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Give Me Disproportionate Economic Hardship or Give Me Death: The Application of Administrative Review to the Renewable Fuel Standard – *Sinclair Wyoming Refining Co. v. EPA*

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GIVE ME DISPROPORTIONATE ECONOMIC HARDSHIP OR GIVE ME DEATH: THE APPLICATION OF ADMINISTRATIVE REVIEW TO THE RENEWABLE FUEL STANDARD – *SINCLAIR WYOMING REFINING CO. V. EPA*

ANDREW RASBOLD*

I. Introduction

In October 2017, the Tenth Circuit vacated an Environmental Protection Agency ("EPA") ruling in *Sinclair Wyoming Refining Co. v. EPA*.[1] The ruling creates serious ramifications for the Renewable Fuel Standard ("RFS") program, in which both renewable fuel and traditional oil and gas industries have significant interests. The Tenth Circuit held that the EPA's denial of an exemption from the program exceeded its statutory authority.[2] Although the court rationalized its holding according to Supreme Court precedent, a dissent coupled with contrary holdings in other circuits threatens to create inconsistent judicial results.[3] Furthermore, substantial political pressures brought by both supporters and detractors of the RFS

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1. 887 F.3d 986 (10th Cir. 2017).
2. *Id*.
3. *Id*.

program seem likely to guarantee continued litigation along similar lines.[4] The decision implicates serious policy concerns, and potential changes, for both the RFS program and broader application of judicial deference to administrative decisions.

The federal legislature passed the Clean Air Act ("CAA") in 1990 in response to environmental concerns regarding the effect of pollution on public health.[5] The EPA is tasked with implementation of the CAA in various respects, including the establishment and enforcement of parameters by which fuel emissions, as air pollutants, are regulated.[6] The EPA implements the CAA's mandate in part through the RFS program, which describes the required blending by obligated parties of renewable fuels with traditional fossil fuels prior to entering the downstream marketplace.[7] The Energy Policy Act of 2005 introduced the RFS system to the CAA, and the Energy Independence and Security Act of 2007 expanded the program , bringing the program into its current implementation.[8] The blending of fuels is intended to lower the demand for traditional gasoline or diesel fuels, thereby encouraging a greater reliance on domestic sources of fuel—both traditional and biofuel—as well as reduce the pollutants introduced to the atmosphere via the burning of traditional fuels.[9]

The RFS program attempts to provide a comprehensive industry standard, but the EPA (as required by statute) does consider small refinery exemptions for qualifying refiners.[10] The administrative process by which the EPA granted or declined exemptions was recently analyzed in *Sinclair*

4. *See* Renewable Fuels v. EPA, 18-9533 (10th Cir. Dec. 14, 2018) (WL, 10th Cir. Docket); *see also* Ben Nuelle, *Industry stakeholders react to draft fuel bill*, AGRIPULSE (Dec. 11, 2018 2:32 PM), https://www.agri-pulse.com/articles/11737-industry-stakeholders-react-to-fuel-draft-bill (discussing criticism and praise of proposed changes to the RFS program).

5. 42 U.S.C. § 7401 et seq. (2017); *Overview for Renewable Fuel Standard Program,* U.S. ENVT'L PROT. AGENCY, https://www.epa.gov/renewable-fuel-standardprogram/overview-renewable-fuel-standard. The CAA represents a broad congressional attempt to describe the federal response to a multiplicity of pollutants affecting national health and safety. While this paper will focus on the regulations regarding the production of gas, and specifically the guidelines applicable to small refineries in the RFS program, the CAA considers many variables beyond midstream blending.

6. *See, e.g.*, 42 U.S.C. § 7545(o) (2017). The renewable fuel program is described in this statute, which defines the biofuels considered acceptable in blending and various other criteria that the EPA further defines and implements.

7. Codified in 40 C.F.R. § 80.1100 (2018) et seq.

8. U.S. ENVT'L PROT. AGENCY, *supra* note 5.

9. *See, e.g.*, Nadia B. Ahmad, *Responsive Regulation and Resiliency: The Renewable Fuel Standard and Advanced Biofuels*, 36 VA. ENVTL. L.J. 40, 41–42 (2018).

10. 40 C.F.R. § 80.1441 (2018) ("Small Refinery Exemptions").

Wyoming Co. v. EPA, and the resulting holding is likely to create considerable ramifications throughout the industry, because *Sinclair* invalidated the EPA's previous determinative policy of granting or denying exemptions.[11] This note will explore the Tenth Circuit's limitation of the EPA's administrative decisions as it relates to the small refinery exception within the Renewable Fuel Standard expressed in 40 C.F.R. § 80.1100 et seq.

II. Law Before the Case

A. An Overview of the Renewable Fuel Standard Program

The RFS is largely driven by requiring compliance in the Renewable Identification Numbers ("RINS") marketplace.[12] The RINS program creates a tradeable asset—the RINS—that is generated with and separated from a required volume of renewable fuel.[13] The RINS program is not without controversy, and of primary importance to the context here is the burden of the refiner, not a blender, to ensure the blending of traditional fuels with the necessary biofuels.[14] Pursuant to the EPA's promulgated regulations, an obligated party is "any *refiner* that produces gasoline or diesel fuel within the 48 contiguous states or Hawaii. . . . A party that simply *blends* renewable fuel into gasoline or diesel fuel, as defined in § 80.1407(c) or (e), is *not* an obligated party."[15] Although the obligation seems counterintuitive to the reality of blenders bearing the actual responsibility of creating the blended product, the instruction makes more sense when recognizing the program is also intended to encourage reliance on domestic sources of fuel, thereby implementing broad legislative policy as well as describing industry specifications.[16] RINS are generated when traditional fuel is

11. Sinclair Wyoming Co. v. EPA, 887 F.3d 986 (10th Cir. 2017).

12. 40 C.F.R. § 80.1427. Obligated parties under the RFS system either generate or purchase RINS to satisfy an algorithm that fulfills the calculated obligations of a refiner.

13. *Id*. § 80.1452. Description of the RINS asset.

14. *See, e.g.*, Bob Neufeld & Rebecca Lynne Fey, *Winners and Losers: The EPA's Unfair Implementation of Renewable Fuel Standards*, 60 S.D. L. REV. 258, 259 (2015). Refiners are often placed in the problematic position of ensuring compliance with the RINS system with no viable means of actually blending the fuels. Therefore, refiners must sell traditional petroleum without complying with the RINS mandate and trust that the blender will comply with the RINS requirements. The obligation is important to the context as refiners are incentivized to challenge EPA determinations.

15. 40 C.F.R. § 80.1406(a)(1) (emphasis added).

16. *See* Adam Christensen & Connie Lausten, *Fundamental Inconsistencies Between Federal Biofuels Policy and Their Implications*, 44 ENVTL. L. REP. NEWS & ANALYSIS

blended with a renewable biomass fuel—such as ethanol— in the manner described by EPA regulations.[17] RINS then demonstrate compliance with the RFS program through a Renewable Volume Obligation ("RVO") formula that uses either generated or purchased RINS to compute a result that indicates compliance.[18]

An exemption to the requirement that refiners satisfy the RVO through RINS generations or purchase may apply in the case of administratively-defined "small refiners.[19] The economic incentive to seek an exemption is substantial, with millions of dollars potentially saved should an exemption grant a refiner relief from compliance with the RFS program.[20] Refiners meeting the definition of "small" must petition the EPA for the granting of an exemption "period of not less than two additional years," and the EPA's decision in turn considers a Department of Energy ("DOE") evaluation that compliance would create a "disproportionate economic hardship."[21] The statutory basis for the administrative rule essentially mirrors the rule, in that it provides the necessity of an exemption for "disproportionate economic hardship," as well as the petitioning requirements and the cooperation of the DOE in studying the appropriate economic factors.[22] The language of "disproportionate economic hardship" is determinative to the evaluation of *Sinclair*, as the implementation of the analysis prior to granting an exemption by the EPA required a viability test to determine if compliance with the program threatened a refinery's survival, and a refinery seeking an exemption challenged that process and procedure.[23]

10395, 10398 (2014) ("The rules around exported renewable fuels ensure that the RFS can only be complied with by using renewable fuel domestically.").

17. 40 C.F.R. § 80.1426.

18. 40 C.F.R. § 80.1427 ("How are RINS used to demonstrate compliance?"); 40 C.F.R. § 1407 (2018) ("How are the Renewable Volume Obligations calculated?").

19. *Id*. § 80.1401 ("Small refinery means a refinery for which the average aggregate daily crude oil throughput (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels."); *Id.* § 80.1441 ("Small refinery exemption.").

20. Jarrett Renshaw & Chris Prentice, *Exclusive: EPA gives giant refiner a 'hardship' waiver from regulation*, REUTERS, https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P (Apr. 3, 2018 11:03 AM). Reuters reports that Andeavor and HollyFrontier, two large refiners, were granted small refinery exemptions for individual refineries within their organizations that saved each company approximately $58 million in the cost of RINS credits for RFS compliance.

21. 40 C.F.R. § 80.1441(e)(1).

22. 42 U.S.C. § 7545(o)(9)(B) (2017); *Id*. § 80.1441(b), (e).

23. *Sinclair*, 887 F.3d at 988.

B. An Overview of Administrative Deference

1. Chevron and Skidmore

The challenge of an administrative action in the judicial realm traditionally follows one of two doctrinal frameworks when judicial review is necessary: *Chevron* or *Skidmore*.[24] Each provides direction of how to evaluate an agency decision.[25] *Chevron* represents a highly deferential judicial review of administrative decisions.[26] Although the holding applies to all administrative regulations that meet the threshold test, *Chevron* ironically (with respect to the current subject) concerns another EPA ruling regarding the CAA.[27] The EPA promulgated regulations that enacted the CAA's mandate to control air pollution by allowing States to encapsulate multiple pollutant-emitting devices within a single industrial grouping, thereby controlling emissions from a larger source without necessitating bureaucratic procedures as they relate to each single device.[28] The EPA based its decision on its construction of the term "stationary source," a term that received less than full statutory guidance.[29] The first step of a *Chevron* analysis is to question whether Congress has provided guidance to the "precise question at issue."[30] If Congress has indeed provided specific guidance, neither a court nor the agency may determine its own construction of the issue.[31] As a second step, if instead Congress is silent or ambiguous, judicial inquiry is limited to whether the agency's construction is permissible and not whether a differing interpretation is possible or even preferable.[32] Such a standard is very deferential to the agency's position, as the Court recognized that silence or ambiguity is often intentional by

24. See, e.g., RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS (Wolters Kluwer 7th ed.) (2015).

25. *Id*.

26. Chevron, U.S.A., Inc. v Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

27. *Id*. at 839–40.

28. *Id*. at 840.

29. *Id*.

30. *Id*. at 842.

31. *Id*. at 843.

32. *Id*.

Congress, so as to provide a method by which the agency may determine the best way to fulfill the legislative mandate.[33]

Skidmore represents a less deferential framework than *Chevron,* in that the judicial analysis requires a balancing of multiple factors in determining whether an agency decision is due judicial deference.[34] Petitioners in that case sought to overturn an agency decisions regarding the Fair Labor Standards Act.[35] The Supreme Court reversed the lower court's determination based on an understanding of employment law it found incorrect, but it also provided the framework by which courts could consider multiple factors in determining whether to grant an agency decision deference.[36] The rules and regulations of an agency decision could guide the court depending on factors such as "[(1)] the thoroughness evident in its consideration, [(2)] the validity of its reasoning, [(3)] its consistency with earlier and later pronouncements, and [(4)] all those factors which give it power to persuade, if lacking power to control."[37] The balancing approach allows courts to evaluate an informal agency action that necessarily moves beyond a strict legislative grant of power without presuming either lawfulness or illegality.[38] More judicial deference is due as the *Skidmore* factors become stronger.[39]

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33. *Id*. at 843–44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). Although the CAA amendments were "lengthy, detailed, technical, complex, and comprehensive," Congress was nonetheless deemed silent or ambiguous as the specific issue before the Court, the "bubble concept" or "stationary source," was not directly addressed and therefore subject to deference. *Id*. at 848–51.

34. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

35. *Id*. at 135.

36. *Id*. at 140. The Court held that the lower court's determination that petitioners were not due damages because their claims for withholding of employment benefits were based on times during which they were largely free to do what they wished and any burdens of employment were not onerous was an incorrect interpretation of law. *Id*.

37. *Id*.

38. Supreme Court decisions have echoed the lessons of *Skidmore* and *Mead*. In *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), the Court upheld an informal agency interpretation based on factors such as: (1) the interstitial nature of the issue, (2) the expertise of the agency, (3) the importance of the administrative issue to the relevant legislative statute, (4) the complexity of the administration, and (5) the length of time and care provided to the issue.

39. *Skidmore* at 140.

2. Mead and Barnhart

Although *Chevron* is still valid law and relevant to many administrative decisions, further case law has developed new criteria for determining whether to apply *Chevron* or *Skidmore* deference. In *United States v. Mead Corp.*, the Supreme Court has added a "Step Zero" to the traditional two-step analysis.[40] In *Mead*, the Supreme Court held that *Chevron* deference is applicable to formal regulations that have the force of law by an agency, not informal policies.[41] In *Mead*, the Customs Service changed its categorization of an import, to which the importer objected.[42] The legislature directed the Customs Service to determine the classification of imported items, but the method of doing so was explicitly limited to individual transactions that other parties could not rely on and was therefore outside the boundaries of *Chevron* deference because the categorical descriptions did not have the force of law.[43] Without a "lawmaking pretense," agency decisions cannot enter the *Chevron* doctrinal framework.[44] Agency decisions do not, however, rest entirely as acceptable within *Chevron's* framework or unacceptable if otherwise. Additionally, the Court noted that deference could still apply to the Customs rulings, and remanded the case with instructions to apply the *Skidmore* framework.[45]

Barnhart v. Walton represents another complication to determining which application of deference is appropriate.[46] In *Barnhart*, an applicant appealed the denial of Social Security benefits.[47] The Social Security agency based its declination of benefits on an agency interpretation of "inability" as it related to a twelve-month requirement of unemployment.[48] Although the agency interpretation rested on less formal processes than traditional notice-and-comment rulemaking, the *Barnhart* opinion noted that no such requirement must be met before granting *Chevron* deference.[49]

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40. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (April 2006).
41. United States v. Mead Corp., 533 U.S. 218, 221 (2001).
42. *Id*. at 224–26.
43. *Id*. at 222–27.
44. *Id*. at 233. The Court noted factors such as formal process, facial interpretations of statute, and the effect of the regulation (whether broad or narrow). Here Customs had no formal procedure for establishing a classification, a facial reading of the statute implied interpretive rule only without the force of law, and the ruling only applied to a single party.
45. *Id*. at 238–39.
46. Barnhart v. Walton, 535 U.S. 212 (2002).
47. *Id*. at 215–16.
48. *Id*. at 214–15.
49. *Id*. at 221–22.

However, the Court noted that "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time," when considered in conjunction of acting within statutory intent, created context by which *Chevron* applies.[50] Therefore, *Chevron* deference may apply to informal agency decisions, but only after an analysis of whether the agency is appropriately situated to make the determination.

III. Statement of the Case

A. Facts

Sinclair, at the time of the opinion, owned and operated two refineries in the state of Wyoming that fit the EPA's definition of "small refinery."[51] The refineries were initially exempt from the RFS program until 2011 under the initial terms of the statute.[52] Under the direction of Congress and a subsequent DOE study, the EPA extended Sinclair's (and other refiners') exemptions until 2013.[53] Following the expiration of Sinclair's small refinery exemptions, it petitioned the EPA for further exemptions under the argument of "disproportionate economic hardship," as required by regulation.[54] The EPA denied Sinclair's petitions twice, on the grounds that it found the refiner to be profitable enough to require RINS compliance within the RFS program.[55]

In order to make such a determination, the EPA reviews a recommendation by the DOE, a party privy to any petition by a refiner.[56] The DOE bases its recommendation on a "scoring matrix" that reviews potential impact on a refiner in either (1) disproportionate structural and economic impact, or (2) viability.[57] The DOE determines the impact prong by looking at:

> (1) "disproportionate structural impact metrics" (a refinery's percentage of diesel production, access to credit, local market acceptance of renewable fuels, etc.) and (2) "disproportionate

50. *Id*.
51. *Sinclair*, 887 F.3d at 989–90.
52. *Id*. (citing 42 U.S.C. § 7545(o)(9) (2017)).
53. *Id*. (citing 42 U.S.C. § 7545(o)(9)(A)(ii)(I) (2017)).
54. *Id*.
55. *Id*.
56. *Id*. at 993.
57. *Id*. at 993–94.

> economic impact metrics" (the firm's relative refining margin, the degree to which the refiner can blend renewable fuels, whether RINs are a net source of revenue, etc).[58]

The DOE determines the viability prong by looking at:

> (1) whether the cost of compliance 'would reduce the profitability of the firm enough to impair future efficiency improvements;' (2) whether 'individual special events' have had 'a temporary negative impact on the ability of the refinery to comply;' and (3) whether compliance costs are 'likely to lead to shutdown' of the refinery.[59]

The EPA explained its decision to deny exemptions to the Sinclair refineries based on its long-term evaluation of the refineries, noting in particular its (1) interpretation of "disproportionate economic hardship" as something greater than simple impact, (2) the fact that the DOE's recommendation did not oblige the EPA to any decision, and (3) that a refinery must face imminent closure due to the hardships created through RFS compliance before the granting of an exemption.[60]

B. Issue

The Tenth Circuit looked to evaluate the appropriateness of the EPA denial in the light of either *Chevron* or *Skidmore* deference.[61] Although each party argued that they should win in light of either doctrine,[62] the judicial determination of which analysis would be appropriate held clear ramifications for the ultimate holding. The court was essentially determining which party would win the litigation based on which doctrine it applied.

C. Holding

After analyzing the EPA's administrative process, the Tenth Circuit held in favor of Sinclair.[63] The court evaluated the agency's determination based

58. *Id*. at 994 (citing J.A. Vol. 1 at 99–102 (DOE's 2011 Small Refinery Exemption Study)).

59. *Id*. (citing Aplt. Br. At 13–14 (quoting J.A. Vol. 1 at 103–04)).

60. *Id*. at 994–95 (quoting J.A. Vol. 1 at 17–20).

61. *Id*. at 991.

62. *Id*. at 992 ("Sinclair argues that we should review the EPA's decisions using only *Skidmore* deference, but maintains it would still prevail under a more deferential *Chevron* review. The EPA, of course, argues the opposite.") (citation omitted).

63. *Id*. at 999.

on *Skidmore*, upon its conclusion that *Mead* compelled the court to forego a *Chevron* analysis with its substantial deference.[64] In applying *Skidmore*, the court reviewed the relevant statutory language, the resulting agency decision, and the plain language meaning of the associated words to determine that the EPA's decision was impermissibly narrow in light of its own interpretation and so was not afforded any deference.[65]

IV. Decision of the Tenth Circuit

A. Majority

The majority opinion, while acknowledging general administrative reviews as driven by *Chevron*, moved quickly into determining that *Mead* required a review of whether the court should even consider the agency action as having the force of law.[66] Writing for the majority, Chief Judge Tymkovich noted *Mead's* evaluation of "notice-and-comment rulemaking" was of particular importance to Sinclair's appeal before the Tenth Circuit, as the EPA's determination of whether to grant exemptions was an informal process and noted as "the same procedure employed by the U.S. Customs Service in *Mead*."[67] The court placed informal adjudication squarely under the *Mead* exception to *Chevron* deference, and therefore applied the *Skidmore* analysis to the administrative action.[68] The action was an adjudication based on the legal ramifications specific to the individual parties, and were informal based on the lack of traditional "trial-like" procedures and protections (such as oral argument).[69] Furthermore, although some informal agency decisions are still afforded *Chevron* deference in contexts such as *Barnhart* (requiring, primarily, specialized knowledge and careful consideration over a long period of time), the agency's decision did not meet the standards for such substantial deference.[70]

Other factors further influenced the court to determine that *Skidmore* was the appropriate doctrine to apply. The court recognized the EPA lacked a direct authorization to promulgate rules regarding the parameters of the small refinery exemption, thereby limiting potential notice available to

64. *Id*. at 992.
65. *Id*. at 993–99.
66. *Id*. at 990–91.
67. *Id*. at 992.
68. *Id*.
69. *Id*. (citation omitted).
70. *Id*. at 991 (citation omitted).

Sinclair or other companies seeking to place refineries in the exemption category.[71] The informality of the process, already determinative to the *Skidmore* rationale, was again referenced for the lack of expert testimony that could be presented and therefore considered as having influence on a decision with the force of law.[72] *Chevron* also presumed an agency action addressed from the top of the organization—thereby giving the action a presumption of formality—whereas the EPA's determination was made by a mid-level official.[73] Furthermore, the EPA's decision had no precedential value to third-parties (seen in *Mead* as influential to avoiding *Chevron*), and the agency's analysis was only a few years old.[74] The above factors therefore "compel[led the court's] conclusion that Congress did not intend the EPA's interpretation of 'disproportionate economic hardship' to have the 'force of law,'" and the majority applied only *Skidmore* deference.[75]

The court then turned to an analysis of the EPA's decision. The court noted that the statutory authority for the agency action, as imperative to both the action and any subsequent judicial review, provided two key elements: (1) the statute failed to provide a definition of "disproportionate economic hardship," and (2) the statute did provide a "comprehensive directive" for the EPA's decisions regarding exemptions.[76] As noted above, part of the exemption framework included the DOE's recommendations regarding an exemption, and the DOE's scoring matrix for evaluations of small refineries included two parts: economic metrics and viability metrics.[77] The DOE's scoring matrix, while considering factors such as the long-term (and short-term) viability of a refinery forced to comply with the RFS program through RINS compliance, did not require compliance with the program to threaten the continued existence of the refinery in order to recommend an exemption.[78] Contradicting the EPA's strict interpretation of viability, the DOE recommended a fifty-percent (50%) waiver of RFS requirements to allow for compliance by companies who met the criteria both for and against exemptions.[79] The DOE recommended the reduction

71. *Id*. at 992 (citing 42 U.S.C. § 7545(o)(2)(A)(i) (2017)).
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*. at 993.
76. *Id*.
77. *Id*. at 993–94.
78. *Id*. at 994.
79. *Id*.

for Sinclair.[80] The EPA, in denying Sinclair's petition, confirmed its position on "disproportionate economic hardship" as requiring the threat of eventual closure, and noted that it bore the ultimate responsibility for such determinations and therefore did not need to follow the DOE recommendation.[81]

The court held that the EPA's requirement of a viability test, as well as its discounting of the DOE recommendation, placed it outside of permissible interpretation by "reading a 'viability' requirement *into* the statute and the 'disproportionate' requirement *out* of it."[82] The court noted that viability was not an impermissibly attached factor to the analysis, as "disproportionate economic hardship" is a term subject to considerable interpretation, but by attaching the word "necessary" to the viability test prior to the granting of an exemption altered the interpretation's nature.[83] The court analyzed the plain language meaning of "hardship," as well as the DOE's own viability matrix, which included but did not require a risk of closure.[84] Although the EPA pointed to a viability test as permissible under the "other economic factors" allowed by statute, the court still deemed the decision to base an exemption off of the sole factor of viability ran contrary to the "holistic evaluation *required* by Congress."[85] Furthermore, the court recognized that Congress was well-versed in providing a "closure test" as it relates to the CAA, and while the RFS program did not contain such a clause, the lack thereof was then evidence of the lack of intent to require closure as the sole analysis for exemption.[86]

By reviewing the EPA's determination under *Skidmore* and *Mead*, the Tenth Circuit determined that Sinclair correctly argued that the agency read a necessary viability test into its consideration for exemptions, and by doing so exceeded its statutory authority.[87] The EPA's viability requirement, as an informal adjudication, was subject to an argument of persuasion before the

80. *Id*.

81. *Id*. at 995.

82. *Id*. at 996 (emphasis added).

83. *Id*.

84. *Id*. at 996–97 (citing, *e.g., Oxford English Dictionary*). The court noted that the DOE provided three elements for the viability matrix, each of which ascended in potential consequences for a refinery, from (1) reduced profitability, (2) temporary negative events, to (3) risk of closure. Under the DOE analysis, the EPA chose to "ignore[] two-thirds of this analysis." *Id*.

85. *Id*. at 997 (emphasis added).

86. *Id*. at 997–98. Such an interpretation by the court is not likely permissible under the deference of *Chevron.*

87. *Id*. at 997-99.

court, and the court was unpersuaded of its validity.[88] Therefore, the circuit court vacated the EPA's decision and remanded for further proceedings consistent with the opinion.[89]

B. Dissent

The dissent, written by Judge Lucero, addresses two primary points: (1) the framework by which the majority analyzed the EPA's decision, and (2) the potentially precedential case law.[90] The first point is based on the EPA's actual evaluation of the Sinclair refinery based on DOE findings.[91] Although the EPA arguably disregarded the DOE's findings, their own metrics "reproduce[d] the Department's scoring matrix for the facility."[92] The EPA differed from the DOE, however, in requiring that a refinery return scores qualifying the facility for exemption on both structural impact and viability, but therefore the resulting score of zero for viability affected the determination appropriately.[93] The inference is that the EPA did not simply require a viability test, but required viability as *part* of a thorough analysis that should have been deemed appropriate by the court. The EPA's requirement that viability be endangered, according to the dissent, was merely a determinative factor upon the structural impact, and that without a viability score evidencing a threat to the refiner's operations the structural impact of compliance was simply not disproportionate.[94] As viability itself was a nuanced, comprehensive analysis, the dissent saw no reason to overturn the agency's determination.[95] The second point is addressed by an analysis of the potential circuit split.

C. Circuit Split

The District of Columbia Circuit held in *Hermes Consolidated, LLC v. EPA* that a *Chevron* analysis of the EPA's exemption denial compelled an affirmation of the agency's decision.[96] The obligated party argued that "[c]onsideration of a viability index . . . is inconsistent with that statutory

88. *Id*. at 999.
89. *Id*.
90. *Id.* at 999, 1002 (Lucero, J., dissenting).
91. *Id*. at 999 (Lucero, J., dissenting).
92. *Id*. at 1000 (Lucero, J., dissenting).
93. *Id*. (Lucero, J., dissenting).
94. *Id*. at 1000–01 (Lucero, J., dissenting).
95. *Id*. at 1002-04 (Lucero, J., dissenting).
96. Hermes Consolidated, LLC v. EPA, 787 F.3d 568 (D.C. Cir. 2015).

mandate."[97] With regard to "disproportionate economic hardship," the petitioner contended that the EPA's determination was either (1) entirely invalid under step 1 of *Chevron*, or (2) an impermissible interpretation of *Chevron*.[98] The D.C. Circuit held that the statutory authority of the EPA to consider viability as determinative to "disproportionate economic hardship" was clearly established by the mandate to consult with the DOE and determine how to evaluate exemption requests.[99] Furthermore, under the second step of *Chevron*, the EPA's evaluation was reasonable, and opined (importantly for the *Sinclair* dissent) that:

> Even considered on its own terms, EPA's interpretation of the phrase "disproportionate economic hardship" is wholly reasonable. DOE concluded, and EPA agreed, that the relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the program . . . DOE determined that the best way to measure "hardship" entailed examining the impact of compliance costs on a refinery's ability to maintain profitability and competitiveness—*i.e.*, viability—in the long term. EPA adopted DOE's understanding, and that choice lies well within the agency's discretion.[100]

The majority in *Sinclair* noted that the *Hermes* decision rested on petitioner's choice to suggest that a viability factor was entirely impermissible under *Chevron*, a strategy that it noted was not factually supported and so differentiated the case from its own.[101] The dissent preferred to view the opinions as addressing the reasonableness of EPA's decision, regardless of what it viewed as minimally distinguishing facts.[102]

The Eighth Circuit similarly determined in *Lion Oil Co. v. EPA* that the EPA's denial of a small refinery exemption was appropriate.[103] Lion Oil argued that the EPA's determination was arbitrary and capricious based on the EPA's reliance on a flawed DOE scoring matrix.[104] In affirming the agency's determination, the Eighth Circuit held that the statute requires that

97. *Id.* at 574.
98. *Id.* at 574–75.
99. *Id.* at 575.
100. *Id.*
101. *Sinclair*, 887 F.3d at 998-99.
102. *Id*. at 1002 (Lucero, J., dissenting).
103. Lion Oil Co. v. EPA, 792 F.3d 978 (8th Cir. 2015).
104. *Id*. at 982.

the EPA consider DOE findings and that the EPA's interpretation of "disproportionate economic hardship" was reasonable.[105] The majority in *Sinclair* found the opinion lacking as to the argument before the Tenth, in that the Eighth was not considering (or it was not clear) that Lion Oil argued against the EPA's determination of "disproportionate economic hardship" on the grounds that the agency considered viability, and viability alone, as the ultimate determinative of exemptions.[106] The dissent noted the Eighth Circuit's reference to viability as an appropriate, and important, element of an EPA determination upon which financial burden cannot, by itself, sway a decision.[107]

V. Analysis

A. Importance of the Decision

The Tenth Circuit's decision is not only important for providing judicial interpretation of the EPA's small refinery exemptions within the RFS/RINS program. First, Sinclair persuaded the majority that the appropriate administrative analysis fell under *Skidmore*, an interpretation that likely signifies the continuation of a judicial trend that may ultimately override or modify *Chevron* deference. There is an ongoing presumption that the current Supreme Court will be willing to overturn *Chevron.* Opposition to Justice Brett Kavanaugh's appointment to the Supreme Court, if limited to academic and judicial considerations, rested strongly on the presumption that Justice Kavanaugh will seek to overturn *Chevron.*[108] Justice Gorsuch is already on the record as skeptical of a doctrine that requires judicial deference to administrative interpretations of law.[109] Justice Thomas has vocalized opposition to *Chevron* in Supreme Court opinions.[110] Should Chief Justice Roberts and Justice Alito, as conservative voices on the bench

105. *Id*. at 984 (citing Hermes Consolidated, LLC v. EPA, 787 F.3d 568 (D.C. Cir. 2015)).

106. *Sinclair*, 887 F.3d at 999.

107. *Id*. at 1002 (Lucero, J., dissenting).

108. Michael McConnell, *Kavanaugh and the "Chevron Doctrine,"* HOOVER INST. (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine.

109. Henry Gass, *Gorsuch hearings: Should agencies–or courts–decide the law?*, CHRISTIAN SCI. MONITOR (Mar. 22, 2017), https://www.csmonitor.com/USA/Justice/2017/0322/Gorsuch-hearings-Should-agencies-or-courts-decide-the-law.

110. Valerie C. Brannon and Jared P. Cole, *Deference and its Discontents: Will the Supreme Court Overrule "Chevron?"*, CONG. RESEARCH SERV. (October 11, 2018), https://fas.org/sgp/crs/misc/LSB10204.pdf (citing Michigan v. EPA, 135 S.Ct. 2699 (2015) (Thomas, J., concurring)).

and presumably of a similar mindset to the aforementioned justices, join such opposition, the Supreme Court would appear primed to reconsider *Chevron*.[111] Cases such as *Sinclair* might provide sufficient reason (through a potential circuit split and the highly politicized nature of the RINS program) for the Court to use the EPA's exemption determinations as the proper vehicle through which to do so.

The ramifications of the Tenth Circuit's holding are also significant because of the potential circuit split, as discussed by the dissent. As both the dissent and potential circuit split opinions are discussed above, it suffices to note their existence and the resulting actions by the EPA. The dispute among the Tenth Circuit judges was the importance placed by the EPA on terminology within the exemption framework of the RINS program. If the EPA determines that its methodology used to refuse an exemption request to Sinclair refining was indeed sufficient, and therefore only poorly articulated before the Tenth Circuit majority (as insinuated by the dissent), it is likely that further judicial challenges will result in disparate circuit holdings. If other circuits review the same EPA methodology regarding RINS exemptions, there will be further opportunity for differing opinions on both judicial deference and factual conclusions. It is likely, however, that the EPA will (and has) changed its policy to allow for greater exemption grants. Although the EPA does not disclose its exemptions publicly, reports indicate that requests, and potentially grants, for the exemption have doubled since *Sinclair Wyoming Refining Co. v. EPA*.[112] Based on such rough reports, it is logical to suggest that the EPA has changed its methodology rather than pursue continued judicial interpretation of its past methods. Therefore, while the EPA's voluntary action may moot the specific circuit split described by the *Sinclair* dissent, the continued administration of the RFS program will remain a contentious issue for litigation by all affected parties.

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111. *Id.* The authors speculate that Chief Justice Roberts or Justices Alito or Breyer (albeit for different reasons) might seek to narrow *Chevron's* scope or eliminate the doctrine altogether.

112. Jarret Renshaw, Chris Prentice, and Jessica Resnick-Ault, *EPA grants biofuel credit exemptions for small refineries*, REUTERS (April 3, 2018), https://www.hydrocarbonprocessing.com/news/2018/04/epa-grants-biofuel-credit-exemptions-for-small-refineries; *Ethanol Coalition Files Suit Against EPA's Secretive Small Refinery Exemptions*, AM. COAL. FOR ETHANOL (May 29, 2018), https://ethanol.org/news/news/2018/05/29/ethanol-coalition-files-suit-against-epa's-secretive-small-refinery-exemptions/ ("Although EPA typically publishes its proposed actions and final decisions in the Federal Register, EPA has not followed those protocols for small refineries; nor has EPA even informed the public by any means that it had received or acted on such carve-out requests.").

The third reason the *Sinclair* decision is likely to retain significant interest in the energy industry is because of potential changes dictated to the entire RFS program. Debate over the intent, efficacy, and sustainability of the program has continued unabated since the inception of the program.[113] Certain segments of academia have criticized the program and the implementation thereof.[114] The industries involved in the RFS/RINS program are large and influential. Simply put, the attention paid to an administrative decision regarding substantial interests within those industries will be significant. As noted above, a single exemption determination has significant financial implications for multiple parties. It is a simplistic narrative to suggest that the oil industry disfavors the RFS/RINS program simply because of the financial considerations attached to program exemptions, just as it is equally simple to suggest that biofuel producers favor the program for the opposite reasoning. Nevertheless, it is true that the economics of the RINS requirements places the oil industry presumptively against the program, whereas biofuel producers and many environmental policymakers presumptively favor the program. As such large interests collide, any judicial decision with significant program ramifications, such as *Sinclair*, will encourage adversarial rhetoric and maneuverings.

B. Analysis of the Sinclair Majority

The Tenth Circuit's review under *Skidmore* deference resulted primarily because the EPA's informal adjudication processing of refinery exemptions mirrored that in *Mead*, the Supreme Court precedence calling for lower judicial deference.[115] The court's reasoning is persuasive. Other than the simple fact that the EPA's determination followed a similar mechanism for decision-making as in *Mead*, the agency's determination lacked many of the characteristics by which deference is typically preferred. Although the

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113. *Compare, e.g.*, Article, Antoine C. Schellinger, *Energy is Energy: Segregation of Renewable and Fossil Fuels Impedes Energy Security Goals*, 55 S. TEX. L. REV. 471 (2014) *with* Zippy Duval, *Time to Build on the Success of RFS*, AM. FARM BUREAU FED'N (June 13, 2018), http://www.fb.org/viewpoints/time-to-build-on-the-success-of-rfs.

114. *See, e.g.*, Kourtney Lanea Kech, Comment, *Supply and Demand, One and the Same Since When?: The EPA's Failed Attempt to Find a Loophole in the Renewable Fuel Standard*, 5 LSU J. ENERGY L. & RES. 397 (2017). The author evaluated the EPA's implementation of promulgated regulations regarding biofuels within the RFS program. Analyzed under *Chevron*, the author concluded that courts could find that the EPA was implementing biofuel waivers favorably to oil industry's interests rather than as it was statutorily authorized, thereby potentially invalidating some of its regulations.

115. *Sinclair*, 887 F.3d at 992.

court noted that informal agency actions do not necessarily require *Skidmore* deference, such contexts do create a need for a more thorough analysis of which deference is appropriate.[116] Formal notice-and-comment procedure allows for interested parties to contribute to administrative policy, and the lack of such ability threatens to render an administrative decision more arbitrary. The lack of such protections in *Sinclair* did not immediately render *Skidmore* as the appropriate vehicle for review, and instead was part of a larger context. The inability of Sinclair to support its position through petition or expert testimony also threatened the integrity of the administrative process. Through such a limited process, only one party may voice a thorough argument in support of its position. Although agencies must make informal decisions to efficiently operate the day-to-day operations of the agency, once judicially challenged an informal decision lacks the inherent authority of a properly vetted and established rule. Therefore, Sinclair's lack of an ability to support its case in an administrative hearing added to context suggesting *Chevron* was the inappropriate deferential standard to apply.

The Tenth Circuit also noted weaker contextual evidence, such as (1) a mid-level official making the determination, (2) the lack of precedential value to the determination, and (3) the EPA's own interpretation as "only a few years old."[117] Although each prong may not require *Skidmore* deference by itself, the cumulative narrative created by the above points creates a context which compelled the court's reasoning to apply *Skidmore*.[118] The *Barnhart* factors that would allow a court to review an informal administrative decision with *Chevron* deference simply were not present as a result of the informal process. Although the RFS/RINS administration is, by its very nature, a complex subject that the EPA is uniquely situated to understand and implement, refineries seeking exemptions are similarly sophisticated parties that operate within the RFS/RINS regulations, and a process that limits the adversarial system—a system that presumptively results in fairer and more just results—is rightfully afforded less deference. It must be noted that judicial deference under *Skidmore* does not automatically render an administrative decision improper. Although the context before the court in *Sinclair* turned on which deference the court

116. *See id*.
117. *Id*.
118. *See id*.

chose to apply, informal decisions by agencies are not presumptively invalid and the holding is limited to the circumstances of the case.[119]

The analysis thus turns to the Tenth Circuit's evaluation of the EPA's determinative process. By the factual terms expressed by the majority, the EPA did exceed its authority. A plain reading of the statutory language reveals a clear intent of Congress to grant small refinery exemptions should a number of economic factors emerge that show disproportionate economic hardship. The statute explicitly states that the EPA "shall" (a mandatory command) consider the DOE's findings as it relates to "disproportionate economic hardship."[120] Although the EPA received DOE findings, as mandated by statute, the agency categorically denied the DOE's recommendation (a 50% waiver of RINS compliance) due to its official, stated belief that "disproportionate economic hardship" was intrinsically tied to long-term viability.[121] The terms are not synonymous, and the rejection of the DOE recommendation (statutorily required to be considered) further provides evidence of an arbitrary or capricious agency determination unauthorized by statute. The dissent's characterization of the EPA's test as satisfactory runs contrary to the EPA's own admission that viability remained of primary importance. The apparent willingness of the EPA to disregard the DOE finding provided strong evidence that the agency was operating outside of its statutory authority.

The initial failure of the EPA to consider the DOE's findings influenced the review of the agency's interpretation of "disproportionate economic hardship."[122] The evidence before the court convincingly suggested that the EPA interpreted statutory provisions in an independent manner not completely in accordance with statutory authority. Although the court noted that the legislature did not define "disproportionate economic hardship,"[123] the application of *Skidmore* deference did not require the court to accept the agency interpretation, particularly when such an interpretation was accompanied by legislative command regarding input into the decision. As the DOE finding is statutorily essential to considering exemptions, the EPA's apparent refusal to so consider rendered their own interpretation vulnerable upon judicial review. Therefore, the Tenth Circuit's review of

119. *See* 5 U.S.C. § 701 et seq. (2017) (governing judicial review agency regulations or actions); *see also Sinclair* at 992 (noting "the decisions hold no precedential value for third parties," a fact that would not change with judicial intervention).

120. 42 U.S.C. § 7545(o)(9)(B) (2017).

121. *See Sinclair*, 887 F.3d at 994–95.

122. *See id*. at 993.

123. *Id*. at 993.

the *Sinclair* decision is rational within the administrative boundaries of the action.

VI. Conclusion

Sinclair Wyoming Refining Co. v. EPA represents a significant shift in judicial review of a disputed, and financially important, government program. Following the Tenth Circuit's overturning of the EPA's administrative denial of a small refinery exemption as it pertains to the Renewable Fuel Standard, the economic consequences of the decision will encourage continued litigation as parties seek to fully understand the ramifications of the holding. That understanding is further complicated by other circuit opinions that suggest a split regarding analysis of the EPA's RFS program interpretation. The purposeful application by the Tenth Circuit of *Skidmore* deference to the judicial review is also important to any subsequent litigation. The combination of political attention and legal indecision should create a ripe context for the Supreme Court to grant certiorari on the issue. Although prognostication of Supreme Court decisions is difficult at best, the current Court seems ideally situated to grapple with judicial review of the administrative state. *Sinclair Wyoming Refining Co. v. EPA* may prove to be a catalyst for significant policy changes for either—or both—the Renewable Fuel Standard or the modern administrative state.