

ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1005 (and consolidated cases)

**United States Court of Appeals
For the District of Columbia Circuit**

AMERICANS FOR CLEAN ENERGY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY &
REGINA A. MCCARTHY, ADMINISTRATOR
Respondents,

E.I. DU PONT DE NEMOURS & CO., *et al.*,
Intervenors.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, 80 FED. REG. 77,420 (DEC. 14, 2015)

**BRIEF OF AMICUS CURIAE SMALL RETAILERS COALITION
IN SUPPORT OF OBLIGATED PARTY PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Amicus Curiae, the Small Retailers Coalition (“SRC”), discloses the following: SRC is a national trade association with more than 30 members from across the United States. SRC represents the interests of thousands of small, independent petroleum retailers and convenience stores and is dedicated to combating an issue that threatens the future viability of such businesses—the uneven playing field created by the Renewable Fuel Standard. SRC is in the process of becoming a Texas non-profit entity and intends to operate as a tax-exempt organization under the provisions of section 501(c)(6) of the Internal Revenue Code. SRC has no parent corporation, and no publicly-held company owns 10 percent or more of its stock.

September 15, 2016

/s/ Alec Zacaroli

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**CERTIFICATE OF PARTIES, RULINGS
UNDER REVIEW, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for SRC certifies the following:

(A) Parties and Amici

Except for the SRC, all parties, intervenors, and amici appearing in this Court are, to the best of my knowledge, listed in the Obligated Party Petitioners' Opening Brief Regarding EPA's Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule, which was filed on September 8, 2016 (Doc. No.1634780).

(B) Ruling under Review

The final agency action under review is found at 80 Fed. Reg. 77,420 (Dec. 14, 2015), and is entitled "Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016, and Biomass-Based Diesel Volume for 2017."

(C) Related Cases

This case was not previously before this Court or any other court. It has been consolidated with Case Nos. 16-1044, 16-1047, 16-1049, 16-1050, 16-1053, 16-1054, 16-1056. Per the Court's order of May 5, 2016, Case No. 16-1052 (*Alon Refining Krotz Springs, Inc. v. EPA*) was deconsolidated.

September 15, 2016

/s/ Alec Zacaroli

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**STATEMENT REGARDING CONSENT TO FILE
AND SEPARATE BRIEFING**

Pursuant to Fed. R. App. P. 29(a), SRC certifies that it has filed a Motion for Leave to Participate as Amicus Curiae concurrently with this brief. SRC further certifies that it has consulted with the parties. Petitioners American Fuel & Petrochemical Manufacturers, Monroe Energy, LLC, and Valero Energy Corp. and Respondent United States Environmental Protection Agency have consented to SRC's participation. One Petitioner, American Petroleum Institute, has stated that it opposes SRC's participation. Petitioners Americans for Clean Energy and National Biodiesel Board did not object, but reserved their rights to oppose after seeing SRC's motion. No other counsel for any parties or movant-intervenors in the case responded to notice sent to designated or liaison counsel, as applicable, asking whether they consented, objected, or took no position on SRC's proposed participation.

Pursuant to Fed. R. App. P. 29(c)(5), SRC states that no party or party's counsel authored this brief in whole or in part, and that no other person besides amicus curiae contributed money that was intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), SRC states that a separate brief is necessary for the following reasons: SRC is a not-for-profit national trade association whose mission is to promote the interests of small retailers in the retail fuel business.

SRC members are thus uniquely positioned to provide the Court with a different perspective from any other party or amicus. Although SRC is aware that a group of businesses and trade associations are seeking to file a joint amici curiae brief in opposition to the respondents in this case, this proposed amici curiae brief is expected to address an unrelated issue (i.e., higher biofuels volume standards) than what is addressed in SRC's amicus brief. Accordingly, SRC anticipates that the focus of this brief is not likely to be duplicated by any other party or amicus and that a separate brief is necessary.

Respectfully submitted,

September 15, 2016

/s/ Alec Zacaroli

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GLOSSARY OF ACRONYNS AND ABBREVIATIONS

Acronym / Abbreviation	Definition
SRC	Small Retailers Coalition
EPA	United States Environmental Protection Agency
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
OPP Brief	Obligated Party Petitioner's Opening Brief Regarding EPA's Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule
E85	High-level ethanol fuel blend containing 51% to 83% ethanol

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae, the Small Retailers Coalition (“SRC”), respectfully submits this brief in support of the Obligated Party Petitioners.¹

SRC represents more than 30 independent, small businesses engaged in the retail sale of gasoline to the public. SRC was formed to raise awareness of a significant threat to the viability of its members: the current structure of the Renewable Fuel Standard (“RFS”) Program, which provides larger fuel retailers with a significant competitive advantage by allowing them to capture the Renewable Identification Number (“RIN”) value of fuel without incurring the obligation under the RFS Program to supply renewable fuels. This is a threat that, even now, only a handful of small retailers have come to fully appreciate. SRC is continuing to grow its membership as more retailers become aware of the issue.² In the interim, as small retailers are becoming more aware of the uneven playing

¹ The Obligated Party Petitioners are American Fuel & Petrochemical Manufacturers; Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Placid Refining Company; U.S. Oil & Refining Co.; Wyoming Refining Company; Monroe Energy, LLC; and Valero Energy Corp.

² Because SRC was recently formed, SRC was not able to submit formal comments to the rule at issue here. SRC, however, did submit comments to the Docket for the Proposed Renewable Fuel Standards for 2017, and the Biomass-Based Volume for 2018. *See, e.g.*, Bill Douglass, Chairman, Douglass Distributing, Comment Letter on Proposed 2017 RFS (July 28, 2016) (Docket No. EPA-HQ-OAR-2016-0004-3574-A2).

field in which they are forced to compete, many have filed comments with EPA. These comments raise concerns that small retailers are being driven out of the market by their larger, more integrated competitors who can sell RINs to supplement their income.³

Although small gasoline retailers are not regulated under the RFS Program, SRC's members are an integral part of the fuel distribution system necessary for the success of the Program, and are currently directly and adversely impacted by it. SRC's members, along with all small retailers, are essential to the system because in the aggregate they comprise approximately 65 percent of the nation's retail gas business. Small retailers thus serve millions of customers with gasoline and renewable fuels, thereby helping supply renewable fuels to a vast market across the country and maintaining the competition necessary to ensure the efficient, even distribution of gasoline and diesel.

Currently, however, small retailers are adversely impacted by the RFS Program because of the requirement that places the point of obligation for

³ See, e.g., Bruce W. Heine, Magellan Midstream Partners, Comment on Proposed 2017 RFS (July 11, 2016) (Docket No. EPA-HQ-OAR-2016-0004-2695); Joe Jobe, Rock House Advisors, Comment on Proposed 2017 RFS (July 10, 2016) (Docket No. EPA-HQ-OAR-2016-0004-1717); E. Harvey Steinhagen III, PetroTex Fuels, Inc., Comment on Proposed 2017 RFS (July 15, 2016) (Docket No. EPA-HQ-OAR-2016-0004-3546); Michael C. Kelly, Gordon Petroleum, Comment on Proposed 2017 RFS (Aug. 1, 2016) (Docket No. EPA-HQ-OAR-2016-0004-3557); Shujat Swati, Swati Enterprises, Inc., Comment on Proposed 2017 RFS Rule (July 29, 2016) (Docket No. EPA-HQ-OAR-2016-0004-3573).

compliance with renewable fuel mandates on fuel importers and refiners, rather than blenders. This requirement means that large fuel retailers with the capability of blending gasoline or diesel with a renewable fuel at the rack can capture the RIN from the renewable fuel source.⁴ Because these large retailers are not obligated parties under the RFS, they are then free to sell the RIN and pocket the revenue. Small retailers, in contrast, are unable to blend fuel because they lack the necessary infrastructure, and are forced to buy the finished product directly from blenders.⁵ The result is that large retailers are making a windfall from the sale of RINs, are artificially lowering the price of gasoline to undercut small retailers, and are well on their way to running small retailers out of business altogether.⁶

Accordingly, SRC submits this amicus brief in support of the request to grant the Petition for Review and remand for EPA's consideration of the point-of-

⁴ The "rack" (also called terminal or terminal rack) is the point at which fuel is prepared and distributed into the commercial market. It is where fuels are blended to meet the RFS and other requirements, and are then distributed into commerce.

⁵ Although refiners could blend fuel at the time of refining and sell the same blended gasoline to both large and small retailers, pipelines will not allow ethanol-blended products in the pipeline for various reasons.

⁶ See *RINs Debate Touches Off Concern on Wall Street*, TEXAS FUEL & FOOD ASSOC. (Aug. 10, 2016), <https://txfoodandfuel.org/2016/08/10/rins-debate-touches-off-concern-on-wall-street/> ("Goldman Sachs and Credit Suisse 'are advising investors to avoid companies with high RIN exposure and to buy shares in large retail and distribution chains.'"); James Osborne, *Ethanol Credit Spike Divides Gas Stations*, FUELFIX (Aug. 24, 2016) ("Between 1994 and 2015 the number of filling stations fell from more than 200,000 to about 150,000.").

obligation definition under the current program. Only SRC is in a position to adequately represent to the Court the nature and extent of this impact on its members, as well as on all small fuel retailers.

ARGUMENT

EPA refused to address the point-of-obligation definition in the RFS regulations through the promulgation of the Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016, and Biomass-Based Diesel Volume for 2017. This refusal will have a devastating impact on the nation's small gasoline retailers and will further undermine the long-term viability of the RFS Program.⁷

I. The current structure of the point of obligation in the RFS Program is raising the cost of renewable fuel and driving small retailers out of business.

As noted in the brief filed by the Obligated Party Petitioners, EPA has already conceded that the RIN market is not operating as intended, and is driving up prices of renewable fuels for both obligated parties and consumers. OPP Br. at 9-10; *see also* OPP Br. at 12-13. Indeed, as the Obligated Party Petitioners have

⁷ SRC supports the positions set forth in the Obligated Party Petitioner's Opening Brief Regarding EPA's Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule ("OPP Brief"). In particular, SRC supports, for all of the reasons set forth in the OPP Brief, the Obligated Party Petitioner's position that EPA was obligated to address the point-of-obligation definition contained in the RFS regulations through this rulemaking. SRC will not repeat those arguments here, but rather wishes to explain why this obligation on the part of the agency was particularly important for small retailers, and why the impact on small retailers further undermines the long term viability of the RFS Program.

told EPA and this Court, “the regulatory definition of ‘obligated party’ is a root cause of the RIN system’s inefficiency, because it allows unobligated blenders to profit from RINs rather than passing their value through to retail customers in the form of subsidized E85 prices.” OPP Br. at 31. That structure is particularly devastating to the nation’s small gasoline retailers because it provides large fuel retailers with the ability to artificially undercut the market price of gas at the pump, capture additional market share, and ultimately drive small retailers out of business altogether.

Under the current system, the point of obligation for compliance with renewable fuel mandates is placed on fuel importers and refiners, rather than blenders. 40 C.F.R. § 80.1406(a)(1). This means that anyone with the capability of blending gasoline or diesel with a renewable fuel at the rack can capture the RIN from the renewable fuel source, and then sell the RIN in the market because they are not obligated parties under the RFS Program.⁸ Large fuel retailers across the country are taking advantage of this structure. Those with the capability to blend fuel are buying gasoline from merchant refiners (this fuel comes with no obligation), buying ethanol (which comes with a RIN), blending the two, and

⁸ Harry Simpson, President, Crimson Renewable Energy, Comment on Proposed 2016 RFS Rule at 3-6 (July 25, 2015) (Docket No. EPA-HQ-OAR-2015-0111-1823-A1).

capturing the RIN.⁹ The retailers then sell the RIN in the market or back to the refiner, which needs the RIN to meet its obligation.¹⁰

This is not a hypothetical—it is occurring in the market today—and large retailers are increasingly formulating business plans around selling the RIN in lieu of selling gasoline. For example, in a recent earnings call, executives from Couche-Tard¹¹ were highlighting positive earnings by explaining how large retailers have access to RINs that give them a market advantage.¹² The Chief Financial Officer started by saying:

We think our scale and procurement allows us to buy product as well as anyone, we think our—we got generally broader access to RINs in the U.S. than most of our competition. So as RINs increase in value we think that widens our competitive advantage and then finally we focus on the Categories. So we think we were widening what we believe it's a key competitive and sustainable advantage in the fuel space.

⁹ Chris Prentice, *EPA Should Change Biofuels Program to Help Small Fuel Retailers: Letter*, REUTERS (Aug. 1, 2016, 2:30 PM), <http://www.reuters.com/article/us-usa-biofuels-retailers-idUSKCN10C2ZX>.

¹⁰ See George Damiris, President & CEO, HollyFrontier Corp. Earnings Call Transcript (May 4, 2016), <http://seekingalpha.com/article/3971326-hollyfrontier-hfc-george-j-damiris-q1-2016-results-earnings-call-transcript>.

¹¹ Couche-Tard is more commonly known as Circle-K.

¹² See Brian Hannash, CEO, Alimentation Couche-Tard Inc. Q1 2017 Earnings Conference Call (Aug. 30, 2016), <http://seekingalpha.com/article/4003201-alimentation-couche-tards-ancuf-ceo-brian-hannasch-q1-2017-results-earnings-call-transcript>.

Thereafter, the President and CEO stated, “as RIN values increase, we think the advantages we have of having access to those RINs widens our supply advantage vis-à-vis competition, so in general we do like having a higher value RIN.”¹³

All of this is devastating the nation’s small gasoline retailers, who do not have the ability to blend fuel and separate RINs for subsequent sale.¹⁴ Not only are large retailers able to enjoy an additional revenue stream not available to small retailers, but large retailers are now consistently underpricing gasoline at the pump in order to drive small retailers out of business.¹⁵ RINs are currently trading at approximately 88 cents per gallon (8.8cpg on a blended gallon), enabling large retailers to cut the price of gasoline at the pump by 8 to 15 cents per gallon and still earn a profit.¹⁶ This has a huge impact on small retailers, as consumers will “price

¹³ *Id.*

¹⁴ See Samantha Oller, *Refiners, Small Retailers Fight RIN System*, CSP DAILY NEWS (Aug. 18, 2016), <http://www.cspdailynews.com/fuels-news-prices-analysis/fuels-analysis/articles/refiners-small-retailers-fight-rin-system>.

¹⁵ See Douglass, *supra* note 2.

¹⁶ A recent SEC filing from a large retailer, Casey’s General Store, reports:

The fuel margin was up about \$0.02 per gallon from the first quarter last year, due to a decline in the wholesale cost of fuel and a favorable environment for renewal energy credits resulting in a fuel margin of \$0.195 per gallon for the quarter. During this time, we sold approximately 17.9 million RINs at an average price of \$0.82. This represented about \$0.027 per-gallon benefit to the fuel margin.

See CASEY’S GENERAL STORES, INC., FORM 8-K (Sep. 7, 2016), *available at* <http://secfilings.nasdaq.com/filingFrameset.asp?FilingID=11583075>.

shop while they drive,” meaning that as many as 64 percent of consumers will “take a left turn across a busy street” or “drive 5 miles out of their way” to save \$0.05 a gallon on gas.¹⁷

If large retailers that profit from the RIN are allowed to undercut small retailers by 5 to 14 cents a gallon and still earn a profit, small retailers will be completely shut out of the market, and consumers will be left with only the large retailers to provide gasoline. This reduces choice and fair price competition for the consumer, and results in fewer retail outlets to supply fuel to the market.¹⁸ It also undermines the RFS Program. The goal of the program is to incentivize investment in infrastructure that can provide consumers with gasoline that contains higher ethanol blends like E85. As long as large retailers can profit from the sale of RINs, they have no incentive to invest in any additional infrastructure to deliver higher ethanol blends. EPA recognizes that “the RIN is currently an inefficient mechanism for reducing the price for higher level ethanol blends at retail, and therefore unlikely to be able to significantly impact the supply of ethanol in the United States in 2016.” 80 Fed. Reg. at 77,457.

¹⁷ *Even at \$2, The Gas Price Still Dominates Purchasing Decisions*, NACS ONLINE (Mar. 7, 2016), <http://www.nacsonline.com/YourBusiness/FuelsCenter/Basics/Articles/Pages/Even-at-2-The-Gas-Price-Still-Dominates-Purchasing-Decisions.aspx>.

¹⁸ Once competition is eliminated, however, there is no incentive (or price competition) to keep prices low.

A recent study by Dr. Bernard L. Weinstein, Associate Director, Southern Methodist University Maguire Energy Institute, supports these conclusions:

The bias against small retailers has serious implications for their long-term survival because the current regulatory regime governing RINs trading allows large fuel marketers and large retailers to gain revenues and a competitive advantage over small retailers. Reports indicate that large retailers are using the RIN profit stream for retail expansion and acquiring a larger share of a limited market. Small retailers are losing both sales volume and stores to large retailers. In other words, small retailers aren't just less profitable but they are going out of business due to their growing inability to compete with large retailers. As a result, the demise of small "mom-and-pop" fueling stations has accelerated, with more than 12,000 closing since 2007.¹⁹

EPA's refusal to consider the effect of the point of obligation requirement on small retailers thus provides an additional reason to grant the petition for review.

II. The current point-of-obligation requirement is a market constraint contributing to the inadequate supply of renewable fuels that EPA purports to correct in this Final Rule.

In the Final Rule under review, EPA recognizes that Congress imposed a time-critical obligation on the agency to increase the volumes of renewable fuels into the marketplace so that they can be used in the transportation sector. EPA purports to take this obligation seriously in the rulemaking, stating that it is obligated to "consider the full range of constraints, including legal, fuel

¹⁹ Dr. Bernard L. Weinstein, *Renewable Identification Numbers (RINS) Trading Under the Renewable Fuels Program: Unintended Consequences for Small Retailers*, SMU MAGUIRE ENERGY INST. (Aug. 2016), <http://www.smu.edu/Cox/CentersAndInstitutes/MaguireEnergyInstitute/PapersPubs>.

infrastructure and other constraints, that could result in an inadequate supply of renewable fuels to consumers.” 80 Fed. Reg. at 77,438. EPA further emphasizes that, “[u]nder this interpretation, we would not limit ourselves to consideration of the capacity to produce or import renewable fuels but would also consider practical and legal constraints affecting the volume of qualifying renewable fuel supplied to the ultimate consumer.” *Id.* Yet, EPA’s placement of the current point of obligation is a practical and legal constraint that affects the volume of renewable fuels to the consumer.

The system provides an incentive to large retailers to sell RINs, rather than develop the fuel infrastructure necessary to implement the RFS. In fact, the system as designed actually encourages large retailers to maximize revenue by driving up the price of RINs.²⁰ RIN prices increase when the RINs are in short supply, so large retailers have an incentive to limit biofuel blending and keep E85 out of the market to maintain high RIN prices. In addition, when RIN prices are high, the large retailers have more room to manipulate the price of gas per gallon by subsidizing their business with RIN revenue.²¹ This is the exact opposite of the

²⁰ See Damiris, *supra* note 10; Hannash, *supra* note 12; see CASEY’S STORE 8-K, *supra* note 16.

²¹ According to a Goldman Sach’s earning call, this rule will result in “substantial tightening in the RIN markets” and that “inventories of the credits to fall from early 2016 inventories that represent 1.87 billion gallons (7.1 billion liters) of biofuels, down by 484 million gallons this year and another 600 million

system EPA should be working to grow. As EPA has recognized, one of its statutory obligations is to distribute the point of obligations more effectively to ensure the success of the RFS Program. In its Final Rule, the agency stated:

EPA agrees that its approach to interpreting the term ‘inadequate domestic supply’ should be consistent with the objective of the statute to grow renewable fuel use *over time by placing appropriate pressure on all stakeholders to act within their spheres of influence* to increase biofuel production and use of renewable fuels.

80 Fed. Reg. at 77,439 (emphasis added); OPP Br. at 32.

But rather than placing appropriate pressure on all stakeholders (most notably, large retailers), EPA has created what one leading investor called a “rigged system” enabling large retailers to game the system, profiting from RINs and pushing small retailers out of the market.²² This will inevitably result in an inadequate domestic supply of renewable fuel to the ultimate consumer—the very issue that EPA was required—but refused—to address.

CONCLUSION

EPA is required by law to consider the practical and legal constraints affecting the availability of renewable fuel to the consumer. The current point of obligation is such a constraint because it enables large gasoline retailers to profit

next year.” *Prices of U.S. Biofuels Credits Jump on Supply Worries*, REUTERS (Sept. 15, 2016), <http://af.reuters.com/article/idAFL1N19L0RJ>.

²² *Icahn Urges EPA to Change Renewable Fuel Credit Market*, CNBC (Aug. 16, 2016, 6:56 AM), <http://www.cnbc.com/2016/08/16/icahn-urges-epa-to-change-renewable-fuel-credit-market.html>.

from RINs and push small retailers out of the market. Yet, EPA refused even to address this issue.

Accordingly, SRC respectfully requests that the Court grant the Petition and direct EPA to consider the point of obligation requirement and whether to amend the point of obligation to the point of blending. This will eliminate the uneven playing field that allows large retailers to profit from RINs and create a market where all retailers are incentivized to accommodate the larger volumes of renewables contemplated by the RFS.

Respectfully submitted,

September 15, 2016

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P 29(d) because it contains 2,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

September 15, 2016

/s/ Alec Zacaroli

Alec Zacaroli

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Small Retailers Coalition***

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2016, the foregoing Brief of Amicus Curiae Small Retailers Coalition in Support of Obligated Party Petitioners was served upon all counsel of record electronically through the Court's CM/ECF system.

September 15, 2016

/s/ Alec Zacaroli

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