

Regulatory Impact Analysis: Renewable Fuel Standard Program

Chapter 9 Small-Business Flexibility Analysis

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Chapter 9: Small-Business Flexibility Analysis

This chapter presents our Small Business Flexibility Analysis (SBFA) which evaluates the potential impacts of the new standards on small entities. The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Prior to issuing a proposal for this rulemaking, we analyzed the potential impacts of these regulations on those entities that we believe are small entities (see section 9.3, below). As a part of this analysis, we conducted outreach with those entities to gather information and recommendations from these entities on how to reduce the impact of the rule on small businesses.

9.1 Requirements of the Regulatory Flexibility Act

We are generally required under the Regulatory Flexibility Act (RFA) to conduct a regulatory flexibility analysis unless we certify that the requirements of a regulation will not cause a significant impact on a substantial number of small entities. The key elements of the RFA include:

- a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;
- an identification to the extent practicable, of all other relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and,
- any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

The RFA was amended by SBREFA to ensure that concerns regarding small entities are adequately considered during the development of new regulations that affect them. Although we are not required by the Clean Air Act to provide special treatment to small businesses, the RFA requires us to carefully consider the economic impacts that our proposed rules will have on small entities. Specifically, the RFA requires us to determine, to the extent feasible, our rule's economic impact on small entities, explore regulatory options for reducing any significant economic impact on a substantial number of such entities, and explain our ultimate choice of regulatory approach.

We have concluded that the final RFS rule will not have a significant impact on a substantial number of small entities. We based this conclusion on several criteria. First, the

industry is expected to be overcomplying by a wide margin independent of the standard, thus causing compliance costs to be minimal. Second, the Energy Policy Act of 2005 (Energy Policy Act) already provides relief from the renewable fuels standards until 2011 for the majority of the small entities; and lastly, we are extending this relief to the remaining small entities. This is discussed further below.

9.2 Need for the Rulemaking and Rulemaking Objectives

A detailed discussion on the need for and objectives of this rule are in the preamble to the final rule. As previously stated, EPA is required to promulgate regulations implementing a renewable fuel program under Section 1501 of the Energy Policy Act, which amended the Clean Air Act by adding Section 211(o). The Energy Policy Act requires EPA to establish a program to ensure that U.S. gasoline contains specific volumes of renewable fuel for each calendar year beginning in 2006, to increase the amount of renewable fuel used in vehicles and engines in the U.S.

9.3 Description of Affected Entities

9.3.1 Definition of Small Entities

Small entities include small businesses, small organizations, and small governmental jurisdictions. For the purposes of assessing the impacts of the rule on small entities, a small entity is defined as: (1) a small business that meets the definition for business based on the Small Business Administration’s (SBA) size standards (see Table 9-1); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Table 9.3.1-1 provides an overview of the primary SBA small business categories potentially affected by this regulation.

Table 9.3.1-1. Small Business Definitions

Industry	Defined as small entity by SBA if:	NAICS Codes ^a
Gasoline refiners	≤1,500 employees ¹¹⁵	324110

^a North American Industrial Classification System

9.3.2 Summary of Small Entities to Which the Rulemaking Will Apply

The refiners that are potentially affected by this proposed rule are those that produce gasoline. For our recent rulemaking “Control of Hazardous Air Pollutants from Mobile Sources”

¹¹⁵ In the Draft RIA, we also referred to a 125,000 barrels of crude per day (bpcd) crude capacity limit. This criterion was inadvertently used and is not applicable for this program (as it only applies in cases of government procurement). We note that the number of small entities remains the same whether this criterion is used or not.

(72 FR 8428, February 26, 2007), we performed an industry characterization to determine the universe of potentially affected gasoline refiners. Information about the characteristics of refiners comes from sources including the Energy Information Administration within the U.S. Department of Energy, and from Hoover's (a division of Dun and Bradstreet). The refining industry is located primarily in NAICS code 324110.

The industry characterization was then used to determine which refiners met the SBA definition of a small refiner. From the industry characterization, and further analysis following the Notice of Proposed Rulemaking (71 FR 55552, September 22, 2006), we determined that there were 15 gasoline refiners (owning 16 refineries) that met the definition of a small refiner. It should be noted that because of the dynamics in the refining industry (e.g., mergers and acquisitions), the actual number of refiners that ultimately qualify for small refiner status could be different from this estimate.

Title XV the Energy Policy Act provides, at Section 1501(a)(2) [42 U.S.C. 7545(o)(9)(A)-(D)], special provisions for "small refineries", which includes a temporary exemption from the standards until calendar year 2011. Further, the Energy Policy Act states that EPA must use the definition of "small refinery" and apply the special provisions provided for small refineries in the RFS program. The Energy Policy Act defines the term "small refinery" as "...a refinery for which the average aggregate daily crude oil throughput for a calendar year...does not exceed 75,000 barrels."

A small refinery (as defined by the Energy Policy Act) is very different from a small refiner (as defined in SBA's regulations at 13 CFR 121.201). Per 13 CFR 121.201, and as stated above in Table 9-1, a small refiner is a small business that employs less than or equal to 1,500 employees. A small refinery, per the Energy Policy Act, is a small-capacity refinery and could be owned by a larger refiner that exceeds the criterion specified in SBA's small entity definition; whereas small refiners generally only own a few (and more often than not, only one) refineries.

In our analysis of the potentially affected small refiners, we found that 42 refineries met the Energy Policy Act's definition of a small refinery. Of these, we determined that 13 of these refineries were owned by small refiners. Therefore, 12 of the 15 small refiners owned refineries that also met the Energy Policy Act's definition of a small refinery. As a result, we believe that all but three small refiners would automatically be granted relief by implementing the provisions specified in the Energy Policy Act.

9.4 Issues Raised By Public Comments

During the public comment period we received numerous comments regarding various aspects of the proposed rule, including our proposed small refiner provisions. The following section provides a summary of the comments that we received on our proposed provisions. More information on these comments can be found in the Final Summary and Analysis of Comments, which is a part of the rulemaking record.

9.4.1 Extension of the Small Refinery Exemption to Small Refiners

Commenters that supported the provision extending the small refinery exemption to small refiners generally stated that they believe that a small refiner exemption is necessary as those entities that would qualify as small refiners are generally at an economic disadvantage due to their company size – whereas the Energy Policy Act only recognizes facilities, based on the size of each location. These commenters also stated that they have concerns with the cost and the availability of credits under the RFS program, and believe that provisions for small refiners are necessary to help mitigate any significant adverse economic impact on these entities.

Commenters that opposed the provision commented that they believe that EPA exceeded its discretionary authority, that there appears to be no basis on which the Agency can legitimately expand this statutory exemption to add small refiners, and that Congress “clearly did not intend that the exemption be broadened to also include small refiners.” One commenter also stated that it does not believe that small refiner provisions are necessary because the RFS program does not require costly capital investments like previous fuel regulations.

9.4.2 Application Deadline

We proposed that refiners would need to apply for the small refinery exemption, and that the 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). We received comments on this provision in which commenters stated that requiring small refinery applications was inconsistent with the language set out in the Energy Policy Act. The commenters stated that the Energy Policy Act intended that small refineries would automatically receive the small refinery exemption upon the effective date of the standard, and that these parties should not be considered obligated parties in 2007 even if they do not submit a small refinery application.

9.4.3 Provisions for Foreign Small Refineries and Refiners

For consistency with prior gasoline-related fuel programs, we also proposed to extend the RFS small refinery (and small refiner) exemption to foreign refiners, and we requested comment on this provision. We received some comments in which commenters stated that they believe that there is no reason to extend the small refinery exemption to these refiners. One commenter even stated that it believed that such an allowance would be unlawful.

9.4.4 Other

We received some comments which stated that EPA needed to clarify whether or not exempt small refineries (and small refiners) could separate a RIN simply by owning a batch of fuel. We also received a comment which stated that it was not clear in the proposed rule whether or not small refineries (and small refiners) blending ethanol at a terminal or any location without formally opting into the program could separate RINs.

9.5 Related Federal Rules

Other current and proposed Federal rules that are related to this rule are: the Mobile Source Air Toxics (MSAT2) rule (72 FR 8428, February 26, 2007), the Tier 2 Vehicle/Gasoline Sulfur rulemaking (65 FR 6698, February 10, 2000), and the fuel sulfur rules for highway diesel (66 FR 5002, January 18, 2001) and nonroad diesel (69 FR 38958, June 29, 2004).

9.6 Projected Reporting, Recordkeeping, and Other Compliance Requirements

For any fuel control program, EPA must have the assurance that refiners meet the applicable standards. Thus, requirements are imposed to ensure that compliance obligations are met.

The recordkeeping, reporting and compliance provisions of this program are fairly consistent with those currently in place for our other 40 CFR part 80 fuel programs, including the highway and nonroad diesel and MSAT regulations. These provisions include:

- Registration (the registration numbers will also be used in the RINs)
- Submission of annual reports summarizing a refiner's annual gasoline production and a demonstration of its compliance with the renewable fuels standard and submission of annual reports detailing and tracking a refiner's RINs; EPA's Central Data Exchange will be used for report submissions
- Recordkeeping will consist of the retention of all compliance documents (such as Product Transfer Documents and all reports submitted to EPA) for at least five years

For a more detailed discussion of these provisions, please see section IV of the preamble to this final rule.

9.7 Steps to Minimize Significant Economic Impact on Small Entities

As stated above, we conducted outreach to a number of stakeholders that met the definition of a small entity to gain feedback and advice on the needs of small businesses and potential challenges that these entities may face. The feedback that we received from these entities as a result of these meetings was used during the development of the proposed rule for developing regulatory alternatives to mitigate the impacts of the rulemaking on small businesses. General concerns raised by these entities were the potential difficulty and costs of compliance with the upcoming standards given the other fuel compliance requirements that the fuel refining industry is subject to. Below we discuss the regulatory flexibility alternatives and provisions which are being finalized in this action.

While we do not believe that the RFS program with just the statutorily-prescribed temporary relief for small refineries would have a significant economic impact on a substantial number of small entities, we continue to believe that some refiners, due to their size, generally

face greater challenges compared to larger refiners. These refiners generally have greater difficulty in raising and securing capital for investing in capital improvements and in competing for engineering resources and projects. This rulemaking does not require that refiners make capital improvements, however there are still costs associated with meeting the standard. Thus, we find it appropriate to extend the small refinery temporary exemption, as set out in the Energy Policy Act, to small refiners. Under this exemption, any gasoline produced at a refinery owned by a small refiner will not be counted in determining the renewable fuel obligation of a refiner until January 1, 2011; further, the small refiner may exclude gasoline produced at its refineries from its compliance calculations. Beginning in 2011, refineries owned by small refiners will be required to meet the same renewable fuel obligation as all other refineries.

Past fuels rulemakings have included a provision that, for the purposes of the regulatory flexibility provisions for small entities, a refiner must also have an average crude capacity of no more than 155,000 barrels of crude per day (bpcd). To be consistent with these previous rules, we are finalizing in this rule that refiners that meet this criterion (in addition to having no more than 1,500 total corporate employees) will be considered small refiners for the purposes of the regulatory flexibility provisions for RFS program. Further, the refiner must have produced gasoline at its refineries by processing crude oil through refinery processing units. We are also finalizing that eligibility will be based on 2004 data.

We agree with statements from commenters that the Energy Policy Act did in fact intend to provide the small refinery exemption without the need for the submission of small refinery applications, and that these parties should receive the exemption upon the effective date of the rule. We also believe that this should be the case for small refiners as well. Therefore, we are finalizing that small refiners will also receive the exemption immediately upon the effective date of the rule. However, to ensure that only those refiners who meet the criteria above receive this exemption, we believe that it is necessary for refiners to verify that they do in fact meet the criteria. Therefore, these refiners will also be required to submit a verification letter showing that they meet the criteria for qualification as a small refiner for the regulatory flexibility provisions. This letter will be similar to the small refiner status applications required under other EPA fuel programs (and must contain all the required elements specified at §80.1142 of the regulations), except the letter will not be due prior to the program. Small refiner status verification letters for this rule that are later found to contain false or inaccurate information will be void as of the effective date of this rule. Small refiners who subsequently do not meet all of the RFS program's regulatory flexibility qualification criteria (i.e., cease producing gasoline by processing crude oil, employ more than 1,500 people, or exceed the 155,000 bpcd crude oil capacity limit) as a result of a merger with or acquisition of or by another entity, are disqualified as small refiners, except in the case of a merger between two previously approved small refiners. As in other EPA programs, where such disqualification occurs, the refiner must notify EPA in writing no later than 20 days following the disqualifying event.

We are finalizing the proposed provision allowing foreign refiners to apply for a small refinery or small refiner exemption under the RFS program. The Energy Policy Act definition of "small refinery" is not limited to domestic facilities, and we believe that we have the discretion to apply the definition of small refinery, and the similar relief that we are providing to small refiners, to foreign producers. We believe that this provision is necessary for consistency with

prior fuel programs (anti-dumping, MSAT, and the fuel sulfur rules) which allowed foreign refiners to receive such exemptions. Under this provision, gasoline produced at approved foreign small refineries, and by approved foreign small refiners, will be exempt from the RFS standard such that obligated parties (importers or blenders) would not count these volumes towards their renewable volume obligations.

We are also finalizing the proposed provision that the automatic five year exemption, and any small refinery extended exemptions (extensions of the small refiners exemption will only be available to small refineries), may be waived upon notification to EPA. Gasoline produced by a small refiner who waives its 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. However, exempt small refiners cannot separate a RIN simply by owning a batch, a RIN can only be separated by these parties once the volume of renewable fuel is blended with gasoline or diesel to produce a motor vehicle fuel (as stated in the regulations at §80.1129). If a small refiner does not waive its small refiner exemption, it can still separate and transfer RINs, but only for the renewable fuel that the refiner itself blends into gasoline (i.e., the refinery operates as an oxygenate blender facility). Lastly, exempt small refiners who blend ethanol can separate RINs from batches without formally opting in to the program.

9.8 Conclusions

After considering the economic impacts of today's proposed rule on small entities, we do not believe that this action will have a significant economic impact on a substantial number of small entities. While the Energy Policy Act provided for a temporary exemption for small refineries from the requirements of today's proposed rule, these parties will have to comply with the requirements following the exemption period. Therefore, we had to take into account the economic effects of the program on small entities when they would need to comply with the standard. As described in section VI of the preamble to this final rule, the annual projections of ethanol production are greater than the annual renewable fuel volumes required by the Energy Policy Act. For example, in 2011, when the Energy Policy Act's small refinery exemption ends, over one billion gallons in excess RINs are projected to be available. Further, excess RINs are anticipated for each year of the program. Due to this projected excess supply in comparison to the standard, the cost of RINs should be very low—near the level of the transaction costs.

Due to the low cost to affected small entities, and the projected RIN availability, as well as the temporary relief provided to small refineries and small refiners, we do not believe that this program will impose a significant economic impact on a substantial number of small entities.

Endnotes

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^{xxii} National Ethanol Vehicle Coalition (http://www.e85fuel.com/e85101/faqs/number_ffvs.php).

^{xxiii} EIA 2004 Petroleum Marketing Annually (Table 48: Prime Supplier Sales Volumes of Motor Gasoline by Grade, Formulation, PAD District, and State).

^{xxiv} EIA Historical RFG MTBE Usage (file received from EIA representative on March 9, 2006).

^{xxv} EIA Monthly Energy Review, June 2006 (Table 10.1: Renewable Energy Consumption by Source, Appendix A: Thermal Conversion Factors).

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