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").[1] 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*"),

[1] 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 (10th 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 (10th 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.[2] 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

[2] 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.[3]

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

[3] 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.[4]

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

[4] 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. Cmtys. 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.[5] In addition, EPA acknowledges that it

[5] 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.[6]

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,

[6] 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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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