

United States Senate

WASHINGTON, DC 20510

June 9, 2022

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street NW
Washington, D.C. 20548

Dear Mr. Dodaro:

On June 3, 2022, the Environmental Protection Agency (EPA) announced its decision to deny 69 small refinery exemption (SRE) petitions through the “June 2022 Denial of Petitions for RFS Small Refinery Exemptions” (hereinafter “Denial”).¹ We are writing to seek your review of whether this Denial constitutes a rule for purposes of the Congressional Review Act.

While EPA asserts its Denial is “not a rulemaking,” the Denial appears to be an agency statement of future effect that is designed to implement, interpret, and prescribe law and policy. The U.S. Government Accountability Office has previously found that agency documents may constitute a “rule” under the Congressional Review Act irrespective of the label given by an agency. The proposed Denial was issued by EPA and made available for public comment in the Federal Register, a process generally required under the Administrative Procedure Act.²

As it set forth an approach to evaluate SRE petitions, this has future effect, with EPA noting in the Federal Register the proposal would apply to 65 “pending/undecided” petitions.³ The Denial establishes criteria for hardship petitions that would apply to all small refineries, including the recently denied SRE petitions and refineries that wish to submit a petition in the future. EPA also acknowledges in its proposal that the Agency has altered “its statutory interpretation of the Clean Air Act small refinery provisions” and has established a policy that “there can be no disproportionate economic hardship pursuant to the statute” for small refineries, precluding any refinery from being granted relief — now or in the future.⁴ This new statutory interpretation and the preclusion of any refinery receiving hardship relief was affirmed in the Denial.⁵

¹ The SRE Denial is available at: <https://www.epa.gov/renewable-fuel-standard-program/june-2022-denial-petitions-rfs-small-refinery-exemptions>.

² *Notice of Opportunity To Comment on Proposed Denial of Petitions for Small Refinery Exemptions*, 86 Fed. Reg. 237, 70999 (Dec. 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-12-14/pdf/2021-26983.pdf>.

³ *Id.*, at 71000.

⁴ *Proposed RFS Small Refinery Exemption Decision* (Dec. 2021), <https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions>.

⁵ *June 2022 Denial of Petitions for RFS Small Refinery Exemptions* (June 2022), <https://www.epa.gov/system/files/documents/2022-06/420r22011.pdf>.

The Denial is also of general applicability since it applies to all small refineries, whether they had a pending hardship petition or not. Therefore, this decision not only applies to all small refineries, but as a practical matter would affect all obligated parties under the national RFS program. The Denial is not limited in scope and would apply nationwide.

Finally, the Denial does not fit within any of the three exceptions set forth in 5 U.S.C. § 804(3)(A)-(C). As noted, it applies generally to parties that fall within its scope and is therefore not a rule of particular applicability. It does not relate to agency management or personnel. And finally, it is not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties; rather, as noted, it substantially affects the rights and obligations of small refineries and related parties.

For the reasons above, we seek expedited determination as to whether the Denial constitutes a rule pursuant to the Congressional Review Act.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Bill Hagerty". The signature is written in a cursive style with a large, sweeping "H".

Bill Hagerty
United States Senator

A handwritten signature in blue ink that reads "Shelley Moore Capito". The signature is written in a cursive style with a large, sweeping "S".

Shelley Moore Capito
United States Senator

A handwritten signature in blue ink that reads "Roger F. Wicker". The signature is written in a cursive style with a large, sweeping "R".

Roger F. Wicker
United States Senator