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March 16, 2017

Administrator Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC

RE: Petition for Reconsideration – Docket No. EPA-HQ-OAR-2015-0111

Dear Administrator Pruitt:

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, the American Fuel & Petrochemical Manufacturers (“AFPM”)¹ petitions the Administrator of the U.S. Environmental Protection Agency (“Agency” or “EPA”) to reconsider its January 17, 2017 denial of AFPM’s petition for a waiver of the 2016 Renewable Fuel Standard (“RFS”) cellulosic biofuel standard.²

AFPM submitted its petition on December 28, 2016, near the end of the 2016 RFS compliance year.³ The petition was based on data posted in EPA’s Moderated Transaction System (“EMTS”), which confirmed that the cellulosic biofuel industry produced significantly less cellulosic biofuel than estimated by EPA when it established the 2016 cellulosic biofuel standard.⁴ This data indicated that the production of cellulosic biofuel in 2016 would likely be between 173.8 and 190 million gallons, or about 40-60 million gallons short of EPA’s mandated level of 230 million gallons of cellulosic biofuel in 2016.⁵

On January 17, 2017, EPA denied the petition based on the Agency’s additional analysis that estimated the total number of 2016 cellulosic biofuel renewable identification numbers (“RINs”) that were generated before and after January 1, 2017. Specifically, EPA included three memoranda and additional data as attachments to its January 17, 2017 denial of AFPM’s petition.⁶

¹ AFPM is a national trade association of nearly 400 companies. AFPM represents high-tech American manufacturers, fueling and building America’s future. Our members produce virtually all the refined petroleum products and petrochemicals manufactured in the United States and are obligated parties under EPA’s RFS.

² Denial of AFPM Petition for Waiver of 2016 Cellulosic Biofuel Standard, Office of Transportation and Air Quality, January 17, 2017.

³ AFPM Petition to Administrator Gina McCarthy for Waiver of 2016 Cellulosic Biofuel Volumetric Requirements, December 28, 2016.

⁴ 80 Fed. Reg. 77420 (December 14, 2015).

⁵ AFPM Petition at 2.

⁶ Attachment A: Estimate of cellulosic biofuel volume requirement for 2016, David Korotney, Office of Transportation and Air Quality, January 10, 2016; Attachment B: Projecting 2016 Cellulosic RIN Generation On or After January 1, 2017, Dallas Burkholder, Office of Transportation and Air Quality,



Given the short period of time between the submittal of AFPM's petition for a waiver and the denial of its petition by EPA, it was impracticable to raise objections to EPA's analysis or to review new information that became available following the submission of the petition. Additional information on cellulosic biofuel production and analytical information contained in Agency memoranda projecting post January 1, 2017 cellulosic biofuel RIN generation only became available concurrent with the Agency's waiver denial.⁷ Therefore, AFPM was unable to review or raise objections to EPA's analytical approach that formed the basis of its denial of our waiver petition or to provide other informed comment.

EPA also departed from past practice regarding consideration of RFS waiver requests. As opposed to its consideration of waiver requests submitted in 2008 and 2012, the Agency did not provide notice to the public in the *Federal Register* concerning the receipt of a waiver petition or allow interested parties to submit written comments.⁸

The matter of how much qualified cellulosic biofuel was produced in 2016 is of central relevance to EPA's denial of the waiver petition. Therefore, the Administrator must "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."⁹

DISCUSSION

In *API v. EPA*,¹⁰ the U.S. Court of Appeals for the District of Columbia Circuit vacated the 2012 RFS cellulosic biofuel standard due to the Agency's unrealistic projections for cellulosic biofuel production. Specifically, the court instructed EPA to abandon its role in "promoting growth" in cellulosic biofuel production and to embrace a prediction "that aims at accuracy, not at deliberately indulging a greater risk of overshooting than undershooting."¹¹

When the Agency's projections are inaccurate and the standard is higher than actual production, obligated parties who do not own sufficient RINs, including carryover RINs, must purchase cellulosic waiver credits to make up the shortfall. For the 2016 standard, cellulosic waiver

January 11, 2017; Attachment C: 2016 Cellulosic Biofuel Carryover RINs Calculation, Nick Parsons, Office of Transportation and Air Quality, January 10, 2017.

⁷ See <https://www.epa.gov/sites/production/files/2017-01/documents/afpm-rfs-petition-decision-ltr-2017-01-17.pdf>

⁸ See Notice of Receipt of a Request From the State of Texas for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 29,753 (May 22, 2008); see also Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 52,715 (Aug. 30, 2012).

⁹ 42 U.S.C. § 7607(d)(7)(B). While EPA does not consider RFS waiver determinations to constitute an Agency "rule," judicial review pursuant to 42 U.S.C. §7607(b) is available with respect to "final action, taken by the Administrator under [the Clean Air Act.]" *Id.* §7607(b)(1).

¹⁰ See *API v. EPA*, 706 F.3d 474 (D.C. Cir. 2013).

¹¹ *Id.* at 479.



credits cost \$1.33 each. Because actual production of cellulosic biofuel in 2016 has fallen far short of the 2016 standard, obligated parties will be required to pay millions of dollars to comply with this aspect of the RFS. And this expenditure is directly attributable to EPA's significant overestimation of cellulosic biofuel production for 2016.

AFPM attempted to address this situation with its waiver petition filed December 28, 2016. In its denial of the AFPM petition, EPA expected "an additional approximately 19 million 2016 cellulosic biofuel RINs to be generated after January 1, 2017."¹² If these RINs had been generated, according to EPA "[t]his additional volume of 2016 cellulosic biofuel RINs would bring the total volume of 2016 RINs to 197 million gallons."¹³ But this didn't happen. Based on more recent EMTS information, this incremental, post January 1 posting of 2016 cellulosic RINs in EMTS was only 14 million gallons and the final total for 2016 cellulosic biofuel RINs generation is 190.57 million gallons. This is substantially below the 2016 RFS cellulosic biofuel standard of 230 million gallons and will directly result in the expenditure of millions of dollars by AFPM members to purchase cellulosic waiver credits.

This lower number of "available" RINs exacerbates the problems faced by obligated parties.¹⁴ While EPA's waiver denial explicitly relies on a projection that 39 million "carryover" RINs will be available in 2016, parties that hold cellulosic biofuel RINs are under no compulsion to sell such RINs. This means that AFPM members could face difficulties in obtaining sufficient cellulosic biofuel RINs over the next two weeks (prior to the March 31, 2017 deadline) and could be effectively penalized if they are forced to carry a cellulosic biofuel deficit into 2017 or need to purchase additional cellulosic waiver credits due to a lack of available RINs.¹⁵

Not granting a waiver also makes overall RFS compliance costlier. First, obligated parties who buy cellulosic waiver credits are essentially paying for a renewable fuel that does not exist and cannot be used by American consumers. This is contrary to the focus of the RFS on ensuring "transportation fuel sold or introduced into commerce in the United States . . . contains at least the applicable volume of renewable fuel."¹⁶ And it is, by definition, unproductive and uneconomic behavior. Second, as EPA points out, where there is a shortage of RINs as in 2016, their price tends to track the cost of cellulosic waiver credits as adjusted for the need to purchase

¹² Denial of AFPM Petition at 2.

¹³ *Id.*

¹⁴ Many obligated parties are unable to acquire RINs through blending of renewable fuels, *i.e.*, less than 4 million of the 190 million cellulosic biofuel RINs generated in 2016 represented liquid biofuel, such as cellulosic ethanol that could be blended into gasoline.

¹⁵ This provides another reason why EPA should extend the compliance date for the 2016 RFS, as previously requested by AFPM. Request to Delay 2016 RFS Compliance Date, Letter from Richard Moskowitz to Sarah Dunham, EPA Office of Air and Radiation, February 24, 2017.

¹⁶ 42 U.S.C. §7545(o)(2).



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other RINs when using credits for compliance.¹⁷ While credits beneficially serve to cap the price of RINs, where scarcity exists, there is no market incentive to price RINs lower than the cost of complying through cellulosic biofuel credits.

Therefore, if EPA does not reconsider the 2016 RFS final rule provisions on cellulosic biofuel, obligated parties will be required to spend millions of dollars complying with an RFS standard for fuel that was neither produced nor consumed in 2016. This result effectively imposes a phantom fuel tax on obligated parties based on EPA's overestimation of the amount of cellulosic biofuel production that would occur in 2016. Given that the tax will not result in the production of additional cellulosic biofuel in 2016, such a penalty does not further any purpose of the RFS program.

CONCLUSION

Based on new EMTS data confirming the magnitude of the shortfall in cellulosic biofuel production in 2016 and the resulting obligation to purchase cellulosic waiver credits for fuel that was never produced, this petition for reconsideration is both well supported and timely. We ask that you expeditiously grant this petition and take any other actions that are necessary to avoid imposing a mandate that is not required by the RFS and that will result in economic harm to AFPM's membership. Specifically, we request that you act on this petition prior to the March 31, 2017 deadline for compliance with the 2016 RFS cellulosic biofuel standard or take other action to extend the compliance deadline while consideration of our petition takes place. If you have any questions concerning the issues raised in this petition, please contact the undersigned at 202-552-8474.

Respectfully submitted,

Richard Moskowitz

cc: Sarah Dunham
Christopher Grundler
Byron Bunker

¹⁷ See Denial of Waiver Petition at 5, nt. 5. EPA projected that the total, average 2016 cost of an obligated party using a cellulosic waiver credit was \$2.22 (due to the need to purchase an advanced biofuel RIN for \$0.89) while the average price of a 2016 cellulosic biofuel RIN was \$2.01, making compliance through waiver credit purchases \$0.21 more expensive. When EPA compared the price of RINs purchased on December 28, 2016, however, compliance through credit purchases was \$0.10 cheaper than through the purchase of cellulosic RINs. But EPA's analysis does not examine what prices would be if there were a sufficient amount of RINs available (or conceivably some level of oversupply), making purchase of credits unnecessary.