

Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program

Summary and Analysis of Comments

Chapter 4 Exemptions for Obligated Parties

Assessment and Standards Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency

RFS Summary and Analysis of Comments

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4 EXEMPTIONS FOR OBLIGATED PARTIES

What We Proposed:

The comments in this section correspond to Sections III.C.3 of the preamble to the proposed rule, and are therefore targeted at exemptions to the Renewable Fuels Standard for obligated parties. A summary of the comments received, as well as our response to those comments, are located below.

4.1 Small Refineries and Small Refiners

4.1.1 Exemption Should be Automatic without the Need for Prior Application

What Commenters Said:

Marathon, the American Petroleum Institute (API), the National Petrochemical and Refiner's Association (NPRA), and the Society of Independent Gasoline Marketers of America and the National Association of Convenience Stores (SIGMA/NACS) commented that EPA should change the small refinery provisions to automatically exempt small refineries in 2007, and that the gasoline produced by these exempted parties should be excluded from the overall calculation of national gasoline production. Commenters stated that requiring that refiners submit applications for the small refinery exemption is inconsistent with the small refinery provisions in the Energy Policy Act of 2005 (amended CAA section 211(o)(9)(C) and (D)). API further commented that it believes that this will avoid uncertainty regarding the RFS obligation status of small refineries for 2007 while preserving the principle that small refineries must qualify for the exemption; and that the required RFS percentage for 2007 should take into account only those small refineries that have been fully confirmed as exempt.

NPRA further commented that the proposed value of the required RFS percentage for 2007 (RFStd₂₀₀₇) would be smaller if the Agency would automatically assume that all small refiners and small refineries will decide to waive the exemption. The commenter also noted that the assumption that small refiners and small refineries are either all in or all out in 2007 makes a difference between estimating RFStd₂₀₀₇ as 3.45% or 4.02%. The commenter also stated that if the Agency assumes that all small refiners and small refineries are not in the RFS program in 2007 (as the proposed rule implied) and promulgates RFStd₂₀₀₇ at or near 4.02%, then regulatory over-compliance in 2007 is possible. The commenter stated that it believes that it would not be fair for EPA to promulgate a larger-than-necessary value for RFStd₂₀₀₇ and provide no accommodation for this oversight; the commenter suggested that EPA consider a rebate or a refund if the promulgated RFStd₂₀₀₇ is too high. Lastly, the commenter stated that there will not be an opportunity for RFS regulatory over-compliance in 2007 if EPA clearly explains that small refineries will not be obligated parties in 2007.

Additionally, regarding the regulations, API commented that in §80.1143 there should be a provision for small refineries and non-contiguous states and territories to opt-in effective with the first compliance period (2007). The commenter noted that the language currently would not allow such opt-ins to become effective until the 2008 compliance period.

Letters:

American Petroleum Institute (API) OAR-2005-0161-0185
Marathon Petroleum Company (MPC) OAR-2005-0161-0175
Society of Independent Gasoline Marketers of America (SIGMA)/National Association
of Convenience Stores (NACS) OAR-2005-0161-0234
National Refiners and Petrochemical Association (NPRA) OAR-2005-0161-0170, -0232

Our Response:

In the proposal we stated that applications for a small refinery exemption must be received by EPA by September 1, 2007 for the exemption to be effective in 2007 and subsequent calendar years, and that the small refinery exemption would be effective 60 days after receipt of the application by EPA (unless EPA notifies the applicant that the application was not approved or that additional documentation is required). The Energy Policy Act clearly intended to provide the small refinery exemption. Given the short timeframe between the effective date of this final rule and its implementation, there is not enough time for the typical application and approval process. Consequently, we are finalizing the rule without the need for applications. In order to ensure that this provision is not being misused, we believe that it is necessary for refiners to verify that their refineries meet the small refinery definition. We are thus finalizing that the small refinery exemption will become active immediately upon the effective date of this rule. Refiners will only be required to send a letter to EPA, by August 31, 2007, verifying their refineries' status as small.

As discussed below in section 4.1.2.1, we are extending, to qualified small refiners, the same exemption provided for small refineries; thus, we are finalizing that qualified small refiners receiving the small refiner exemption will also receive the exemption immediately upon the effective date of the rule. Small refiners will also be required to submit verification letters showing that they meet the small refiner criteria. This letter will be similar to the small refiner applications required under other EPA fuel programs, except the letter will not be due prior to the program.

Please see section III.C.3.a of the preamble to the final rule for more information on the small refinery and small refiner verification letter requirements. Also note that a submission of the verification letter does not automatically mean that the refiner is entitled to the relief. They have to in fact meet the criteria for a small refinery or a small refiner. A submission of verification entitles a party to the exemption only in those cases where a party meets the criteria.

With regard to the comment that we did not allow for small refineries and non-contiguous states and territories to opt-in in 2007, we do not anticipate that these parties will choose to waive the exemption given the design of the renewable identification number (RIN) program. They can receive and market RINs in their capacity as oxygenate blenders without subjecting themselves to the standard as an obligated party. Section III.A of the preamble to the final rule discusses how the applicable standards were calculated.

4.1.2 Provisions for Small Refiners

4.1.2.1 Extension of the Small Refinery Exemption to Small Refiners

What Commenters Said:

Marathon, ExxonMobil, Shell/Motiva, and API commented that they do not support the extension of the small refinery exemption to small refiners. Some commenters stated that they believed that EPA exceeded its discretionary authority by extending the exemption to small refiners. Other commenters stated that the Energy Policy Act specifically states that the exemption is for small refineries, and that it is clear that Congress did not intend for the exemption to be broadened to also include small refiners. The commenters all stated that they believed that §80.1142 should be deleted from the regulations in the final rule. Further, some commenters stated that after EPA includes small refiners back in the general RFS program, the applicable percentage for 2007 should be recalculated to include the volumes of fuel expected to be produced by the small refiners. ExxonMobil also commented that it believes that small refiners should not be granted the exemption because verification of processing capability and/or employment records would be far more difficult, and in some cases impossible, for EPA to accomplish. API further commented that it also does not agree with the regulations at §80.1142(d), which it believes could allow two small refiners who merge to become a large company and still be exempted.

The New York Department of Environmental Conservation commented that it believes that in programs where large capital equipment investments are involved, relief for small refiners makes sense, as it agrees that per barrel costs are generally greater for smaller units. However, the commenter stated that because this rule requires no significant capital investment for any refinery (large or small), compliance can be achieved by acquiring credits for renewable fuel. The commenter stated that it does not believe that small refiners are at a disadvantage and that EPA should not provide any exemptions for small refiners beyond what is required by the Energy Policy Act. (Additionally, the commenter's comments implied that it did not agree with exemptions for small refiners or those for small refineries.)

SIGMA/NACS, Countrymark, and the Ad Hoc Coalition of Small Business Refiners (Small Refiners) commented that they supported the expansion of the small refinery exemption to small refiners. SIGMA/NACS specifically stated that it believes

that the inclusion of small refiners in this exemption is a reasonable exercise of regulatory interpretation by EPA, and urged EPA to finalize this provision. The Small Refiners further commented that they did not insist on a SBREFA Panel predicated on the small refinery exemption being extended to small refiners. In its comments, NPRA did not explicitly state that it supports this extension of the provision, however its references to “small refineries and small refiners” implies that NPRA supports this provision as well.

Letters:

Ad Hoc Coalition of Small Business Refiners (Small Refiners) OAR-2005-0161-0214
American Petroleum Institute (API) OAR-2005-0161-0185
ExxonMobil Refining & Supply Co. OAR-2005-0161-0197
New York State Department of Environmental Conservation (NYDEC) OAR-2005-0161-0169
Marathon Petroleum Company (MPC) OAR-2005-0161-0175
Society of Independent Gasoline Marketers of America (SIGMA)/National Association of Convenience Stores (NACS) OAR-2005-0161-0234
Shell Oil Company/Motiva Enterprises OAR-2005-0161-0215

Our Response:

As stated in the proposal, we believe that we have discretion in determining an appropriate lead-time for the start-up of this program, as well as discretion to determine the regulated refiners, blenders and importers, “as appropriate.” We continue to believe that some refiners, due to their size, generally face greater challenges compared to larger refiners. The Small Business Regulatory Enforcement Fairness Act (SBREFA) also recognizes this and requires agencies, during promulgation of new standards, to assess the potential impacts on small businesses (as defined by the Small Business Administration (SBA) at 13 CFR 121.201).

In recent EPA fuel programs under the Clean Air Act, “small refiners” have historically been recognized in our fuel regulations as those refiners who produce fuel by processing crude oil, employ no more than 1,500 employees, and have an average crude oil capacity of 155,000 bpcd. These refiners generally have greater difficulty in raising and securing capital for investing in capital improvements and in competing for engineering resources and projects. Though the RFS program does not require that refiners make capital improvements, there are still costs associated with meeting the standard. While we were not required to assess the impacts on small businesses under the Energy Policy Act, we are required to do so under SBREFA. Based on our analysis, our assessment is that this rule will not impose a significant adverse economic impact. However, as small refiners informed us, there will still be economic impacts on these entities. Further, we believe that the number of small refiners that do not meet the Act’s definition of a small refinery is limited. Based on our current assessment of the refining industry, there are only three refiners that do not meet the Act’s definition of a small refinery but will qualify as small refiners for this rule. Therefore, we are finalizing the

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proposed provision that the same exemption will be provided to qualified small refiners as to small refineries.

We do not agree with the statements that the verification of small refiner processing capability and employment records will be difficult or impossible. For all of our previous fuel programs that have included small refiner provisions, small refiners have been required to submit extensive information with their small refiner applications showing that they do in fact meet the small refiner qualification criteria. The information that small refiners will be required to submit for the RFS program is the exact same, except it will be due after the program has begun rather than before (as our other fuel programs have required). Further, for any refiner who falsifies information regarding the qualification criteria, their small refiner status will be considered void as of the applicable date of the standard. This will also place the refiner in violation of the RFS rule requirements, and the refiner would be subject to Clean Air Act penalties of up to \$32,500 per day per violation, as stated at section 80.1163 of the regulations.

4.1.2.2 Participation in the RIN ABT Program

What Commenters Said:

Countrymark and the Small Refiners commented that they believe that small refiners should be able to generate RFS credits if they elected to blend renewables before 2011 without formally opting in to the program, but they should not be held to specific RFS volumes under the program compliance requirements prior to 2011. The commenters stated that they believe that this will allow flexibility to small refiners and will be beneficial to the renewable fuels program in general as some small refiners will elect to blend and earn credits who would otherwise not enter into a blending program and those credits will keep the credit program function properly. The Small Refiners also urged EPA to clarify whether or not a small refiner blending ethanol at a terminal or any location without formally opting into the program before 2011 can separate RINs and sell, transfer, or bank them.

CHS commented that it believes that a small refinery that is an oxygenate blender should be able to generate credits as if its RVO is zero (and thus whatever renewables they blend will be reflected as RIN credits available in the market). The commenter noted that it would like confirmation from EPA that such an entity can start its RVO and RIN credit building from a base of zero.

Countrymark commented that it believes that many of the exempted small refineries will be owned by major oil companies or companies who do not meet the small refiner criteria that have been used in EPA's past fuel programs. The commenter stated that small refiners are concerned that the small refinery exemption may create problems in credit trading and suggests that EPA monitor closely the activities of these refineries' effect on the credit trading program. The Small Refiners commented that they believe that the cost and availability of credits are important issues to small refiners. The

commenters thus requested that the rule include a specific provision, similar to that in the proposed MSAT2 rule, to review the credit program and its impact on small refiners on a periodic basis.

Letters:

Ad Hoc Coalition of Small Business Refiners (Small Refiners) OAR-2005-0161-0214
CHS Inc. OAR-2005-0161-0203
Countrymark Cooperative OAR-2005-0161-0225

Our Response:

As previously stated, we have decided to finalize the provision to allow small refineries and small refiners to waive their exemption. Gasoline produced at a refinery which waives its small refinery or small refiner exemption will be included in the RFS program and will be included in the gasoline used to determine the refiner's renewable fuel obligation. If a refiner waives the exemption, the refiner will be able to separate and transfer RINs like any other obligated party. Exempt small refineries and small refiners cannot separate a RIN simply by owning a batch. However, a RIN can be separated by these parties once the volume of renewable fuel is blended with gasoline or diesel to produce a motor vehicle fuel. In this respect they would be considered a blender as stated in the regulations at §80.1129. Thus if a small refinery or small refiner does not waive the exemption, the refiner could still separate and transfer RINs, but only for the renewable fuel that the refiner itself blends into gasoline. Exempt small refineries and small refiners who blend ethanol can separate RINs from batches without opting in to the program, so long as they own the renewable fuel at the time of blending. The commenters suggest that small refiners or refineries should be able to generate credits by blending renewable fuels into gasoline. However in the RFS program that we are adopting, refiners do not generate credits by blending renewable fuels. The RINs perform the function of credits, and they are generated by the renewable fuel producer, not the blender. However, as noted above, exempt refiners or refineries that blend renewable fuels into gasoline may separate RINs from the renewable fuel, as may other blenders.

With regard to the comments concerning a review of the credit program, we are not finalizing a review of the credit program. We note that all of the information that parties are required to report annually will provide EPA with all of the information that we believe will be needed to assess the credit market in the event of any shortage or problem.

4.1.2.3 Company vs. Facility Impacts

What Commenters Said:

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The Small Refiners noted that companies with several facilities will be able to comply but still benefit from exemptions for their small refineries. The commenters noted that they generally endorse the RIN structure, but oppose its companywide (versus individual facility) compliance basis. The commenter stated that it estimates that over half of the 42 refineries that are expected to qualify as small refineries are refineries owned by large companies—the commenters stated that they are concerned about the disproportionate advantage which will be enjoyed by large companies which can spread RINs among several refining facilities. The commenters also commented that these larger companies may build or acquire their own ethanol production facilities, but that small refiners with only one plant operating in the same market area will be disadvantaged.

Letters:

Ad Hoc Coalition of Small Business Refiners (Small Refiners) OAR-2005-0161-0214

Our Response:

As discussed in Section 2.3.1 of this document, we are finalizing the RIN program structure as proposed, and therefore will be retaining the company-wide compliance aspect. Further, the mandates of the Energy Policy Act call for a nationwide trading program, thus EPA does not have the discretion to restrict this aspect of the program. We note that EPA believes such a nationwide trading program is appropriate under the circumstances of this program, and would adopt such a program in any case. Thus, even if we were to impose a facility-based trading program, the ability to trade nationwide would still default to company-wide trading for larger companies.

The goal of the RIN program is to allow ethanol to be blended and marketed normally, and simply allow refiners to transfer RINs. The program allows for ample flexibility to obtain and trade RINs nationwide from refiners and oxygenate blenders. Given the number and variety of producers of renewable fuels (which are separate from the refiners that the commenters are concerned about) and the expected production volumes of renewable fuels, EPA believes that a smoothly functioning and competitive market for renewable fuels and the associated ability to separate RINs, and a market for RINs themselves, is likely to occur and this should address the concerns raised by the commenters. Further, the RIN program is for all refiners.

For a more detailed discussion of the RIN program structure, please see sections III.D and E of the preamble to the final rule.

4.1.2.4 Additional Small Refiner Concerns

What Commenters Said:

Countrymark and the Small Refiners commented that the proposed rule did not address seasonality issues that they believe small refiners who market gasoline in non-attainment areas, or in areas with varying state RVP standards without one pound summer RVP waivers, may face. The commenters requested that EPA and the Energy Information Administration (EIA) study as early as possible the impact that varying state RVP standards have on the blending of renewable fuels. The Small Refiners also specifically requested that the RFS regulations allow subsequent revisions to the small refiner provisions to recognize the hardship which seasonality issues impose on small refiners if demonstrated by the EIA study.

The Small Refiners also expressed the concern that in markets where corn-based ethanol production is expected to be significant, large refining companies could decide to meet their blending obligation at plants situated close to ethanol production sources—thus saving transportation costs incurred when ethanol is shipped to other markets. The commenters believe that this could result in an imbalance in the distribution of ethanol, with a concentration in the corn-belt area and lower coastal volumes, leading to lower gasoline prices which will disadvantage (and “in fact may be disastrous to”) small refiners or small refineries dependent upon gasoline sales.

Letters:

Ad Hoc Coalition of Small Business Refiners (Small Refiners) OAR-2005-0161-0214

Countrymark Cooperative OAR-2005-0161-0225

Our Response:

The comments regarding seasonality issues are beyond the scope of this rulemaking. We believe that the Boutique Fuel studies required by Congress will help to alleviate the commenters’ concerns with regard to varying state RVP standards.

With regard to the comment that some companies may choose to meet their blending obligation at plants close to ethanol production sources, we note that this is not an impact of our rule. Rather, this is an impact of the economic marketing of renewable fuels—a practice that our RIN system is designed to allow to continue unhindered. Renewable fuels can continue to be blended where it is most economical to do so, and RINs may be traded to refiners serving areas where renewable use would be less economical.

4.1.3 Foreign Small Refiners/Refineries

What Commenters Said:

ExxonMobil commented that nothing in the Energy Policy Act requires EPA to grant relief to foreign small refineries. The commenter further stated that it believes that it is inappropriate to extend “this unlawful exemption” to foreign small refiners; and that

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verification of processing capability and/or employment records would be far more difficult and in some cases impossible for EPA to accomplish.

Letters:

ExxonMobil Refining & Supply Co. OAR-2005-0161-0197

Our Response:

As discussed in the proposal, in several recent fuel programs EPA has provided relief to foreign refiners when the fuel program provides relief to a subset of domestic refiners. In these circumstances we have decided to provide the same relief to foreign refiners who meet the same criteria for relief as the domestic refiners, with additional provisions for the foreign refiner related to ensuring that the program is fully enforceable against foreign refiners. EPA believes that this is an appropriate way to exercise our statutory authority, and is fully consistent with our obligations under the Global Agreement on Tariffs and Trade (GATT). As a result, we proposed the provision to extend the small refinery and small refiner exemptions to foreign small refineries and small refiners. The proposal contained the related enforcement provisions adopted in prior fuels regulations. This is consistent with prior fuel programs (e.g., anti-dumping, MSAT, and the fuel sulfur rules), which allowed foreign refiners to receive such exemptions. We are finalizing this provision. Under this provision, gasoline produced by foreign small refiners and foreign small refineries who apply for and demonstrate that they meet all of the regulatory requirements to receive these exemptions (including the additional provisions related to enforceability), will be exempt from the RFS standard such that obligated parties (importers or blenders) would not count these volumes towards their renewable volume obligations.

4.1.4 Other

What Commenters Said:

In its comments, the Missouri Department of Natural Resources noted that it used the EIA/NPRA United States Refining and Storage Capacity Report, 2006 to determine that there are 137 refineries in the U.S., and that 57 of those refineries would qualify as small refineries for the RFS program. The commenter stated that this implies that 46 percent of all U.S. refineries (and about 14 percent of crude throughput) will be exempt from the RFS program until 2011. The commenter stated that with the small refinery/refiner exemption, it is concerned that there are a number of states that have refinery operations but will be exempt under the provisions of the RFS due to the size of these refineries (including Georgia, Montana, Nevada, North Dakota, Oregon, Utah, Virginia, Washington, and Wyoming).

Letters:

Missouri Department of Natural Resources (MDNR)

OAR-2005-0161-0217

Our Response:

To the extent the commenter is concerned that many states may have refineries that will qualify for the small refinery and small refiner exemptions, and that this could hurt the overall goal of the RFS program, we would note that the purpose of the nationwide RIN-based trading program is to ensure that obligated parties are able to comply with the standard while providing the flexibility for those parties to use renewable fuel in the most economical ways possible. In this regard, we expect the distribution and sale of renewable fuels to be marginally impacted at most by the requirements of this program, and with or without the small refinery and small refiner exemptions, we expect renewable fuels to continue to be used where it is most economical to do so.

4.2 Other Exemptions

What Commenters Said:

Sutherland Asbill Brennan commented that although the mandated amounts of renewable fuels currently are projected to be exceeded by the actual amounts produced and consumed, such a status quo is not guaranteed. The commenter stated that a potential problem, such as a natural disaster in the U.S. agriculture sector, could make it difficult to meet Congress' renewable fuels mandates and thereby drive the price of RINs high enough to disrupt the gasoline market. The commenter stated that it believes that the final rule needs to be flexible enough to address any such occurrences. The commenter further stated that a "change of rules", if it is determined that the program is not sufficiently flexible to meet changing times and circumstances, would be inappropriate.

The Missouri Department of Natural Resources commented that it believes that EPA may have incorrectly presumed that an obligated party would not be impaired in its ability to obtain sufficient RINs to comply with the applicable RFS standard in the event of a natural disaster. The commenter further stated that a reduction in gasoline production and the corresponding reduction in the demand for authorized RINs may fall short of the pre-determined compliance level, therefore rendering obligated parties out of compliance and subject to penalties. The commenter urged EPA to consider providing a temporary exemption in the event of a regional or national disaster.

The Small Refiners commented that they believe it is impossible to predict at this early stage just how this program will impact small refiners, especially the RIN market. The commenter strongly requested that EPA include hardship provisions in the final rule, as they believe there are competitive disadvantages that may result for small refiners if the small refinery exemption is not expanded to small refiners and if the company-wide compliance structure of the RIN program is not changed.

Letters:

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Ad Hoc Coalition of Small Business Refiners (Small Refiners) OAR-2005-0161-0214

Missouri Department of Natural Resources (MDNR) OAR-2005-0161-0217

Sutherland Asbill Brennan OAR-2005-0161-0210

Our Response:

Under other EPA fuels programs, compliance is based on a demonstration that the fuel meets certain component or emissions standards. Unforeseen circumstances, such as a natural disaster, may affect an individual refiner's or importer's ability to produce or import fuel that complies with the standards. As a result, we have included in other fuels programs provisions for a temporary hardship exemption from the standards in the event of an unforeseen natural disaster which affects a party's ability to produce gasoline that complies with the standards. Unlike most other fuels programs, compliance under the RFS program is based on a demonstration that a party has fulfilled its individual renewable fuels obligation on an annual basis, and compliance is demonstrated by showing the purchase of RINs associated with the production of a renewable fuel (generally a non-gasoline fuel) as compared to meeting specific gasoline content requirements on a per-gallon or annual average basis. The use of RINs to meet the renewable fuels obligation functions as a credit program, and there is a deficit carry-forward provision allowing compliance to be shown over more than one year. In the event of a natural disaster, the volume of gasoline produced by an obligated party is also likely to drop, which would result in a reduction in the party's renewable fuel obligation. As a result, we believe that an individual party would still be able to meet its renewable fuel obligation in the event of a natural disaster that affects the party's refinery or blending facility. Therefore, unlike other fuels programs, we do not believe there is a need to include a temporary hardship exemption in the RFS rule to address an individual party's inability to comply with its renewable fuels obligation due to unforeseen circumstances.

Most of the concerns raised by the commenters relate to problems that would have a more regional or national effect, as compared to affecting one or a few individuals. In the event that unforeseen circumstances do occur which result in a shortage of renewable fuel and available RINs, we believe that Congress provided an adequate mechanism for addressing such situations in the Energy Policy Act (at section 1541(a) [42 U.S.C. 7545(c)(4)(C)(ii)-(v)]). The Energy Policy Act provides that on petition by one or more States, EPA, in consultation with the Departments of Agriculture and Energy, may waive the required aggregate renewable fuels volume obligation in whole or in part upon a sufficient showing of economic or environmental harm, or inadequate supply. As a result, we believe that a renewable fuel supply problem that affects all (or a large number of) parties can be addressed using this statutory provision. We have carefully considered the comments; however, we do not believe that the comments provide a compelling rationale for providing a temporary hardship exemption from the RFS obligation based on unusual circumstances that goes beyond the provisions that Congress included in the Renewable Fuel Program. As a result, the final rule does

not contain provisions for a temporary hardship exemption based on unforeseen circumstances.

In regards to the Small Refiners' concerns, we note that we are extending the same exemption that small refineries are receiving to small refiners (as discussed above).