June 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries

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EXECUTIVE SUMMARY

In this action (hereinafter, the "Compliance Action"), the U.S. Environmental Protection Agency (EPA or "the Agency") is providing 31 small refineries with an alternative approach to demonstrating compliance with their Renewable Fuel Standard (RFS) renewable volume obligations for one or more of the 2016, 2017, and 2018 compliance years (hereinafter the "2016–2018 obligations"). The 2018 obligations for 31 small refineries that are covered by this action were created by the Agency's April 2022 Denial of Petitions for RFS Small Refinery Exemptions.[1] The 2016 and 2017 obligations for three small refineries that are covered by this action were created by the Agency's June 2022 Denial of Petitions for RFS Small Refinery Exemptions.[2] This Compliance Action is therefore a supplement to the Agency's April 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries [3] to include three additional small refinery exemption (SRE) petitions that had not yet been decided at the time that action was taken.[4]

This alternative approach allows the 31 small refineries to resubmit their 2016, 2017, and/or 2018 RFS annual compliance reports with zero deficit carryforward and no additional RIN retirements. The small refineries subject to this action are identified in Appendix A.[5] Each of these 31 small refineries had previously received an SRE for one or more of the 2016, 2017, and 2018 compliance years. However, as a result of court remands in 2021, their SRE petitions came before the Agency for reconsideration: (1) 31 SRE petitions for the 2018 compliance year, originally granted in August 2019, were remanded to the Agency without vacatur by the D.C. Circuit on December 8, 2021[6]; and (2) Two SRE petitions for the 2016 compliance year and one SRE petition for the 2017 compliance year, originally granted in March 2017 and January 2018, respectively, were remanded without vacatur by the Tenth Circuit on July 29, 2021.[7]

This Compliance Action is necessary because of a unique confluence of timing factors, legal considerations, and overall RFS program conditions. As described above, the SRE Denials included 34 petitions from 31 small refineries that EPA initially granted but has now denied on remand. EPA has determined that there are extenuating circumstances that would present

[1] "April 2022 Denial of Petitions for RFS Small Refinery Exemptions," EPA-420-R-22-005, April 2022 (hereinafter the "April 2022 SRE Denial").
[2] "June 2022 Denial of Petitions for RFS Small Refinery Exemptions," EPA-420-R-22-012, June 2022 (hereinafter the June 2022 SRE Denial"). We refer to the April 2022 SRE Denial and the June 2022 SRE Denial together as the "SRE Denials".
[3] "April 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries," EPA-420-R-22-006, April 2022 (hereinafter the "April 2022 Compliance Action").
[4] This Compliance Action covers a total of 34 SRE petitions; however, the three additional SRE petitions were all submitted by small refineries that were previously covered in the April 2022 Compliance Action. Thus, this Compliance Action still applies to 31 small refineries.
[5] EPA has identified the 31 small refineries that may use this alternative compliance demonstration approach in Appendix A. EPA is providing a redacted Appendix A publicly to preserve claims of confidentiality asserted by the petitioning small refineries for which EPA has not yet made a final confidentiality determination.
[6] Order, *Sinclair Wyo. Refining Co. v. EPA*, No. 19-1196 (consol. with 19-1197) (D.C. Cir.), Doc. No. 1925942 (December 8, 2021).
[7] EPA's Motion for Clarification of the Court's July 29, 2021, Mandate, *Renewable Fuels Ass'n, et al. v. EPA*, No. 18-9533 (*RFA*) (10th Cir.), Doc. No. 010110564301 (August 19, 2021); Order, *RFA*, Doc. No. 010110567206 (August 26, 2021).

virtually insurmountable obstacles to the 31 small refineries and significant concerns relating to the RFS program as a whole were these small refineries required to meet their newly created 2016–2018 obligations under the existing compliance scheme. Therefore, EPA is providing an alternative compliance demonstration approach that the 31 small refineries identified in Appendix A may use to meet their 2016–2018 obligations without retiring any additional RINs.[8]

While the need for the Compliance Action flows from the SRE Denials, and there would be no need for the Compliance Action without the SRE Denials, the actions are separate and independent from each other. The SRE Denials, consistent with the statute and applicable case law, adjudicate SRE petitions; this Compliance Action determines how the identified 31 small refineries may demonstrate compliance with their 2016–2018 obligations. These actions utilize different authorities and operate independently. Thus, it is our intent that the action taken in this Compliance Action be severable from the decision to deny SRE petitions in the SRE Denials.

[8] We note that the SRE Denials adjudicate seven other 2018 SRE petitions that are not covered by this Compliance Action: two SRE petitions were submitted in January 2020 and were not pending before EPA on remand, as well as five SRE petitions that EPA initially denied. Because five of those SRE petitions were originally denied, the SRE Denials do not reverse previous exemptions for those SRE petitions as they did for the 34 remanded SRE petitions covered by this action. Because the two remaining SRE petitions were submitted after the 2018 compliance deadline and were decided for the first time in the June 2022 SRE Denial, they similarly do not have a new obligation created by the SRE Denials. Accordingly, this Compliance Action does not apply to those seven SRE petitions.

I. Background

A. The RFS Program

In 2005 and 2007, Congress amended the Clean Air Act (CAA or "Act") to establish the RFS program.[9] Congress enacted this program to "move the United States toward greater energy independence and security" and to "increase the production of clean renewable fuels," among other purposes.[10] The statute specifies increasing annual "applicable volumes" for four categories of renewable fuel for the transportation sector: total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel (BBD).[11] The specified applicable volumes for renewable fuel, advanced biofuel, and cellulosic biofuel are prescribed for each year through 2022, and for BBD through 2012; EPA must determine the applicable volumes for subsequent years.[12]

Congress directed EPA to establish a compliance program and annual percentage standards to ensure that the applicable volumes are used each year.[13] To calculate these percentage standards, EPA divides the applicable volume for each type of renewable fuel established in the CAA or determined by EPA[14] using the Energy Information Administration's estimate of the national volume of transportation fuel that will be introduced into commerce in that year.[15] For example, if EPA set the percentage standard for total renewable fuel at 10%, an obligated party that produced 1,000,000 gallons of gasoline one year would need to ensure that 100,000 gallons of renewable fuel was introduced into the market that year.

Congress authorized EPA to place the obligation to satisfy the applicable percentage standards on "refineries, blenders, and importers, as appropriate."[16] By regulation, EPA determined that refineries and importers of gasoline and diesel fuel must fulfill the requirements of the RFS program.[17] These "obligated parties" apply the percentage standards to their own annual production (or importation) of gasoline and diesel fuel to calculate their individual RVO for each category of renewable fuel. Thus, the RFS standards place the same obligation on all producers and importers of gasoline and diesel fuel in proportion to their production (or importation) volume.

B. Renewable Identification Numbers (RINs)

The CAA requires EPA to establish a credit trading program allowing obligated parties that acquire excess credits in one year to apply credits toward compliance in a subsequent year or

[9] *See* Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492.
[10] 121 Stat. 1492.
[11] CAA section 211(*o*)(2)(B)(i)(I)–(IV).
[12] *Id*.
[13] *Id*.; CAA section 211(*o*)(2)(A)(i), (iii), and (3)(B)(i).
[14] CAA section 211(*o*)(2)(B), (7)(A), and (7)(D)–(F).
[15] CAA section 211(*o*)(3)(A).
[16] CAA section 211(*o*)(3)(B)(ii)(I).
[17] 40 CFR 80.1406.

to sell the credits to another obligated party for use in its own compliance.[18] In conjunction with EPA's authority under CAA section 211(*o*)(2)(A) to put in place implementing regulations for the RFS program, and in compliance with CAA section 211(*o*)(5), EPA designed a flexible and comprehensive system of tradable credits (Renewable Identification Numbers or RINs). Section 211(*o*)(5) required only that EPA allow for the generation and trading of credits for obligated parties that refine, blend, or import excess renewable fuel. The RIN system fulfills that statutory provision and also creates a fungible system of credit trading by not just obligated parties but also by renewable fuel producers and others, creating an open, liquid market for RINs to allow obligated parties to comply with their RFS obligations.

Under the RIN system, producers and importers of renewable fuel generate RINs for each gallon of renewable fuel they import or produce for use in the United States.[19] RINs are "assigned" to batches of renewable fuel by the producers and importers of renewable fuel.[20] RINs may be "separated" from those batches by a party that blends the renewable fuel into gasoline or fossil-based diesel fuel to produce a transportation fuel, heating oil, or jet fuel.[21] Once separated, RINs may be kept for compliance or sold.[22] Obligated parties may use a RIN to demonstrate compliance for the compliance year in which the RIN is generated, or for the following compliance year (for up to 20% of an obligated party's obligations).[23] An obligated party may not use a RIN for any subsequent compliance years because the RIN has expired, is now invalid, and therefore not useable for compliance purposes.[24] Obligated parties meet their RFS obligations by accumulating RINs and "retiring" them in an annual compliance demonstration.[25] Obligated parties must retire RINs corresponding to each of the renewable fuel categories (i.e., RINs corresponding to total renewable fuel, advanced biofuel, BBD, and cellulosic biofuel).[26] The statute and RFS regulations also provide that, in lieu of retiring the requisite number of RINs to show compliance for a particular compliance year, an obligated party may choose to carry forward a RIN deficit into the following compliance year under certain conditions.[27] An obligated party may carry forward a RIN deficit equal to its full or partial RFS obligations in a given compliance year, but must satisfy the deficit in full the subsequent compliance year, along with the obligations for that subsequent year in full (i.e., the obligated party cannot carry forward the subsequent compliance year's obligations as a deficit).

The RIN trading system was designed to enable parties that were already producing and blending renewable fuel to continue to do so. They could then sell excess RINs to obligated parties that lacked blending capability. This open trading market for RINs provides three main benefits. First, it allows all obligated parties, regardless of size or situation, equal ability to comply with their RFS obligations immediately without having to invest capital or resources into blending facilities. They can contract with others already providing the services and/or go into

[18] CAA section 211(*o*)(5)(A)–(C).
[19] 40 CFR 80.1426(a).
[20] 40 CFR 80.1426(e).
[21] 40 CFR 80.1429(b).
[22] 40 CFR 80.1425-29.
[23] 40 CFR 80.1427(a)(6), 80.1428(c), and 80.1431(a).
[24] 40 CFR 80.1427(a)(6), 80.1428(c), and 80.1431(a).
[25] 40 CFR 80.1427(a).
[26] *Id*.
[27] CAA section 211(*o*)(5)(D), and 40 CFR 80.1427(b).

the open market to acquire RINs. Second, this system averts the need for each individual obligated party to purchase and blend renewable fuel into its own gasoline and diesel fuel.[28] Thus, the program was designed to "preserve[] existing business practices for the production, distribution, and use of both [petroleum] and renewable fuel."[29] Third, it levels the playing field for the cost of compliance, with all obligated parties having access to the RINs needed for compliance at the same cost, regardless of whether they acquire the needed RINs by purchasing them on the open market or by blending renewable fuel themselves.[30]

C. Small Refinery Exemptions Under CAA Section 211(*o*)(9)

A small refinery is defined by the CAA as "a refinery for which the average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels."[31] Both the original RFS statutory provisions enacted pursuant to the Energy Policy Act (EPAct) and the current text of the statute as amended by the Energy Independence and Security Act (EISA) provided all small refineries an initial blanket exemption from their obligations under the RFS program until calendar year 2011.[32] The CAA includes two additional provisions regarding extensions of the SRE for the period after the initial blanket exemption expired. Under the first statutory mechanism, applicable to 2011 and 2012, if the Department of Energy (DOE) determined, through a study mandated under the CAA, that compliance with the RFS requirements would impose "disproportionate economic hardship" (DEH) on a small refinery, EPA was required to extend the small refinery's exemption by at least two years.[33] The second statutory mechanism provided that small refineries "may at any time petition the Administrator for an extension of the exemption in [section 211(*o*)(9)(A)] for the reason of [DEH]."[34] The Act directs the EPA Administrator, when evaluating SRE petitions, "in consultation with the Secretary of Energy," to "consider the findings of the study under [CAA section 211(*o*)(9)(A)(ii)(I)] and other economic factors."[35]

In 2009, DOE completed its study and found that, in a liquid and competitive RIN market, compliance with the RFS requirements would not impose DEH on any small refinery. Subsequently, some members of Congress directed DOE to revisit the 2009 DOE Small Refinery Study[36] and in so doing to solicit input from the small refineries themselves.[37] In 2011, DOE completed a second study that used the small refinery input to develop a set of financial and operational metrics intended to inform DOE whether a small refinery was likely to experience

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[28] Complying with such a requirement would have been difficult, if not impracticable, for obligated parties, as different renewable fuels are blended into gasoline and diesel fuel and pipeline operators normally do not allow gasoline or diesel fuel containing renewable fuel to be transported through their pipelines.
[29] "RFS1 Summary and Analysis of Comments," EPA-420-R-07-006 at 1-6, April 2007.
[30] For a more detailed discussion of the operation of the RIN market, *see* SRE Denials, Section IV.D.2.
[31] CAA section 211(*o*)(1)(K).
[32] CAA section 211(*o*)(9)(A)(i).
[33] CAA section 211(*o*)(9)(A)(ii)(II).
[34] CAA section 211(*o*)(9)(B)(i).
[35] CAA section 211(*o*)(9)(B)(ii).
[36] "EPACT 2005 Section 1501 Small Refineries Exemption Study," Office of Policy and International Affairs, U.S. Department of Energy, February 2009 (hereinafter the "2009 DOE Study").
[37] Senate Report 111-45, at 109 (2009).

DEH.[38] DOE organized the metrics into a two-part matrix with sections addressing "disproportionate impacts" and "viability impairment."[39] DOE also developed a scoring protocol for the matrix that required the score in both sections of the matrix to exceed an established threshold for DOE to find that DEH existed at a given small refinery.[40]

Since 2013, DOE and EPA have changed their treatment of the scoring matrix several times as informed by direction from members of Congress, judicial review, and changing administration policies. DOE's changes involved the findings it provided to EPA for a given small refinery based on the matrix, implementing direction in Consolidated Appropriations Act report language to recommend 50% relief when a small refinery's score on either section of the matrix exceeded the applicable threshold.[41] For EPA, the changes involved the weight EPA afforded DOE's findings relative to the "other economic factors" EPA considered when evaluating SRE petitions.

In some prior decisions, DOE and EPA concluded that DEH existed only when a small refinery experienced both disproportionate impacts and viability impairment, as measured by the matrix. In response to concerns that the two agencies' threshold for establishing DEH was too stringent, Consolidated Appropriations Act report language directed DOE to recommend 50% relief when a small refinery's score on either section of the matrix exceeded the applicable threshold.[42] Subsequent Senate Report language directed EPA to follow DOE's recommendation, and to report to Congress if it did not.[43]

The Congressional direction, along with changing administration policies, prompted EPA to change its approach to finding DEH at a small refinery. Whereas EPA had previously exercised discretion in evaluating "other economic factors" in its analysis of a small refinery's petition, EPA changed its approach to instead rely on DOE's findings and began granting a full exemption whenever DOE findings indicated that the small refinery could receive at least 50% relief, based on its matrix score.[44] Under this approach, EPA exempted small refineries from their RFS obligations solely based on this DOE finding, which was derived from metrics that

[38] "Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship," Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (hereinafter the "2011 DOE Study").
[39] 2011 DOE Study at 32-36.
[40] EPA no longer uses the scoring matrix to evaluate SRE petitions. SRE Denials at Section IV.C.
[41] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at 161 Cong. Rec. H9693, H10105 (daily ed. December 17, 2015): "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."
[42] *Id.*
[43] Senate Report 114-281, 71 ("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.").
[44] We note that under this approach, EPA granted full SREs to some very profitable refineries. A substantial number of small refineries that showed no viability impairment on the matrix received a 50% waiver finding from DOE, based only on the small refinery's disproportionate impacts score.

assumed some refineries faced higher RFS compliance costs and that did not account for RIN cost passthrough.[45]

D. The 34 Remanded SRE Petitions

On or about March 6, 2017, and September 13, 2017, EPA received the two SRE petitions for the 2016 compliance year addressed by this Compliance Action.[46] Then, on January 23, 2018, EPA received the one SRE petition for the 2017 compliance year addressed by this Compliance Action.[47] According to EPA's SRE policy at that time—prior to the Proposed Denial that was issued on December 7, 2021[48]—EPA shared the petitions with DOE, and DOE responded with its findings after applying the scoring matrix. EPA issued its original decisions granting these three petitions on May 4, 2017, December 20, 2017, and March 23, 2018, respectively.[49] Because the two 2016 remanded SRE petitions were originally decided after the 2016 compliance deadline (March 31, 2017), both small refineries had already retired RINs to demonstrate compliance with their 2016 obligations prior to receiving their exemptions. After issuing the 2016 decisions, EPA returned the RINs used for compliance to the small refineries.[50] The 2017 remanded SRE petition, however, was granted prior to the 2017 compliance deadline (March 31, 2018) and that small refinery never had to retire RINs to demonstrate compliance with its 2017 obligations. On May 29, 2018, industry groups on behalf of biofuel producers challenged these three SRE decisions in the U.S. Court of Appeals for the Tenth Circuit,[51] putting the three small refineries on notice that the 2016 and 2017 decisions, and their exemptions, would be judicially reviewed. The 2016 and 2017 SRE petitions were ultimately remanded to the Agency without vacatur after the close of the appeals process on July 29, 2021.[52]

In June 2018, small refineries began submitting SRE petitions for the 2018 compliance year, and EPA continued receiving such petitions through early March 2019. The 2018 RFS compliance deadline was March 31, 2019;[53] however, at that time, EPA was still evaluating the numerous SRE petitions for the 2018 compliance year pending before the Agency. While awaiting EPA's decision on their 2018 SRE petitions, 15 small refineries chose to retire RINs to fully comply with their 2018 obligations, while another eight small refineries retired RINs to partially comply with their 2018 obligations and carried-forward the remainder as partial RIN deficits, and the remaining eight small refineries carried-forward full RIN deficits.[54] All small

[45] SRE Denials at Sections II.C and IV.D.2 and SRE Denial Appendix B at Sections III and IV.
[46] EPA Brief, *RFA*, at 13, 15 (10th Cir. Sept. 20, 2019).
[47] *Id*. at 16.
[48] "Proposed RFS Small Refinery Exemption Decision," EPA-420-D-21-001, December 2021.
[49] EPA Brief, *RFA*, at 13, 15, 16 (10th Cir. September 20, 2019).
[50] EPA's customary practice has been to return the RINs used for compliance where a small refinery has retired RINs to demonstrate compliance prior to receiving an exemption. Petition for Review, *Kern Oil & Refining Co. v. EPA*, No. 21-71246, at 9 (Aug. 27, 2021).
[51] Petition for Review, *RFA* (May 29, 2018).
[52] EPA's Motion for Clarification of the Court's July 29, 2021, Mandate, *Renewable Fuels Ass'n, et al. v. EPA*, No. 18-9533 (*RFA*) (10th Cir.), Doc. No. 010110564301 (August 19, 2021); Order, *RFA*, Doc. No. 010110567206 (August 26, 2021).
[53] 40 CFR 80.1451(f).
[54] The compliance demonstrations made by the 31 small refineries that were originally granted exemptions are provided in Appendix B (redacted to preserve claims of confidentiality).

refineries had the option to carry-forward a RIN deficit equal to all or part of their 2018 obligations into the 2019 compliance year, though only some did.

On August 9, 2019, EPA adjudicated 36 SRE petitions for the 2018 compliance year, granting 31 and denying five in a single two-page decision memo ("the 2018 Decision").[55] EPA granted full exemptions "where DOE recommended 100 [and 50] percent relief because these refineries will face a DEH" and denied exemptions "where DOE recommended no relief."[56] EPA's finding of DEH relied solely on DOE's findings through the use of the scoring matrix; there was no independent EPA analysis presented in the 2018 Decision.

After issuing the 2018 Decision, EPA returned the RINs retired for compliance to the small refineries that had demonstrated compliance with their 2018 obligations prior to receiving exemptions. The small refineries generally sold these RINs and/or used some portion of them to satisfy their 2019 obligations.

Shortly after EPA issued the 2018 Decision, parties began filing petitions for review of the decision, putting the 31 small refineries on notice that the 2018 Decision, and their exemptions, would be judicially reviewed.[57] Eventually, the regional circuit cases were dismissed and the D.C. Circuit cases proceeded as coordinated cases. These cases were stayed while the Supreme Court reviewed one holding of the *RFA* decision.[58] On June 25, 2021, the Supreme Court issued its opinion in *HollyFrontier Cheyenne Refining, LLC et al. v. Renewable Fuels Association et al*.[59] On August 25, 2021, EPA filed a motion for voluntary remand without vacatur in the D.C. Circuit cases so that EPA could evaluate the impacts of the *RFA* and *HollyFrontier* decisions on its SRE policy and the decisions made on those SRE petitions.[60] On December 8, 2021, the D.C. Circuit remanded without vacatur the 2018 Decision for EPA to

[55] Memorandum: Decision on 2018 Small Refinery Exemption Petitions, August 9, 2019.
[56] 2018 Decision at 2.
[57] On August 22, 2019, Sinclair Wyoming Refining Company (Sinclair) filed a petition for review of the 2018 Decision in the U.S. Court of Appeals for the Tenth Circuit. Petition for Review, *Sinclair Wyoming Refining Co. v. EPA*, No. 19-9562 (10th Cir. August 22, 2019). On September 20, 2019, Sinclair filed a petition for review of the 2018 Decision in the U.S. Court of Appeals for the D.C. Circuit. Petition for Review, *Sinclair Wyoming Refining Co. v. EPA*, No. 19-1196 (D.C. Cir. September 20, 2019). On September 23, 2019, Big West Oil, LLC, filed a petition for review of the 2018 Decision in the Tenth Circuit and the D.C. Circuit. Petition for Review, *Big West Oil, LLC v. EPA*, No. 19-9576 (10th Cir. September 23, 2019); Petition for Review, *Big West Oil, LLC v. EPA*, No. 19-1197 (D.C. Cir. September 23, 2019). On October 18, 2019, Kern Oil & Refining Co. (Kern) filed a petition for review of the 2018 Decision in the U.S. Court of Appeals for the Ninth Circuit. Petition for Review, *Kern Oil & Refining Co. v. EPA*, No. 19-72643 (9th Cir. October 18, 2019). On October 21, 2019, Kern filed a petition for review of the 2018 Decision in the D.C. Circuit. Petition for Review, *Kern Oil & Refining Co. v. EPA*, No. 19-1216 (D.C. Cir. October 21, 2019). On October 22, 2019, Wynnewood Refining Company, LLC, filed a petition for review of the 2018 Decision in the Tenth Circuit, which was subsequently transferred to the D.C. Circuit on March 26, 2020. Petition for Review, *Wynnewood Refining Co., LLC v. EPA*, No. 19-9589 (10th Cir. October 22, 2019); Order, Doc. No. 1836181, March 26, 2020, *Wynnewood*, No. 19-9589 (10th Cir); *Wynnewood Refining Co., LLC v. EPA*, No. 20-1099 (D.C. Cir.). On October 22, 2019, the Renewable Fuels Association (RFA) and other biofuels groups challenged EPA's 2018 Decision in the U.S. Court of Appeals for the D.C. Circuit. Petition for Review, *Renewable Fuels Association*, No. 19-1220 (D.C. Cir. October 22, 2019).
[58] 948 F.3d 1206 (10th Cir. 2020) (*cert. grant'd sub nom HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021)).
[59] 141 S. Ct. 2172 (2021).
[60] *See e.g.*, EPA's Motion for Voluntary Remand Without Vacatur, *Sinclair Wyo. Refining Co. v. EPA*, No. 19-1196 (consol. with 19-1197) (D.C. Cir.), Doc. No. 1911606 (August 25, 2021).

"issue new decisions" concerning the petitions at issue in the case. The court found that remand was warranted "so that EPA may reconsider its positions in light of the principles behind those holdings [in *RFA* and *HollyFrontier*] and consider providing a more robust explanation of the decisions that remain undisturbed after reconsideration."[61] The court ordered EPA to issue new decisions by April 7, 2022. EPA timely responded to the D.C. Circuit's order with its April 2022 SRE Denial, which denied the 36 2018 SRE petitions on DEH grounds, including 31 remanded 2018 SRE petitions that were previously granted.

This Compliance Action thus covers the 31 small refineries that submitted the remanded 2018 SRE petitions plus the two remanded 2016 SRE petitions and one remanded 2017 SRE petition. The 31 small refineries that submitted these 34 remanded petitions now have unmet 2016–2018 compliance obligations that were imposed through the SRE Denials.[62] However, because of the passage of time between when they received their original SRE grants and the SRE Denials, they either no longer hold the RINs they once acquired to demonstrate compliance or they do not hold RINs in sufficient amounts to meet their combined RFS obligations totaling more than 1.6 billion RINs under the existing compliance scheme.

[61] Order, *id.*, Doc. No. 1925942 (December 8, 2021).

[62] These 31 small refineries had their original 2016, 2017, and/or 2018 obligations waived under the original SRE decisions. Upon issuance of the SRE Denials, the 2016–2018 obligations have been created anew such that they represent obligations that must be met by the next compliance deadline.

II. The CAA and Existing RFS Compliance Scheme

The CAA does not address the precise question of how EPA should implement an RFS obligation for specific parties that were previously exempted by EPA where a change in the law and a judicial remand of the prior exemption decisions requires EPA to issue new decisions, and EPA subsequently denies the exemption requests and thereby creates new obligations for past compliance years. While EPA regulations state that a prior-year deficit gets carried forward into the subsequent year,[63] they do not adequately address the unique situation presented here where a new RFS obligation is imposed for a prior, closed compliance year. Accordingly, EPA is here fashioning an approach to allow these 31 refineries to demonstrate compliance that considers the need to avoid harming the operability of the RFS program going forward,[64] the unique circumstances of this situation (including, but not limited to, the prior exemptions provided to these 31 small refineries and the judicial challenges to those exemptions), and the inability for these small refineries to comply with their 2016–2018 obligations under the existing compliance scheme.

The RFS regulations address the situation where an obligated party fails to retire sufficient RINs to meet its annual obligations under 40 CFR 80.1427(a); whatever remains is called the RIN deficit and is rolled into the following compliance year.[65] Under CAA section 211(*o*)(5)(D) and the RFS regulations, an obligated party that carries a RIN deficit must "achieve compliance" with the following year's obligations and "offset the deficit" (i.e., an obligated party that carries forward the RIN deficit for one year must satisfy the deficit for that year and meet its full obligations for the subsequent year).[66] As an additional compliance flexibility, under CAA section 211(*o*)(5), an obligated party may satisfy its annual obligation using RINs generated in that compliance year, or may use prior year RINs to meet up to 20% of its annual obligation.[67] A RIN expires and cannot be used for compliance after the compliance deadline for the compliance year immediately following the year in which the RIN is generated.[68] For example, a RIN generated in 2017 expired on the compliance deadline for the 2018 compliance year: March 31, 2019.

Our approach to the 2016–2018 obligations created by the SRE Denials is consistent with existing case law regarding retroactive RFS obligations, though we consider these obligations to be created by the SRE Denials that relate back to the 2016–2018 compliance years. Under existing case law, when EPA imposes a retroactive RFS standard, EPA is to reasonably consider and mitigate the burdens on obligated parties in its approach.[69] The court has particularly highlighted the availability of RINs for compliance, as well as compliance flexibilities, as key considerations. We believe that the court's retroactivity analysis, which applied to the

[63] 40 CFR 80.1427(b).
[64] *Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008) (agencies generally have the authority to flesh out their rules through adjudications and advisory opinions); *see also Council for Urological Interests v. Burwell*, 790 F.3d 212, 226 (D.C. Cir. 2015).
[65] 40 CFR 80.1427(b).
[66] *Id.*
[67] 40 CFR 80.1427(a)(6), 80.1428(c), and 80.1431(a).
[68] 40 CFR 80.1428(c), and 80.1431(a).
[69] *See Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017); *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 154-58 (D.C. Cir. 2010).

promulgation of RFS standards after statutory deadlines, is also applicable here, where EPA's action to impose current 2016–2018 obligations on particular parties relates back to prior-year obligations.

Given the unique circumstances surrounding EPA denying these SRE petitions on remand, we are treating the 2016–2018 obligations as newly imposed obligations relating to prior compliance years that are added to the obligations for the earliest compliance year that has not yet closed (i.e., the 2019 compliance year). This is because the 2016, 2017, and 2018 RFS compliance deadlines have passed.[70] In contrast, the 2019 compliance deadline for small refineries has been extended by EPA and is still open.[71] EPA's regulations provide that an unmet RIN obligation be rolled over into the subsequent compliance year. Under our existing regulations, therefore, the 2016–2018 obligations would have been automatically rolled over into the subsequent compliance years. However, the 2016–2018 obligations were created by the SRE Denials and, as such, were not rolled over from prior compliance years. Thus, we have applied a unique approach, informed by the RFS regulations, and tailored to the particular circumstances before us.

In the absence of an alternative compliance demonstration approach, the existing compliance scheme would require these small refineries to acquire and retire 1.6 billion RINs to cover the 2016–2018 obligations created by the SRE Denials. The obligations would need to be satisfied by the 2019 compliance deadline for small refineries. However, because EPA finds that there are not sufficient RINs available—in particular an insufficient number of advanced biofuel RINs to satisfy the 2016–2018 advanced biofuel obligations—and the impacts a significant drawdown of the carryover RIN bank would have on the RFS program as a whole, EPA has fashioned this Compliance Action.

[70] Under the RFS regulations, 2015, 2016, and 2017 RINs have now expired and, as such, are invalid RINs that cannot be used to demonstrate compliance. 40 CFR 80.1427(a)(6), 80.1428(c), and 80.1431(a). According to EMTS data, only approximately 15 million 2018 RINs remain unretired. *See* "EMTS RIN Holding Data as of March 1, 2022," available in the docket for the SRE Denials, EPA-HQ-OAR-2021-0566.
[71] 86 FR 17073 (April 1, 2021); 87 FR 5696 (February 2, 2022).

III. Compliance Action Applicability

The unique situation facing these 31 small refineries given their 2016–2018 obligations is a result of the cumulative impact of several factors, none due to any actions or omissions by the 31 small refineries: (1) The remands of the 34 SRE decisions; (2) The *RFA* decision that led EPA to change its interpretation of the CAA section 211(*o*)(9) SRE provisions such that the Agency may only grant an SRE when a small refinery's DEH is caused by compliance with the RFS program;[72] (3) The long passage of time between EPA's original decisions granting the 34 remanded SRE petitions and the SRE Denials; and (4) The insufficient number of advanced biofuel RINs to satisfy the 2016–2018 advanced biofuel obligations and the impacts a significant drawdown of the carryover RIN bank would have on the RFS program as a whole. The confluence of these factors is unique to the small refineries in this situation; for this reason, the Compliance Action is tailored for them.

EPA further recognizes the exceptional nature of the alternative compliance demonstration approach we are providing in this action, and we have sought to limit its application to the extent possible. In general, the RFS standards as promulgated should be met by all obligated parties using the existing compliance scheme. It is only under the unique circumstances that are present for the 31 small refineries in this situation that the Compliance Action is appropriate.

EPA considered alternatives to this Compliance Action, including adding the 2016–2018 obligations to future years' standards (i.e., the 2022 or later standards) and allowing the 31 small refineries additional time to acquire and retire RINs to satisfy their 2016–2018 obligations. We rejected these options, first because they would not resolve the obstacles to compliance described herein: the applicable compliance years are closed, and the compliance deadlines have passed; there is a shortfall in available advanced biofuel RINs to satisfy the 2016–2018 advanced biofuel obligations; and the potential drawdown of the carryover RIN bank that would threaten the integrity of the current and forthcoming standards. Second, these options would create additional challenges: they would require a new rulemaking, during which time the 31 small refineries would be out of compliance because they would have unmet RIN obligations created by the SRE Denials; 1.6 billion RINs is such a large obligation that it would need to be spread over many subsequent compliance years; and the applicable annual standards would likely need to be adjusted downward to accommodate the additional 2016–2018 obligations, among others.

A. The 31 small refineries have been uniquely affected by the passage of time between their original SRE grants and the SRE Denials.

Since EPA granted the 34 remanded SRE petitions at issue in this action, more than two years have passed, and the 2016–2018 compliance years have closed. The 2016 and 2017 compliance deadlines have long since passed (March 31, 2017, and March 31, 2018, respectively). The RINs needed to demonstrate compliance for these years have expired, may no longer be traded in the RIN market, and cannot be used to satisfy the 2016–2017 obligations created by the SRE Denials.[73] As such, the three small refineries with new 2016–2017 RFS

[72] SRE Denials at Section IV.D.
[73] 40 CFR 80.1427(a)(6).

obligations do not have access to, and could not use even if they did have access to, the RINs that they could have used during the relevant compliance years. Similarly, the 2018 compliance deadline passed on March 31, 2019, four months before EPA issued the 2018 Decision granting 31 2018 exemptions. Thus, many of these small refineries had already demonstrated compliance with their 2018 obligations by retiring RINs at that time. EPA returned the RINs after issuing the exemptions in August 2019. Now, more than two years later, the small refineries no longer hold the RINs they previously used for compliance, having sold the returned RINs and/or used some portion of them to satisfy their 2019 obligations. Additionally, there is limited availability of 2018 RINs because non-small refinery obligated parties were required to comply with their 2019 obligations by March 31, 2020, and many used 2018 RINs to satisfy up to 20% of their 2019 obligations.[74] While the 2016–2018 obligations could be treated as a deficit for 2019—allowing the small refineries the opportunity to use 2019 RINs to comply with both obligations—as explained in Section III.B, there are also insufficient 2019 RINs in the needed categories available to comply with the combined 2016–2018 and 2019 obligations. Thus, if the 31 small refineries attempted to come into compliance through the retirement of 2018 and 2019 RINs, most if not all of them would be unable to achieve compliance under the existing compliance scheme. Requiring these small refineries to retire 1.6 billion RINs could also jeopardize compliance for *all* obligated parties through a significant drawdown of the carryover RIN bank.

Thus, compliance with the 2016–2018 obligations through the use of carryforward deficits into the 2019 obligations is impracticable. Indeed, under the existing compliance scheme, requiring these 31 small refineries to comply with the 2016–2018 obligations created by the SRE Denials would be impossible without EPA reopening the 2016, 2017, 2018 and 2019 compliance years for *all* obligated parties. EPA previously considered reopening the 2016 compliance year in the 2020–2022 Annual Rule Proposal.[75] There, EPA said:

> As we have stated in the past, we believe the burdens associated with altering the 2016 standard are high. (footnotes omitted) To illustrate the burdens associated with such an approach, we considered the steps that would be required to implement a revised 2016 standard. First, we would need to rescind the 2016 standard and promulgate a new 2016 standard. Next, we would need to return all of the RINs used for compliance to the original owners. Once those RINs were unretired (a process that could take several months), trading of those RINs could resume for a designated amount of time before retirements would again be required to demonstrate compliance. Obligated parties could then attempt to comply with a new, higher standard that includes an adjustment to the required total renewable fuel volume to address the ACE decision. However, simply unretiring 2016 RINs would not result in sufficient RINs for compliance with the higher standard. Furthermore, because the suite of obligated parties is no longer the same as it was in 2016, with some companies no longer in business, the distribution of unretired

[74] According to EPA Moderated Transaction Systems (EMTS) data, only approximately 15 million 2018 RINs remain unretired. *See* "EMTS RIN Holding Data as of March 1, 2022," available in the docket for the SRE Denial, EPA-HQ-OAR-2021-0566.
[75] 86 FR 72436, 72460 (December 21, 2021).

RINs could be perceived as unfair as well as uneven, highlighting the complexity of attempting to go back in time.

These same concerns apply here. Because the earliest obligation addressed by this Compliance Action is for the 2016 compliance year, we would need to unwind each compliance year starting with 2016 to potentially make it possible for these 31 small refineries to comply under the current compliance scheme. And, even if EPA were to reopen those compliance years and allow all parties to revisit their compliance demonstrations in an attempt to create equity and free up RINs for compliance, it is not a given that the non-small refinery obligated parties would choose to do so. For example, EPA estimates that approximately 3.5 billion 2018 carryover RINs were available to comply with the 2019 standards.[76] While these RINs were of sufficient type and quantity that the 2016–2018 obligations created by the SRE Denials could be satisfied, as previously noted an overwhelming majority of these 2018 RINs have already been used by obligated parties to demonstrate compliance with their 2019 obligations. EPA would not be able to force the obligated parties that have already complied with their 2016–2019 obligations to revisit those compliance years and to adjust their RIN retirements or sell RINs in the market; this lack of certainty makes compliance with the 31 small refineries' 2016–2018 obligations, under the current compliance scheme, virtually impossible in practice.

B. Limited available RINs makes it impracticable for these 31 small refineries to meet their 2016–2018 obligations under the existing compliance scheme.

The 31 small refineries' combined 2016–2018 obligations exceed 1.6 billion RINs[77] and cannot be met with excess RINs (i.e., carryover RINs), especially due to the shortfall of advanced biofuel carryover RINs. Indeed, the entirety of the carryover RIN bank is at this time approximately 1.8 billion RINs.[78] While this appears to be sufficient to meet the 1.6 billion total RIN demand from the 2016–2018 obligations, there are not enough advanced biofuel carryover RINs available to satisfy the 31 small refineries' advanced biofuel obligations. More specifically, there are currently only approximately 55 million advanced biofuel carryover RINs;[79] the 31 small refineries would require approximately 360 million advanced biofuel RINs to satisfy their advanced biofuel obligations.[80] Furthermore, reliance on carryover RINs to meet the 2016–2018 obligations would undermine the proposed standards for 2022, likely to the point of making them unachievable. The stability of the RFS program relies on the carryover RIN bank to provide "an important and necessary programmatic and cost spike buffer that will both facilitate individual compliance and provide for smooth overall functioning of the program."[81] This is because the

[76] "Carryover RIN Bank Calculations for the 2020 Final Rule," Docket Item No. EPA-HQ-OAR-2019-0136-2052. Note that these RINs were available at the time of compliance with the 2019 RFS standards, which occurred for most obligated parties on March 31, 2020. 40 CFR 80.1427(a)(1).
[77] To put this in perspective, the combined 2016–2018 obligations are over three times the volume remanded in *Americans for Clean Energy v. EPA*, 864 F.3d 691, 720 (D.C. Cir. 2017) (*ACE*), a 500 million gallon RVO that EPA has proposed to spread over two years and applies to all obligated parties, as opposed to just 31 small refineries. *See* 86 FR 72436, 72457 (December 21, 2021).
[78] 86 FR 72436, 72455 (December 21, 2021).
[79] *See* "Carryover RIN Bank Calculations for 2020–2022 Proposed Rule," Docket Item No. EPA-HQ-OAR-2021-0324-0328.
[80] 2016–2018 obligations calculations are provided in Appendix A.
[81] 86 FR 72454 (December 21, 2021).

"[c]arryover RINs enable parties 'long' on RINs to trade them to those 'short' on RINs instead of forcing all obligated parties to comply through physical blending. Carryover RINs also provide flexibility in the face of a variety of unforeseeable circumstances that could limit the availability of RINs and reduce spikes in compliance costs…."[82] EPA in the past has also indicated that it would "not be appropriate" to "reduce the size of the carryover RIN bank" by intentionally setting 2020, 2021, and 2022 volumes that would require a drawdown of the carryover RIN bank.[83]

C. This Compliance Action is needed for RFS program integrity.

1. This action preserves a functional carryover RIN bank.

In establishing RFS standards for each year, EPA considers the number of available carryover RINs and carryforward deficits, which are two important compliance mechanisms available to obligated parties.[84] Compliance with, and the feasibility of the, RFS standards for one year is thereby intertwined with compliance for the prior year, and often later years.

When EPA developed the 2020–2022 Annual Rule Proposal and its associated renewable fuel volumes, a necessary step was for EPA to project the availability of carryover RINs (net of carryforward deficits).[85] This calculation assumed full compliance by all small refineries with their 2019 obligations[86] and that the carryover RIN bank would be preserved at its current level in order for obligated parties to be able to comply with their 2020, 2021, and 2022 obligations; that latter assumption would be upended if the SRE Denials create a new 1.6 billion RIN shortfall. Such a demand would severely draw down the carryover RIN bank, reduce RIN liquidity, and lead to volatility in the RIN market, detrimentally impacting these 31 small refineries and potentially undermining overall compliance with subsequent years' standards.[87] All of these outcomes could have broad and serious impacts on the renewable fuels market and the RFS program overall.

EPA proposed to set the 2020 and 2021 renewable fuel volumes at the actual volumes of renewable fuel consumed in those years such that the carryover RIN bank would be preserved at its existing levels after the assumed 2019 compliance.[88] Had EPA not proposed to reduce the previously established 2020 standards, the carryover RIN bank would have been reduced to 630 million RINs—a decrease of 1.2 billion RINs—which we stated could "reduce the liquidity of RINs and could negatively impact parties that do not currently have sufficient RINs to meet their 2020 obligation. This could make it difficult for some parties to acquire enough RINs to comply

[82] *Id*.
[83] *Id*.
[84] *See, e.g.*, 86 FR 72454 (December 21, 2021), 85 FR 7016 (February 6, 2020), and 83 FR 63704 (December 11, 2018).
[85] 86 FR 72454 (December 21, 2021).
[86] It is appropriate for EPA to assume full compliance by small refineries in this way because, under the statute, compliance with the RFS program is the default, and all obligated parties, including small refineries, must comply with their annual obligations until such time as they petition for and receive an exemption. Moreover, EPA has denied all 2019 SRE petitions for the reasons described in the June 2022 SRE Denial.
[87] 86 FR 72454 (December 21, 2021).
[88] *Id*. at 72436.

with their 2020 RFS obligations, as well as the 2021 and 2022 standards being proposed, and could cause those parties to carry forward deficits or to become noncompliant. This could lead to significant negative impacts on the fuels market and the ongoing implementation of the RFS program."[89] Additionally, even a carryover RIN bank that is sufficient in aggregate does not mean that all obligated parties would have access to these carryover RINs. RIN holding data indicates that just four obligated parties—which represented approximately 40 percent of the 2019 total RVO—currently hold over half of all available 2019 RINs (i.e., carryover RINs), and nine obligated parties—which represented approximately 55 percent of the 2019 total RVO—hold over three-quarters of all available 2019 RINs.[90] Conversely, obligated parties that collectively represent approximately fifteen percent of the 2019 total RVO currently do not hold any 2019 RINs whatsoever;[91] thus, these parties may not have access to 2019 RINs to meet their obligations. Given the shrinking size of the carryover RIN bank, the current holders of additional RINs may choose to sell their RINs only at very high costs or in the alternative choose to not sell their RINs but retain them for their own compliance purposes the next year. Thus, it appears nearly certain that the 31 small refineries, in aggregate, would not be able to acquire sufficient RINs to comply with the standards. A further reduction of the carryover RIN bank by 1.6 billion RINs would be even larger than the 1.2 billion RIN shortfall that would result if we were to leave the 2020 standards in place, seriously jeopardizing the ability for obligated parties to comply with standards EPA proposed for 2020, 2021, and 2022. This further illustrates the need for this Compliance Action to prevent serious harmful impacts to the RFS program, as a whole, going forward.

Consideration of the carryover RIN bank has consistently been a foundational element of the design and implementation of the RFS program.[92] The carryover RIN bank ensures "a liquid and well-functioning RIN market upon which the success of the entire program depends."[93] The carryover RIN bank provides an inventory of RINs that "provide[s] obligated parties compliance flexibility in the face of substantial uncertainties in the transportation fuel marketplace."[94] The carryover RIN bank is an inherent aspect in the design and functionality of the RFS program that allows obligated parties to rely on other market participants, such as renewable fuel producers and blenders, to take the actions necessary to enable obligated parties' compliance. Without that ability, obligated parties would be forced into actions to produce and blend the renewable fuels themselves, severely disrupting the marketplace and likely increasing fuel costs to consumers.

Regardless of the compliance demonstrations the 31 small refineries now make, the amount of renewable fuel used in 2016, 2017, and 2018 will remain unchanged, as those years are in the past and no additional renewable fuel can be produced or used in those years. Accordingly, if EPA were to require these 31 small refineries to acquire and retire RINs now, there would be no impact on renewable fuel production or demand in the 2016, 2017, or 2018

[89] *Id*. at 72454.
[90] *See* "EMTS RIN Holding Data as of March 1, 2022," available in the docket for the SRE Denial, EPA-HQ-OAR-2021-0566. 2019 RIN holdings are presented in relation to the 2019 total RVO as this is the most recent year for which EPA has compliance data. The inclusion of the proportion of the 2019 total RVO provides context for the size of the parties that hold available (i.e., unretired) 2019 RINs and assumes full compliance by small refineries.
[91] *Id*.
[92] 86 FR 72454 (December 21, 2021), *see also e.g.*, 72 FR 23904 (May 1, 2007).
[93] 86 FR 72454 (December 21, 2021).
[94] *Id*.

compliance years. We acknowledge that requiring compliance through a drawdown of the carryover RIN bank may increase demand for renewable fuels in the future. A reduced carryover RIN bank could force obligated parties to rely more on production of new renewable fuel rather than having the ability to also utilize carryover RINs. However, requiring the 31 small refineries to comply with their 2016–2018 obligations, using the existing compliance scheme, would decrease liquidity in the RIN market, causing instability and price volatility, and would likely not allow for all obligated parties to come into compliance, especially due to the shortfall of advanced biofuel carryover RINs. Providing a limited alternative compliance demonstration approach to the small number of obligated parties specifically and distinctly affected by a combination of unique circumstances is a more appropriate response, as it guarantees compliance without detrimental impacts on the RFS program as a whole.

2. This action supports lawful implementation of SRE provisions.

As discussed herein and in the SRE Denials, EPA's approach to evaluating SRE petitions at the time the 34 remanded SRE petitions were decided was impermissible under CAA section 211(*o*)(9), as determined by the *RFA* court. The Tenth Circuit remanded the two 2016 petitions and one 2017 petition to the Agency for reconsideration given the change in the law that is directly applicable to the adjudication of those remanded SRE petitions. Similarly, when EPA originally granted the 31 2018 SRE petitions, it did so in a manner that cited little support from the record, and at a time when the Agency's approach to evaluating SRE petitions was being reviewed in *RFA*; those exemption decisions were later remanded by the D.C. Circuit for EPA to "issue new decisions" in light of the *RFA* and *HollyFrontier* decisions. At the time, EPA's decision to grant those 2018 SRE petitions was based solely on DOE's application of the small refinery scoring matrix and no independent analysis by EPA.[95] EPA's original actions granting the remanded 2016 and 2017 SRE petitions similarly applied an interpretation of the CAA SRE provisions that is inconsistent with the court's finding in *RFA.* In the SRE Denials, EPA no longer relies on the scoring matrix because, among other reasons, neither the 2011 DOE Study nor the scoring matrix considered the possibility that refineries would recover the cost of RINs through higher prices for their products.[96] On remand, given the *RFA* opinion and EPA's extensive findings regarding RIN cost passthrough, EPA has issued the SRE Denials that deny all 34 remanded SRE petitions because they fail to demonstrate that the small refineries experienced DEH. The analysis presented in the SRE Denials is how EPA intends to evaluate all future SRE petitions. This new interpretation of CAA section 211(*o*)(9) will restore consistency and predictability to the adjudication of SRE petitions.

Nonetheless, this new approach affects the 31 small refineries whose SRE petitions were remanded. There are practical obstacles that the 31 small refineries would individually face in acquiring enough RINs to satisfy their unmet 2016–2018 obligations under the existing compliance scheme and requiring them to do so would have detrimental effects on the operation and liquidity of the RIN market. To avoid damaging the RFS program as a whole, which would have negative effects on all obligated parties, EPA is offering this Compliance Action to the

[95] 2018 Decision at 2.
[96] SRE Denials at Sections III and IV.C and D.

subset of small refineries most adversely affected by EPA's change in statutory interpretation regarding SREs and DEH.

D. This compliance action is appropriately limited to small refineries in this situation.

The RFS compliance period is closed for the 2016, 2017, and 2018 compliance years.[97] This is in contrast to the 2019 and later compliance years, which for small refineries for 2019, and for all obligated parties for 2020 and beyond, remain open.[98] Because these current and later compliance years remain open, there is both an opportunity for continued RIN acquisitions and retirements, as well as sufficient RINs available to demonstrate compliance. In contrast, the 2016, 2017, and 2018 compliance periods have closed for all obligated parties; because of the two-year lifespan of RINs, and EPA regulations relating to RIN expiration,[99] it is often in a company's interest to utilize carryover RINs (i.e., prior year RINs) to demonstrate compliance with the following year's obligations, up to the regulatory limit,[100] and not to hold onto such RINs. Thus, 2015, 2016, 2017, and the overwhelming majority of 2018 RINs, are no longer available,[101] and there are insufficient 2019 RINs for parties to demonstrate compliance with all of the 2016–2018 obligations created by the SRE Denials.[102] In addition, as discussed in Section III.A, compliance for these 31 small refineries would be nearly impossible, under the existing compliance scheme, without EPA reopening the 2016, 2017, 2018 and 2019 compliance years for all obligated parties, which would have negative ramifications on all obligated parties and the RFS program.[103] Finally, the impacts of denying SRE petitions for future years will be factored into EPA's evaluation of the RFS standards' ability to incentivize additional renewable fuel use in those years. Thus, the alternative compliance demonstration approach articulated in this Compliance Action would not be appropriate and will not be necessary going forward.

In offering this alternative compliance demonstration approach, EPA is cognizant that it is EPA's original action granting the 34 remanded SRE petitions that initiated the sequence of events that has led to the situation these 31 small refineries now find themselves facing. Had EPA originally denied the petitions, consistent with the findings in the SRE Denials, then the small refineries could have timely come into compliance in the first instance. Furthermore, RFS business decisions made by the small refineries and subsequent policy choices made by EPA would have been based on those compliance demonstrations. In contrast, EPA had not previously decided the 2019, 2020, and 2021 SRE petitions that were addressed in the June 2022 SRE Denial, and thus those SRE petitions are in a very different factual posture.

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[97] 40 CFR 80.1451(f)(1)(i)(A)(*1*).
[98] 40 CFR 80.1451(f)(1)(i)(B)(*1*) and (*2*).
[99] 40 CFR 80.1427(a)(6).
[100] 40 CFR 80.1427(a)(5).
[101] Under the RFS regulations, 2017 RINs have now expired and, as such, are invalid RINs and cannot be used to demonstrate compliance. 40 CFR 80.1427(a)(6), 80.1428(c), and 80.1431(a). According to EMTS data, only approximately 15 million 2018 RINs remain unretired. *See* "EMTS RIN Holding Data as of March 1, 2022," available in the docket for the SRE Denial, EPA-HQ-OAR-2021-0566.
[102] SRE Denials at Section III.B.
[103] 82 FR 72459-60 (December 21, 2022).

IV. Alternative Compliance Demonstration Approach

For all the foregoing reasons, with this Compliance Action, EPA is providing an alternative compliance demonstration approach for the 31 small refineries identified in Appendix A to comply with their 2016, 2017, and/or 2018 obligations without any additional RIN retirements by these small refineries. To comply using this alternative approach, these parties must resubmit their annual compliance reports for 2016, 2017, and/or 2018 and report their actual gasoline and diesel fuel production, actual annual RVOs, and zero RIN deficit carryforward into the following compliance year. EPA recognizes that this will create the appearance of a RIN shortfall in the annual RFS compliance data EPA compiles and EPA will explain this on its website. Through this Compliance Action, that shortfall is satisfied, and no further action will be required by the 31 small refineries.

The 31 refineries may contact the EPA Fuels Compliance Helpline via email at fuelsprogramsupport@epa.gov if they have questions about this alternative compliance demonstration or otherwise require assistance regarding their 2016, 2017, and/or 2018 obligations. We advise the small refineries to update their 2016, 2017, and/or 2018 compliance reports as soon as practicable, but no later than the 2019 compliance deadline for small refineries. We also note here that this alternative compliance demonstration approach will not require updates to any associated attest reports.

V. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of "nationally applicable…final actions taken by the Administrator," or (ii) when such action is locally or regionally applicable, but "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii) described in the preceding sentence.

This final action is "nationally applicable" within the meaning of CAA section 307(b)(1). In the alternative, to the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of "nationwide scope or effect" within the meaning of CAA section 307(b)(1).[104] This final action provides an alternative approach to demonstrating compliance with the 2016, 2017, and/or 2018 RFS obligations for 31 small refineries across the country and applies to small refineries located within 16 states in 7 of the 10 EPA regions and in 7 different Federal judicial circuits.[105] This final action is based on the extenuating circumstances applicable to these 31 small refineries and the impacts their compliance with their newly created 2016, 2017, and/or 2018 RFS obligations under the existing compliance scheme would have on the RFS program. For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the *Federal Register*.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date notice of this final action is published in the *Federal Register*.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking. This action is immediately effective upon issuance.

[104] In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

[105] In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the "nationwide scope or effect" exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. *See* H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

Appendix A – Small Refinery RFS Obligations Governed by this Action

1. 2016 and 2017 Petitions Remanded by the Tenth Circuit in *RFA*

Refinery	Total G+D Production* (million gallons)	Total RIN Obligation* (million RINs)
HollyFrontier Cheyenne Refining, LLC	This information has been claimed as confidential by the affected businesses.	
HollyFrontier Woods Cross Refining, LLC		
Wynnewood Refining Company, LLC		
Total	**1,850**	**190**

* All numbers are rounded to the nearest 10 million gallons or RINs

2. 2018 Petitions Remanded by the D.C. Circuit in the Coordinated Cases No. 19-1196 (consol. with No. 19-1197), No. 19-1216, No. 19-1220, No. 20-1099.

Refinery	Total G+D Production* (million gallons)	Total RIN Obligation* (million RINs)
This information has been claimed as confidential by the affected businesses.		
Total	**13,420**	**1,430**

* All numbers are rounded to the nearest 10 million gallons or RINs

3. 2016–2018 Obligations Calculations

Compliance Year	RFS Standards			
	Cellulosic Biofuel	BBD	Advanced Biofuel	Total Renewable Fuel
2016	0.128%	1.59%	2.01%	10.10%
2017	0.173%	1.67%	2.38%	10.70%
2018	0.159%	1.74%	2.37%	10.67%

Compliance Year	Total Exempt G+D* (million gallons)	RVO* (million RINs)			
		Cellulosic Biofuel	BBD	Advanced Biofuel	Total Renewable Fuel
2016–2017	1,850	3	30	40	190
2018	13,420	20	230	320	1,430
Total	15,270	20	260	360	1,630

* All numbers (except the 2016–2017 Cellulosic Biofuel RVO) are rounded to the nearest 10 million gallons or RINs

Appendix B – Original Small Refinery Compliance Demonstrations

2016–2017 Compliance Demonstrations

Refinery	Original 2016–2017 Compliance Demonstration
HollyFrontier Cheyenne Refining, LLC	This information has been claimed as confidential by the affected businesses.
HollyFrontier Woods Cross Refining, LLC	
Wynnewood Refining Company, LLC	

2018 Compliance Demonstrations

Refinery	Original 2018 Compliance Demonstration

This information has been claimed as confidential by the affected businesses.