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December 1, 2014

Hon. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Re: Notice of Intent to File Suit for Failure to Issue the 2015 Renewable Fuel Standard Regulations

Dear Administrator McCarthy:

The American Fuel & Petrochemical Manufacturers (AFPM) hereby provides notice of its intent to sue the Environmental Protection Agency (“EPA” or “Agency”) under Section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), to enforce EPA’s non-discretionary duties under Clean Air Act section 211(o), to timely determine renewable fuel volumes and promulgate Renewable Fuel Standard (RFS) regulations for 2015.

AFPM is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. As refiners and importers of fuel, AFPM’s members are obligated parties under the RFS program, originally enacted by Congress in 2005 as part of the Energy Policy Act of 2005. AFPM members have been directly regulated by prior rulemakings under the RFS program. Once EPA completes its rulemaking process, AFPM members will be directly regulated by the 2015 RFS rule.

Pursuant to the Clean Air Act, section 42 U.S.C. § 7545(o), EPA is obligated to promulgate annual renewable fuel volumes to implement the RFS by November 30 of the preceding year. As such, EPA should have promulgated the 2015 RFS rule on or before November 30, 2014. Unfortunately, the Agency has not even issued a notice of proposed rulemaking for public comment on the 2015 renewable fuel mandates. As a result, AFPM members will have no knowledge of what renewable fuel obligations and applicable percentages EPA may require until well after the 2015 compliance year has begun.

This is not what Congress intended. Rather, Congress imposed specific, recurring statutory deadlines for the RFS program to provide obligated parties with sufficient lead-time to plan RFS compliance strategies and to ensure that all parties know prior to each compliance year how the program will operate. EPA explicitly recognized this statutory structure when it promulgated rules in 2010 to implement the expanded “RFS 2” program required by the Energy Independence and Security Act of 2007:

Given the implications of these standards and the necessary judgment that can’t be reduced to a formula akin to the RFS 1 regulations, we believe it is



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appropriate to set the standards through a notice-and-comment rulemaking process. Thus, for future standards, we intend to issue an NPRM by summer and a final rule by November 30 of each year in order to determine the appropriate standards applicable in the following year.¹

EPA's track record has become an egregious pattern of statutory non-compliance. With respect to the 2012 RFS, EPA did not issue a final rule until January 9, 2012, 40 days beyond the statutory deadline and after the beginning of the compliance year.² For the 2013 RFS, EPA did not issue a final rule until August 15, 2013, more than 8 months after the statutory deadline and nearly two-thirds of the way through the compliance year.³ For 2014, EPA's delay reached new levels and the Agency still has not yet issued a final rule, even though the compliance year is almost concluded. These repeated inexplicable delays are a violation of the Clean Air Act.

Earlier this year, EPA claimed to be "considering how to improve [its] internal regulatory review process in order to meet established [RFS] deadlines . . . and to identify the causes of delays, and then develop a corrective plan to address them."⁴ But despite such assurances, EPA's failure to comply with RFS deadlines has only caused additional uncertainty to obligated parties, including AFPM's members. We urge EPA to take prompt action to promulgate the 2015 standards.

If you have any questions concerning this Notice, please contact me at (202) 552-8474.

Respectfully submitted,

Richard Moskowitz
General Counsel
American Fuel & Petrochemical Manufacturers

cc: Avi Garbow
Janet McCabe
Chris Grundler

¹ 75 *Federal Register* 14670, 14,675 (March 26, 2010).

² 77 *Federal Register* 1320 (January 9, 2012).

³ 78 *Federal Register* 49794 (August 15, 2013).

⁴ Response of Acting Assistant EPA Administrator Janet G. McCabe to Mr. Frank Rusco, Director, Natural Resources and Environment, U.S. Government Accountability Office. See GAO Report: Petroleum Refining, Industry's Outlook Depends on Market Changes and Key Environmental Regulations, at 61, GAO-14-249 (March 2014).