

August 21, 2019

VIA FOIAONLINE.REGULATIONS.GOV
United States Environmental Protection Agency

Re: Freedom of Information Act Request: Communications between EPA and USDA concerning small refinery hardship relief

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”). Recent media reports indicate that the United States Department of Agriculture (“USDA”) may be involved in decision making related to small refinery hardship relief under the Renewable Fuel Standard (“RFS”), even though USDA has no legal role in the small refinery hardship petition process.

Therefore, we request copies of all communications between the United States Environmental Protection Agency (“EPA”) and USDA, including but not limited to Secretary Sonny Perdue and Deputy Secretary Stephen Censky, concerning the RFS and small refinery hardship relief under 42 U.S.C. § 7545(o)(9)(A)(ii) and 40 C.F.R. § 80.1441 from April 25, 2017 to present. These communications would include, but would not be limited to the following:

1. All emails, text messages, faxes, voicemails, and other communications from or to any person within USDA, as well as any phone logs or other indices which memorialize communications with said persons.
2. All emails, faxes, voicemails, texts, or other forms of communication that have been deleted which fit the above specification and which remain recoverable in any way. If fulfilling this specification requires additional time, I would ask that production of documents meeting the specification above be given priority and processed separately from any potential responsive records to this specification.

This request is not meant to exclude any other records that, although not specifically requested, are reasonably related to the subject matter of this request.

As a matter of law, any interference by USDA in the small refinery hardship process is improper because the Clean Air Act (“CAA”) does not give the agency any authority or role over the petitions. *See* 42 U.S.C. § 7545(o)(9)(B)(ii) (the CAA authorizes only “the Administrator [of EPA], in consultation with the Secretary of Energy,” to act on petitions from small refineries). Therefore, the deliberative privilege under FOIA Exemption 5 would not apply to the communications covered by this request. 5 U.S.C. §552(b)(5). Under FOIA Exemption Five, the deliberative privilege covers “predecisional” materials written by federal agencies as part of their decision-making process. Because USDA has no legal authority with respect to the small refinery hardship decision-making process, any communications between USDA and EPA are inherently not predecisional and, therefore, are not covered by the deliberative process privilege.

If EPA determines that portions of the records requested are exempt from disclosure, please (1) segregate the exempt portions and deliver the non-exempt portions of such records to my attention at the address below and (2) cite the specific exemptions EPA believes justify the denial and notify me of the appeal procedures available under the law.

I appreciate your help in expeditiously obtaining a determination on the requested records. You may email copies of the requested records to:

LeAnn Johnson Koch
LeAnnJohnson@perkinscoie.com

If you are unable to deliver the documents by email, please mail the documents to:

LeAnn Johnson Koch
Perkins Coie
700 Thirteenth Street, N.W. Suite 600
Washington, DC 20005-3960

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VIA USDA FOIA PUBLIC ACCESS WEBSITE

United States Department of Agriculture

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