KERN

Kern Oil & Refining Co.

7724 E. PANAMA LANE
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February 7, 2019

Via Certified Mail

Hon. Andrew R. Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604 for Failure to Perform Non-Discretionary Duty to Approve or Disapprove Kern Oil & Refining Co.'s Petition for an Exemption from the Renewable Fuel Standard's Requirements in 2017 as a Small Refiner Suffering Disproportionate Economic Hardship under Section 211(o)(9)(B) of the Clean Air Act

Dear Acting Administrator Wheeler:

By this letter Kern Oil & Refining Co. ("Kern Oil" or "the Company") respectfully provides notice of its intent to file suit against you pursuant to Section 304 of the Clean Air Act ("CAA"), 42 U.S.C. § 7604, in your official capacity as Administrator of the Environmental Protection Agency ("EPA") for failure to perform the non-discretionary duty under the Clean Air Act of acting upon the Company's petition for an exemption from the requirements of the Renewable Fuel Standard ("RFS") for the 2017 compliance year. As detailed in this letter, Kern Oil also requests that if EPA grants its petition, EPA provide the Company with current-year vintage RINs to address the disproportionate economic hardship that it suffered, and continues to suffer, as a result of compliance with the RFS in 2017.

I. EPA's Failure to Perform a Non-Discretionary Duty

On July 19, 2018, Kern Oil submitted, and EPA received, the Company's petition for an exemption from the requirements of the RFS for the 2017 compliance year due to Kern Oil's qualification as a small refinery suffering disproportionate economic hardship. Under Section 211(o)(9)(B)(3) of the CAA, EPA is required to act on Kern Oil's petition within ninety (90) days after the date of receipt of the petition. The requirement to act within 90 days is a non-discretionary duty, and EPA failed to perform that non-discretionary duty as it has not acted upon Kern Oil's petition by either granting or denying the petition.

While EPA failed to act on the petition, Kern Oil made repeated attempts to engage with EPA on the subject and provide as much information as possible on the disproportionate economic hardship it suffered in 2017. For example, on September 6, 2018, representatives of Kern Oil met with EPA representatives to discuss the petition.[1] At that meeting, EPA confirmed that it considered Kern Oil's petition complete. Despite having all the information it needed to render a decision, EPA continued not to take any action on Kern Oil's petition. On October 16, 2018, almost 90 days after it submitted its petition, Kern Oil's representatives in the US House of Representatives sent a letter to EPA requesting a decision on Kern Oil's petition. On January 3, 2019, Kern Oil sent a letter to you urgently requesting a decision on the petition. Despite EPA having all of the information it needs to render a decision and Kern Oil and its representatives' repeated outreach, EPA has not taken any action on the petition. Therefore, EPA has failed to perform its non-discretionary duty to act on the petition.

II. Kern Oil Suffered Disproportionate Economic Harm

The failure to act on its petition is all the more significant given that Kern Oil unquestionably qualifies as a small refinery and suffered disproportionate economic hardship. As detailed in its petition for an exemption, the Company maintained an aggregate daily crude oil throughput capacity of less than 75,000 barrels, thereby meeting the statutory definition of a small refinery under the CAA. Under the factors that both the CAA and federal courts require that EPA utilize,[2] Kern Oil suffered disproportionate economic impact due to its location, lack of vertical integration, significant diesel production, state regulatory regime, compliance costs and individualized special events associated with Kern Oil's refinery. For the 2017 compliance year, EPA granted RFS small refinery exemptions to 29 other small refineries.[3] Kern Oil is confident it has suffered disproportionate economic hardship as determined under the factors that must be applied to this analysis not only in comparison to large refineries, but also in comparison to other small refineries who have already received exemptions for the 2017 compliance year.

III. Kern Oil Should be Refunded Current-Year Vintage RINs

Kern Oil also continues to suffer economic hardship from EPA's failure to grant the Company's petition. In 2017, Kern Oil incurred an obligation to retire over 23 million RINs, and retired 2016 and 2017 RINs to comply with this obligation. Because EPA has failed to act on its petition, Kern does not have the number of RINs that it would otherwise have available to comply with its RFS obligations for 2018 refining activity that will come due on March 31.[4] Kern Oil must continue to acquire RINs for its upcoming compliance deadline that it may not otherwise need to acquire if EPA had acted on Kern Oil's petition and refunded RINs to the Company. Even if Kern Oil's pending 2018 petition is granted, Kern Oil incurred the high expense of acquiring 23 million RINs, and should be adequately refunded to be made whole, which would not be accomplished by

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[1] On September 6, 2018, Jennifer Haley, Robert Winchester, and Melinda Hicks of Kern Oil met with Bill Wehrum, Chris McKenna, Janet Cohen, Karen Nelson, Dallas Burkholder and Paul Machiele of EPA.

[2] *Sinclair Wyoming Refining v. EPA*, Doc. No. 16-9532, (10th Cir., 2017).

[3] RFS Small Refinery Exemptions Website, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Dec. 18, 2018).

[4] On December 3, 2018, Kern Oil petitioned EPA for an exemption from its 2018 RFS requirements due to disproportionate economic hardship; however, EPA has also not acted on that petition.

the return of expired RINs. As a result, Kern Oil requests that EPA refund current-year RINs in the event that EPA grants the Company's petition. Providing current year vintage RINs will allow Kern Oil to use these RINs for current year compliance or otherwise market them to other parties. As EPA is aware, prior year RINs are significantly less marketable and RINs more than two years old may not be used for compliance and thereby are not marketable.[5] Issuance of current-year RINs is in accordance with EPA's past practice when it has retroactively granted petitions for waivers of the RFS to small refineries.[6]

IV. Compliance with EPA Regulations

Pursuant to 40 C.F.R. §54.3(a), the full name and address of the person providing this notice is:

Kern Oil & Refining Co.
7724 E. Panama Lane
Bakersfield, California 93307-9210
Attention: Jennifer Haley

V. Notice of Intent to Sue

Kern Oil would prefer to resolve this matter and receive a response to its petition for an exemption from the RFS requirements for 2017 without the need for litigation. Therefore, we look forward to EPA contacting Kern Oil and acting upon its petition. If EPA does not, however, Kern Oil intends to sue you and EPA in US District Court pursuant to Section 304 of the CAA for failure to perform their non-discretionary duties as set forth in Section 211 of the CAA and following sixty (60) days after delivery of this letter.

Sincerely,

Jennifer Haley

Jennifer Haley
President
Kern Oil & Refining Co.
7724 E. Panama Lane
Bakersfield, California 93307-9210

[5] 40 C.F.R. §80.1427(a) and 40 C.F.R. §8.1428(c).

[6] HollyFrontier Corp., Form 10-Q filing with the United States Securities and Exchange Commission (Quarterly Period Ending June 30, 2018).