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May 28, 2024

***By Certified Mail Return Receipt Requested***

Hon. Michael Regan, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
William Jefferson Clinton Bldg: EPA East Room 1309  
Washington, DC 20460

Re: Notice of Intent to File Suit for Failure to Waive Cellulosic Biofuel Standard

Dear Administrator Regan:

Pursuant to Clean Air Act section 304(b), 42 U.S.C. §7604(b), and 40 C.F.R. Part 54, American Fuel & Petrochemical Manufacturers (“AFPM”) hereby provides notice of its intent to file suit against you (in your official capacity as Administrator) and the Environmental Protection Agency (collectively, “EPA” or “Agency”) under section 304(a)(2) of the Clean Air Act, (42 U.S.C. §7604(a)(2)). This suit is to enforce EPA’s non-discretionary duties under Clean Air Act sections 211(o)(7)(D), 211(o)(2)(B)(ii), and 211(o)(2)(B)(iv) (42 U.S.C. §§7545(o)(7)(D), 7545(o)(2)(B)(ii), and 7545(o)(2)(B)(iv)), to waive the cellulosic biofuel standards for 2023, adjust 2023 applicable volumes downward, and to “make available for sale” cellulosic biofuel credits.<sup>1</sup>

AFPM is a national trade association that includes virtually all U.S. refiners and petrochemical manufacturers. EPA determined that, as refiners and importers of fuel, AFPM’s members are obligated parties under the renewable fuel standard (“RFS”) program, CAA section 211(o) (42 U.S.C. §7545(o)). AFPM members have therefore been subject to numerous regulations promulgated by EPA to implement the RFS, including standards promulgated by the Agency for 2023 that include requirements to acquire and retire cellulosic biofuel renewable fuel identification numbers (“RINs”) for compliance with the RFS.<sup>2</sup>

EPA’s non-discretionary duty to waive applicable volumes for cellulosic biofuel for 2023 and correspondingly reduce volume percentage standards for this renewable fuel are abundantly clear: “[f]or *any calendar year* for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under [Clean Air Act section 211(o)(2)(B)] . . . the Administrator *shall* reduce the applicable volume of cellulosic biofuel required under [Clean Air Act section(o)(2)(B)] to the projected volume available during that calendar year.”<sup>3</sup>

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<sup>1</sup> 42 U.S.C. §7545(o)(7)(D)(ii).

<sup>2</sup> 88 Fed. Reg. 44468 (July 12, 2023).

<sup>3</sup> 42 U.S.C. §7545(o)(7)(D) (emphasis added).

EPA has abundant information and analysis requiring the Agency to partially waive the 2023 cellulosic biofuel standard. On December 22, 2023, AFPM submitted a petition to the Agency based on EPA’s Moderated Transaction System (“EMTS”) data projecting that the 2023 cellulosic biofuel production would fall 142 million ethanol-equivalent gallons shy of the minimum applicable volume established by EPA’s final standards (840 million ethanol-equivalent gallons).<sup>4</sup> AFPM later updated this petition based on EPA EMTS data released on February 15, 2024 and calculated the shortfall in cellulosic biofuel production during 2023 to be 122,925,367 ethanol-equivalent gallons based on a calculated cellulosic biofuel mandate of 865,167,155 ethanol-equivalent gallons.<sup>5</sup>

EPA denied AFPM’s petition on March 26, 2024, stating its “assessment of the volume of 2023 cellulosic RINs and 2022 cellulosic carryover RINs indicates that obligated parties will be able to readily comply with the existing 2023 cellulosic biofuel standard.”<sup>6</sup> But in taking such action, EPA failed to address a non-discretionary duty imposed by the Clean Air Act to exercise its cellulosic biofuel waiver authority whenever the *projected volume of cellulosic biofuel production* is less than the minimum applicable volume for this fuel established by the Administrator under Clean Air Act section 211(o)(2)(B). Moreover, here *both* EPA and AFPM’s projections confirmed an expected production shortfall, triggering EPA’s twin duties to partially waive the 2023 cellulosic biofuel standard and make available cellulosic biofuel credits.

EPA’s failure to comply with the its statutory obligations under the RFS caused harm and will continue to cause harm to all obligated parties, including AFPM’s members. AFPM members and other obligated parties were forced to either acquire cellulosic biofuel RINs for 2023 in excess of the amount of RINs EPA could lawfully require – or were forced to “carryover” a cellulosic biofuel RIN deficit from 2023 to 2024. And even where AFPM members may have been able to comply with the cellulosic biofuel standard for 2023 taking neither of these actions, obligated parties were forced to use “banked” RINs in excess of the amount that they would have otherwise utilized.

These harms are real and costly to AFPM’s members. Given EPA’s refusal to address this issue, AFPM must now seek available remedies through litigation. Accordingly, AFPM intends to file suit in federal court after the required 60-day notice period over EPA’s failure to perform a “duty under [the Clean Air Act] which is not discretionary.”<sup>7</sup>

As required by 40 C.F.R. §54.3, below is the full name and address of the entity giving notice:

American Fuel & Petrochemical Manufacturers  
1800 M Street, N.W. #900N  
Washington, D.C. 20036

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<sup>4</sup> Petition for Partial Wavier of 2023 Cellulosic Biofuel Volumetric Requirements, AFPM, December 22, 2023 at 3.

<sup>5</sup> AFPM’s Petition for Partial Waiver of the 2023 Cellulosic Biofuel Volumetric Requirements – Update, March 4, 2024.

<sup>6</sup> 89 Fed. Reg. 20961, 20962 (March 26, 2024).

<sup>7</sup> 42 U.S.C. §7604(a)(2). This notice is not exclusive of any rights AFPM has to challenge EPA’s March 24, 2024 denial of its request for a partial cellulosic biofuel waiver for 2023 and AFPM reserves all rights it may possess to obtain relief.

Crowell & Moring is submitting this notice on behalf of American Fuel & Petrochemical Manufacturers. If you have any questions concerning this notice, please contact Robert Meyers at 202-624-2967 or [rmeyers@crowell.com](mailto:rmeyers@crowell.com).

Respectfully submitted,



Robert J. Meyers

cc: Merrick B. Garland, Attorney General of the United States  
Todd Kim, Assistant Attorney General of the United States  
U.S. EPA, Office of General Counsel