenue source (transportation fuels margins) for a refiner.

This section considers both the refinery level and the corporate level businesses. Consistent with the 2011 Study, DOE has always considered an applicant's additional lines of business, in particular upstream operations such as exploration and development that are less correlated with refining, that tend to smooth the firm's cash flows and improve its ability to borrow money at closer to investment grade rates.<sup>1</sup> Typically, exploration and production are not operated within the refinery level entity, but rather with an affiliated corporation, compelling inclusion of the affiliated businesses in the other business line analysis. Refineries with other lines of business score a zero, and those refineries without other lines of business score a ten.

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<sup>1</sup> 2011 Study at 34.



### Refinery Score Explained



#### *Section 1(c) Local Acceptance of Renewables*

Section 1(c) was intended to address the local market consumer acceptance of a renewable fuel versus the national acceptance of that fuel. Consumer acceptance is indicated by retail sales, not by wholesales of products.<sup>2</sup> Thus, retail sales volumes are needed to show the consumer market acceptance of a fuel. Of the three fuels addressed in this section (E10, E85, and biodiesel), only the consumer market acceptance of E10 (subsection 1(c)(i)) is scored for any refinery under the 2011 Study because volumetric data for retail sales is not available at the local level or at the national level for E85 or biodiesel. Consequently, the narrative text on page 34 of the 2011 Study explained that metrics were only fully developed for E10, and specifically noted that scoring for E85 and Biodiesel was “Reserved for later evaluation.”

Subsection 1(c)(i): As described in the 2011 Study for E10 gasoline, refiners in high acceptance states (with 75 percent or greater E10 blending) score a zero, refiners who reside in states with less than 75 percent E10 blending receive a five, and those with less than 25 percent blending receive a ten. Currently, E10 is widely accepted in the retail gasoline market.<sup>3</sup>

### Refinery Score Explained



#### *Section 1(d) – Percentage of Diesel Production*

This metric is intended to credit a refiner that makes a high percentage of its transportation fuel as diesel fuel. Compliance with the RFS requirements is more difficult than gasoline compliance. As noted in the 2011 Study, refineries that produce less than or equal to the industry average of approximately 32 percent diesel production receive a score of zero, those with greater than the industry average but less than 40 percent receive a score of five, and those at 40 percent diesel or above score a ten.

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<sup>2</sup> See 2011 Study at 15.

<sup>3</sup> *Id.* (“Blends of petroleum-based gasoline with 10% ethanol, commonly referred to as E10, account for more than 95% of the fuel consumed in motor vehicles with gasoline engines.”).

**Refinery Score Explained**

[REDACTED]

*Section 1(e) - Subject to Exceptional State Regulations*

This metric is intended to credit those refineries that are located in states that impose restrictive regulations that inhibit the ability of a refiner to meet RFS requirements. According to the 2011 Study,<sup>4</sup> certain states require refiners to sell unblended fuel. Refiners are required to purchase RINs to meet their obligations even though they have no blending opportunities with this fuel. Also, under certain unusual circumstances, the interplay between the State regulations (such as the California Low Carbon Fuel Standard) and the Federal RFS may increase compliance costs.

Those refineries subject to exceptional regulations receive a ten, those with some barriers for compliance are scored a five, and those not subject to exceptional state requirements are scored a zero.

**Refinery Score Explained**

[REDACTED]

*Section 2(a) Relative Refining Margin*

As noted in the 2011 Study, refining margins differ from refiner to refiner for many reasons. To eliminate market volatility, a three-year average margin for all products is calculated for the petitioning refinery. This three-year average, supplied to DOE by EPA on an annual basis, is compared to the national three-year average margin for all products. Refineries with a negative net average margin are scored a ten, those below the industry average but with a non-negative net average margin are scored a five, and those at or above the industry average are scored a zero.

**Refinery Score Explained**

[REDACTED]

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<sup>4</sup> 2011 Study at 34.

*Section 2(b) Renewable Fuel Blending*

Section 2(b) is intended to measure an individual refinery’s renewable fuel blending by examining the percentage of refinery production of a fuel type (gasoline or diesel) that is blended with a biofuel. The higher percentage of a fuel a refiner blends with renewables, the easier it will be for the refiner to meet RFS requirements. Of the three fuel types addressed in this section (Ethanol, Biodiesel, and Advanced Biofuels), only Ethanol is scored (subsection 2(b)(i)) and has ever been scored for any refinery under the 2011 Study. Although the 2011 Study provided a scoring level for metrics 2(b)(ii) (Biodiesel) and 2(b)(iii) (Other Advanced Biofuel), the study notes that it was “reserved for later evaluation” and, in contrast to the Ethanol metric, did not provide explanatory text to inform the evaluation for these two metrics.<sup>5</sup> Because there is still little or no data collected on biodiesel and advanced biofuel blending at refineries needed for a comparison to determine if there is a disproportionate economic impact, these two metrics still are not scored.

Subsection 2(b)(i): This metric examines the percentage of the gasoline pool that is blended with ethanol. The 2011 Study provides that refineries with 75 percent or more of their gasoline blended to E10 were scored a zero, those with 25 to 74 percent of their gasoline blended to E10 were scored a five, those with less than 25 percent blended were scored a ten.<sup>6</sup>

**Refinery Score Explained**

[REDACTED]

*Section 2(c) – In a Niche Market*

This metric is intended to examine the ability of a refiner to enhance refining margins through either the lack of transportation fuel competition, low cost feedstock, or production of non-transportation fuel products.

As noted in the explanatory text on page 35 of the 2011 Study,<sup>7</sup> this metric was intended to determine if a refinery was in a “niche” market in that it has access to specific geographical markets with limited alternative finished product supply or access to distressed crude oil supply, thus creating potential for higher than industry refining margins for the niche refiner. Similarly, refineries classified as “niche” also are those that “produce a specialty slate of products (lube oils, greases, asphalt, etc.) in addition to gasoline and diesel.” The sale of these types of products will also result in the potential for higher than industry refining margins.

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<sup>5</sup> 2011 Study at 35.

<sup>6</sup> 2011 Study at 33.

<sup>7</sup> 2011 Study at 35.

The scoring levels for this metric are: Refineries in a niche market are scored a zero; those with a “moderate niche impact” are scored a five; and those without a niche market are scored a ten. The explanatory text also states that landlocked refiners whose immediate market does not have access to a refined product pipeline are scored a zero as are those whose primary products are not transportation fuels. Landlocked refiners with direct access to single pipeline are scored a five, and refiners with access to more than one pipeline are scored a ten.

### Refinery Score Explained

[REDACTED]

### Section 2(d) – RINs net revenue or cost

This metric was intended to determine whether RIN purchases or sales constitute a net revenue or cost, and a score of ten is awarded if RINs are a net cost or a score of zero if a net revenue generator. However, this metric was not scored in the 2011 Study because there was a “lack of consistency” among the responders to the DOE small refiner survey that was designed to evaluate this metric.<sup>8</sup> Because there was no information available to compare a refinery’s RIN cost/revenue with an industry average obtained from study of refineries’ data (rather than a study of national price data) to determine disproportionate economic hardship, this metric is not scored.

### Section 3

Although the 2011 Study only awarded potential scores of zero or ten for the section 3, DOE adopted an addendum to the study in May 2014, adding an intermediate score for metrics 3(a)<sup>9</sup> and 3(b)<sup>10</sup> in the viability index and reasoning that circumstances have changed since the 2011 study was completed. Generally, there is an improved business climate for refineries that is associated with the country’s economic recovery. In addition, refiners have now had many years since the initiation of the RFS program in 2007 to develop business practices to meet RFS obligations. In assisting EPA in evaluating petitions for small refinery RFS exemptions for 2013, DOE has found that some small refineries should be scored an intermediate level of 5 for metric 3a [whether compliance costs eliminate efficiency gains]. This intermediate score acknowledges an impact of RFS compliance costs on efficiency gains, but at a level lower than would justify a score of 10. DOE also has concluded that an intermediate score of 5 may be appropriate for viability metric 3b [individual special events causing a temporary negative impact] in certain circumstances. Both of these viability metrics address impacts that may

<sup>8</sup> 2011 Study at 35.

<sup>9</sup> The 2011 Study provided for a score of zero if “no impact on efficiency” or ten if “impact on efficiency”. *Id.* at 36.

<sup>10</sup> The 2011 Study provided for a score of zero if “no special event” or ten if “special event impacting viability”. *Id.*

occur across a continuum, and providing for the possibility of an intermediate score allows DOE to more accurately assess an individual refinery's economic situation.<sup>11</sup>

*Section 3(a) – Compliance Costs Eliminate Efficiency Gains (Impairment)*

As described in the 2011 Study, this metric evaluates whether the totality of factors, including both survey results and public information, would reduce the profitability of the firm enough to impair future efficiency improvements. While this would not lead to immediate shutdown, given the increasingly competitive refining market, significant constraints on efficiency improvements would eventually leave many small refineries at risk.

**Refinery Score Explained**

[REDACTED]

*Section 3(b) – Individual Special Events*

This metric evaluates whether refinery-specific events (such as a shutdown due to an accident, and subsequent loss of revenue) in the recent past have a temporary negative impact on the ability of the refinery to comply with the RFS. If an event occurs that affects multiple refineries, it would not constitute a refinery-specific event that would have a *disproportionate* economic impact.

**Refinery Score Explained**

[REDACTED]

*Section 3 (c) - Compliance Costs Likely to Lead to Shut-Down*

Some refineries have a unique vulnerability such as a weak competitive position and any significant additional burden could cause bankruptcy or closure. This metric covers those refineries indicating that compliance may lead to such an outcome. A score of ten is awarded if the refinery is “likely to shut down” or a score of zero if not.

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<sup>11</sup> Office of Energy Policy and Systems Analysis, U.S. Dept. of Energy, *Addendum to the Small Refinery Study: An Investigation into Disproportionate Economic Hardship*, Available at: <https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf> (May 2014) at 1.

**Refinery Score Explained**

[REDACTED]

# Decl. of Joseph Goffman

## Attachment D

(DOE Application of the Small Refinery Scoring Matrix for the Sinclair Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard, 2019)

## DOE Application of the Small Refinery Scoring Matrix for the Sinclair Wyoming Refinery for Exemption as an Obligated Party under the Renewable Fuel Standard

### Background

Section 211(o)(9)(A)(ii) of the CAA required that DOE conduct a study assessing whether the Renewable Fuel Standard (RFS) would impose a “disproportionate economic hardship” on small refineries<sup>1</sup>. This study was required to determine whether the blanket exemption for small refineries as obligated parties under the RFS should be extended for two years after 2010, the year that the blanket exemption expired. EPA was required to grant the continued exemption to all small refineries that were determined by DOE to experience “disproportionate economic hardship” if they became obligated parties after 2010.

In order to comply with the CAA, DOE developed a methodology to determine whether specific refineries would experience “disproportionate economic hardship.” The methodology required business information for the small refineries. This was acquired through a survey of all small refineries. This survey was sent to the owners of 59 refineries. DOE received data for 25 refineries but only analyzed the data for 18 of these refineries<sup>2</sup>. After completing the *Small Refinery Exemption Study* it was provided by the Secretary of Energy to the EPA Administrator.

The CAA also requires that EPA consult with DOE concerning individual applications by small refineries for an exemption from RFS requirements.<sup>3</sup> In order to fulfill this requirement, DOE has applied the scoring matrix, developed for the Small Refinery Exemption Study, to refineries requesting an exemption. DOE employs information provided by EPA from the applicants’ request to see whether this refinery would have received an exemption based on the criteria used in the *Small Refinery Exemption Study*. This scoring matrix includes two general categories; a structural and economic metric and a viability metric that together are used to evaluate whether a refinery faced disproportionate economic hardship.

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<sup>1</sup> Small refineries are defined as those facilities with aggregate crude oil throughput that does not exceed 75,000 barrels per calendar day.

<sup>2</sup> Seven survey responses were not analyzed because the refineries for which the survey response was provided did not meet the CAA definition of a small refinery or because the survey response was incomplete.

<sup>3</sup> The CAA states “(B) Petitions based on disproportionate economic hardship; (i) Extension of exemption. A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.; (ii) Evaluation of petitions In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.; (iii) Deadline for action on petitions The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.



### Sinclair Rawlings, Wyoming Refinery

EPA consulted with DOE to aid in their assessment of whether the Sinclair Rawlings Wyoming refinery should receive a RFS exemption for 2019. DOE is responding to EPA's request by providing values and an explanation for the scoring matrix for this refinery.

Based on the results from the DOE RFS small refinery exemption scoring matrix, described above, the Sinclair refinery received a score of [REDACTED].

Since the Sinclair Rawlings Wyoming refinery scored [REDACTED], DOE findings are that EPA [REDACTED].<sup>4</sup>

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<sup>4</sup> This is in accordance with DOE's fiscal year 2016 appropriations bill that directs the Secretary of Energy to recommend to the EPA Administrator a 50 percent exemption of the RFS requirements for the petitioner that scores above a 1.0 on either the structural and economic metric or viability metric used in evaluating disproportionate economic hardship.

2019 Sinclair  
Wyoming  
Refining  
Company -  
Rawlins, WY

Terms:	Scoring	Weighting
1 Structural		
a Access to capital/credit		
b Other business lines besides refining & marketing		
c Market acceptance of renewables (Local)		
i E10		
ii E85		
iii Biodiesel		
d Percentage of diesel production		
e Subject to exceptional state regulations		
2 Economic		
a Relative refining margin ranking		
b Renewable fuel blending (% of production)		
i Ethanol blending		
ii Biodiesel blending		
iii Other Advanced Biofuel blending		
c In a niche market		
d RINs net revenue or cost		
Subtotal		
Average Subtotal		
Structural/Economic Index		
3 Viability		
a Compliance cost eliminates efficiency gains (impairment)		
b Individual special events		
c Compliance costs likely to lead to shut down		
Subtotal		
Average Subtotal		
Viability Index		

## Confidential Business Information

### Scoring Petitions for Small Refinery Exemption

#### Sinclair Wyoming Refining Company – Rawlins, WY 2019

##### *Section 1(a) Access to Capital/Credit*

This section is scored with consideration of the credit rating of the refinery and the corporate entity. The purpose of this metric is to determine if a refinery has the ability to borrow and invest as may be needed to meet RFS requirements.

DOE scores companies with poor access to capital a ten, as demonstrated by an S&P (or equivalent) long-term credit rating of C's or below or a debt to equity ratio of 50 percent or above. If a company's credit rating in the B's below BB-, it is scored a five, or a zero if BB- or above.

##### **Refinery Score Explained**



##### *Section 1(b) Other Lines of Business Besides Refining and Marketing*

Other lines of business are intended to help determine if a refiner has a portfolio of businesses that will lower the volatility of the refiner's earnings or if the refiner's profitability is solely dependent on transportation fuel margins. Much as diversifying a stock portfolio reduces the exposure to a single stock, diversifying business lines will reduce the exposure to a single revenue source (transportation fuels margins) for a refiner.

This section considers both the refinery level and the corporate level businesses. Consistent with the 2011 Study, DOE has always considered an applicant's additional lines of business, in particular upstream operations such as exploration and development that are less correlated with refining, that tend to smooth the firm's cash flows and improve its ability to borrow money at closer to investment grade rates.<sup>1</sup> Typically, exploration and production are not operated within the refinery level entity, but rather with an affiliated corporation, compelling inclusion of the affiliated businesses in the other business line analysis. Refineries with other lines of business score a zero, and those refineries without other lines of business score a ten.

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<sup>1</sup> 2011 Study at 34.

### Refinery Score Explained



#### *Section 1(c) Local Acceptance of Renewables*

Section 1(c) was intended to address the local market consumer acceptance of a renewable fuel versus the national acceptance of that fuel. Consumer acceptance is indicated by retail sales, not by wholesales of products.<sup>2</sup> Thus, retail sales volumes are needed to show the consumer market acceptance of a fuel. Of the three fuels addressed in this section (E10, E85, and biodiesel), only the consumer market acceptance of E10 (subsection 1(c)(i)) is scored for any refinery under the 2011 Study because volumetric data for retail sales is not available at the local level or at the national level for E85 or biodiesel. Consequently, the narrative text on page 34 of the 2011 Study explained that metrics were only fully developed for E10, and specifically noted that scoring for E85 and Biodiesel was “Reserved for later evaluation.”

Subsection 1(c)(i): As described in the 2011 Study for E10 gasoline, refiners in high acceptance states (with 75 percent or greater E10 blending) score a zero, refiners who reside in states with less than 75 percent E10 blending receive a five, and those with less than 25 percent blending receive a ten. Currently, E10 is widely accepted in the retail gasoline market.<sup>3</sup>

### Refinery Score Explained



#### *Section 1(d) – Percentage of Diesel Production*

This metric is intended to credit a refiner that makes a high percentage of its transportation fuel as diesel fuel. Compliance with the RFS requirements is more difficult than gasoline compliance. As noted in the 2011 Study, refineries that produce less than or equal to the industry average of approximately 32 percent diesel production receive a score of zero, those with greater than the industry average but less than 40 percent receive a score of five, and those at 40 percent diesel or above score a ten.

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<sup>2</sup> See 2011 Study at 15.

<sup>3</sup> *Id.* (“Blends of petroleum-based gasoline with 10% ethanol, commonly referred to as E10, account for more than 95% of the fuel consumed in motor vehicles with gasoline engines.”).

**Refinery Score Explained**

[REDACTED]

*Section 1(e) - Subject to Exceptional State Regulations*

This metric is intended to credit those refineries that are located in states that impose restrictive regulations that inhibit the ability of a refiner to meet RFS requirements. According to the 2011 Study,<sup>4</sup> certain states require refiners to sell unblended fuel. Refiners are required to purchase RINs to meet their obligations even though they have no blending opportunities with this fuel. Also, under certain unusual circumstances, the interplay between the State regulations (such as the California Low Carbon Fuel Standard) and the Federal RFS may increase compliance costs.

Those refineries subject to exceptional regulations receive a ten, those with some barriers for compliance are scored a five, and those not subject to exceptional state requirements are scored a zero.

**Refinery Score Explained**

[REDACTED]

*Section 2(a) Relative Refining Margin*

As noted in the 2011 Study, refining margins differ from refiner to refiner for many reasons. To eliminate market volatility, a three-year average margin for all products is calculated for the petitioning refinery. This three-year average, supplied to DOE by EPA on an annual basis, is compared to the national three-year average margin for all products. Refineries with a negative net average margin are scored a ten, those below the industry average but with a non-negative net average margin are scored a five, and those at or above the industry average are scored a zero.

**Refinery Score Explained**

[REDACTED]

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<sup>4</sup> 2011 Study at 34.

*Section 2(b) Renewable Fuel Blending*

Section 2(b) is intended to measure an individual refinery’s renewable fuel blending by examining the percentage of refinery production of a fuel type (gasoline or diesel) that is blended with a biofuel. The higher percentage of a fuel a refiner blends with renewables, the easier it will be for the refiner to meet RFS requirements. Of the three fuel types addressed in this section (Ethanol, Biodiesel, and Advanced Biofuels), only Ethanol is scored (subsection 2(b)(i)) and has ever been scored for any refinery under the 2011 Study. Although the 2011 Study provided a scoring level for metrics 2(b)(ii) (Biodiesel) and 2(b)(iii) (Other Advanced Biofuel), the study notes that it was “reserved for later evaluation” and, in contrast to the Ethanol metric, did not provide explanatory text to inform the evaluation for these two metrics.<sup>5</sup> Because there is still little or no data collected on biodiesel and advanced biofuel blending at refineries needed for a comparison to determine if there is a disproportionate economic impact, these two metrics still are not scored.

Subsection 2(b)(i): This metric examines the percentage of the gasoline pool that is blended with ethanol. The 2011 Study provides that refineries with 75 percent or more of their gasoline blended to E10 were scored a zero, those with 25 to 74 percent of their gasoline blended to E10 were scored a five, those with less than 25 percent blended were scored a ten.<sup>6</sup>

**Refinery Score Explained**

[REDACTED]

*Section 2(c) – In a Niche Market*

This metric is intended to examine the ability of a refiner to enhance refining margins through either the lack of transportation fuel competition, low cost feedstock, or production of non-transportation fuel products.

As noted in the explanatory text on page 35 of the 2011 Study,<sup>7</sup> this metric was intended to determine if a refinery was in a “niche” market in that it has access to specific geographical markets with limited alternative finished product supply or access to distressed crude oil supply, thus creating potential for higher than industry refining margins for the niche refiner. Similarly, refineries classified as “niche” also are those that “produce a specialty slate of products (lube oils, greases, asphalt, etc.) in addition to gasoline and diesel.” The sale of these types of products will also result in the potential for higher than industry refining margins.

The scoring levels for this metric are: Refineries in a niche market are scored a zero; those with a “moderate niche impact” are scored a five; and those without a niche market are scored a

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<sup>5</sup> 2011 Study at 35.

<sup>6</sup> 2011 Study at 33.

<sup>7</sup> 2011 Study at 35.

ten. The explanatory text also states that landlocked refiners whose immediate market does not have access to a refined product pipeline are scored a zero as are those whose primary products are not transportation fuels. Landlocked refiners with direct access to single pipeline are scored a five, and refiners with access to more than one pipeline are scored a ten.

### Refinery Score Explained



### Section 2(d) – RINs net revenue or cost

This metric was intended to determine whether RIN purchases or sales constitute a net revenue or cost, and a score of ten is awarded if RINs are a net cost or a score of zero if a net revenue generator. However, this metric was not scored in the 2011 Study because there was a “lack of consistency” among the responders to the DOE small refiner survey that was designed to evaluate this metric.<sup>8</sup> Because there was no information available to compare a refinery’s RIN cost/revenue with an industry average obtained from study of refineries’ data (rather than a study of national price data) to determine disproportionate economic hardship, this metric is not scored.

### Section 3

Although the 2011 Study only awarded potential scores of zero or ten for the section 3, DOE adopted an addendum to the study in May 2014, adding an intermediate score for metrics 3(a)<sup>9</sup> and 3(b)<sup>10</sup> in the viability index and reasoning that circumstances have changed since the 2011 study was completed. Generally, there is an improved business climate for refineries that is associated with the country’s economic recovery. In addition, refiners have now had many years since the initiation of the RFS program in 2007 to develop business practices to meet RFS obligations. In assisting EPA in evaluating petitions for small refinery RFS exemptions for 2013, DOE has found that some small refineries should be scored an intermediate level of 5 for metric 3a [whether compliance costs eliminate efficiency gains]. This intermediate score acknowledges an impact of RFS compliance costs on efficiency gains, but at a level lower than would justify a score of 10. DOE also has concluded that an intermediate score of 5 may be appropriate for viability metric 3b [individual special events causing a temporary negative impact] in certain circumstances. Both of these viability metrics address impacts that may

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<sup>8</sup> 2011 Study at 35.

<sup>9</sup> The 2011 Study provided for a score of zero if “no impact on efficiency” or ten if “impact on efficiency”. *Id.* at 36.

<sup>10</sup> The 2011 Study provided for a score of zero if “no special event” or ten if “special event impacting viability”. *Id.*

occur across a continuum, and providing for the possibility of an intermediate score allows DOE to more accurately assess an individual refinery's economic situation.<sup>11</sup>

*Section 3(a) – Compliance Costs Eliminate Efficiency Gains (Impairment)*

As described in the 2011 Study, this metric evaluates whether the totality of factors, including both survey results and public information, would reduce the profitability of the firm enough to impair future efficiency improvements. While this would not lead to immediate shutdown, given the increasingly competitive refining market, significant constraints on efficiency improvements would eventually leave many small refineries at risk.

**Refinery Score Explained**

[REDACTED]

*Section 3(b) – Individual Special Events*

This metric evaluates whether refinery-specific events (such as a shutdown due to an accident, and subsequent loss of revenue) in the recent past have a temporary negative impact on the ability of the refinery to comply with the RFS. If an event occurs that affects multiple refineries, it would not constitute a refinery-specific event that would have a *disproportionate* economic impact.

**Refinery Score Explained**

[REDACTED]

*Section 3 (c) - Compliance Costs Likely to Lead to Shut-Down*

Some refineries have a unique vulnerability such as a weak competitive position and any significant additional burden could cause bankruptcy or closure. This metric covers those refineries indicating that compliance may lead to such an outcome. A score of ten is awarded if the refinery is "likely to shut down" or a score of zero if not.

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<sup>11</sup> Office of Energy Policy and Systems Analysis, U.S. Dept. of Energy, *Addendum to the Small Refinery Study: An Investigation into Disproportionate Economic Hardship*, Available at: <https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf> (May 2014) at 1.



**Refinery Score Explained**

[REDACTED]