



**The Under Secretary of Energy**  
Washington, DC 20585

July 2, 2020

Honorable Senator Charles Grassley  
Honorable Senator Joni Ernst  
United States Senate  
Washington, DC 20510

Dear Senators Grassley and Ernst:

Thank you for your June 26, 2020, letter as a follow-up to our call on June 22, regarding how the Department of Energy (DOE) scores petitions for Small Refiner Exemptions (SREs) in its statutory role as advisor to the Environmental Protection Agency (EPA). As we discussed, the 10<sup>th</sup> Circuit case on SREs, *Renewable Fuels Association, American Coalition for Ethanol, National Corn Growers Association, National Farmers Union v. EPA, et al.*, 948 F.3d 1206 (10<sup>th</sup> Cir. 2020), specifically dealt with extensions of SRE waivers, as well as the whole program overall. As you emphasized to me during our call, this decision comes at a time when ethanol refineries, corn farmers, and others throughout the energy economy are experiencing the adverse effects of the COVID-19 pandemic and global market turmoil. I appreciated the opportunity to hear your concerns and answer your questions.

Further responses to the specific questions in your letter are as follows, below:

Question 1: *“In the technical analysis of the SREs, what data does the technical advisor review? Will the technical analysis change if you are reviewing a request from 2011? Has the basis of what constitutes economic harm remained consistent throughout the implementation of the program?”*

As we discussed, DOE’s role with respect to the Renewable Fuel Standard (RFS) program is to score the petitions received from EPA. DOE has been evaluating petitions for SREs since 2011 using the metrics established in the Small Refinery Exemption Study of March 2011 (2011 Study) as the basis for determining Disproportionate Economic Hardship.<sup>1</sup> Use of the 2011 metrics has not changed since that time. In 2014, an Addendum allowed for a 50 percent score based on the same metrics.<sup>2</sup> This Addendum has not changed the ultimate scoring result DOE provided to EPA. Congress provided direction in Congressional Report language and Joint Explanatory Statements accompanying appropriations laws for Fiscal Years 2016, 2017, 2018, and 2019 that the

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<sup>1</sup> <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf> .

<sup>2</sup> <https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf>.



scoring allow a 50 percent finding, but this did not change the *analysis*.<sup>3</sup> Even with this Congressional directive, EPA has not granted any 50 percent waivers.

DOE reviews the petitioner's application, including the PI-588 Survey Form as described in Appendix D of the 2011 Study and financial reporting documents (Balance Sheet and Cash Flow, including costs). The petitioner is free to add any other information that the petitioner believes is appropriate in determining Disproportionate Economic Hardship. Also, DOE may review publicly available information to validate petitioner's information.

As stated above, DOE has not changed its analysis since the creation of the 2011 Study and the 2014 Addendum. Metrics are scored accordingly and are reported to EPA consistent with the Congressional direction as described above. In addition, DOE is not evaluating past year petitions under the current year's data. Rather, past year petitions are based on and are being evaluated under their same year's respective data. This is because the petitions' analysis and findings should be consistent with how they would have been analyzed during the year in question.

Question 2: *"As you review the SRE requests from the EPA, will you be reviewing eligibility that the 10th Circuit Court requires in their three-part test? Specifically, in DOE's technical evaluation of SRE petitions, "RINs net revenue or cost" is listed as one of the Disproportionate Economic Impact Metrics. Does DOE plan to continue to use that metric for SRE petitions?"*

EPA determines eligibility and makes the final decision on all petitions. As you are likely aware, DOE does not have statutory authority to decide eligibility. In this confined role, DOE scores any petition provided by EPA with respect to the 2011 Study and 2014 Addendum, and only reports findings to EPA. DOE has never used metric 2d ("RINs net cost or revenue") in our analysis because, as stated on pages 33 and 35 of the 2011 Study, the survey data was inconsistent when this metric was developed. Put another way, an increase in RIN prices does not necessarily correlate to a finding of a higher score. In addition, DOE has no plans to initiate the use of this metric and relies upon the same methodology it has used since the creation of the 2011 Study.

Question 3: *"Has DOE received SREs determination requests from the EPA in the past month that have previously been scored by DOE?"*

Yes. DOE has received SRE petitions from EPA in the last month for years that have been previously scored. Specific company names, number of petitions, and the year of the petition are considered Confidential Business Information (CBI). All publicly available information can be found on EPA's website.<sup>4</sup>

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<sup>3</sup>Pub. Law 114-113/H.R. 2029, Committee Print, Consolidated Appropriations Act 2016, at pages 702-703, available at: <https://www.gpo.gov/fdsys/pkg/CPRT-114HPRT98155/pdf/CPRT-114HPRT98155.pdf>.

<sup>4</sup> <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

Thank you for your willingness to discuss this with me on the call and through continued written dialogue. I appreciate the opportunity to answer questions you may have on SRE issues. If you have any further questions or concerns please contact me, directly, or Shawn Affolter, Deputy Assistant Secretary for Senate Affairs, Office of Congressional and Intergovernmental Affairs, at (202) 586-5450.

Sincerely,

A handwritten signature in black ink, appearing to read 'M.W. Menezes', with a long horizontal flourish extending to the right.

Mark W. Menezes