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Administrator E. Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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Via www.regulations.gov

**Re: Docket EPA-HQ-OAR-2017-0091 – Renewable Fuel Standard Program:
Standards for 2018 and Biomass-Based Diesel Volume for 2019:
Availability of Supplemental Information and Request for Further Comment**

The American Fuel & Petrochemical Manufacturers (“AFPM”)¹ submits these comments in response to the Environmental Protection Agency’s (“EPA’s”) Notice of Data Availability Concerning Potential Reductions in the Volume Requirements for 2018 Renewable Fuel and 2019 Biomass-Based Diesel under the Renewable Fuels Standard Program (“NODA”).² AFPM members are directly regulated as obligated parties under the Renewable Fuel Standard (“RFS”) and will be substantially affected by the outcome of EPA’s promulgated standards for 2018 and 2019.³

AFPM supports EPA’s efforts to adjust the RFS mandates to reflect the market’s ability to produce and consume renewable fuels while protecting consumers. Recent events (*i.e.*, expiration of the biodiesel tax credit, assessment of estimated countervailing duties) call into question the ability to supply adequate quantities of biomass-based diesel (“BBD”) to U.S. consumers. These events require EPA to adjust the volume of renewable fuel that will be required under the RFS, and EPA has taken a necessary step to ensure robust public input on these changed circumstances by publishing the NODA and requesting further comments prior to the issuance of the 2018 RFS implementation rule. Basing the biodiesel mandate on domestic production will help protect manufacturing jobs, promote domestic energy security, and ultimately benefit consumers.

¹ AFPM is a national trade association representing virtually all U.S. refiners and petrochemical manufacturers. AFPM’s refinery members comprise more than 95 percent of U.S. refining capacity.

² 82 Fed. Reg. 46,174 (Oct. 4, 2017).

³ Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 34,206 (July 21, 2017).



AFPM welcomes this opportunity to provide comments and additional information concerning potential options for reductions in the total renewable fuel and advanced biofuel volumes that the EPA proposed for the 2018 compliance year and the volume of BBD it has proposed for the 2019 compliance year.⁴ AFPM is also pleased to provide comments regarding potential changes to the volume of BBD EPA promulgated for the 2018 compliance year.⁵

These comments provide EPA with additional data on BBD supplies, the impact of BBD import reductions on the advanced and total renewable fuel mandates, and the ultimate impact on the consumer, domestic biodiesel industry, and refining industry from these changed circumstances. EPA is right track to reconsider the renewable fuel requirements for 2018 and 2019. This NODA more appropriately advances Congress's stated purpose of bolstering America's energy security. American consumers should not have to shoulder more costs to help foreign biofuel producers. Moreover, with the imposition of countervailing duties on foreign biofuel imports, U.S. biodiesel producers should be able to compete in the artificial BBD market created under the RFS. Indeed, AFPM's proposal is to set the BBD mandate equal to actual domestic production, rendering the renewable fuel producers' claims of injury from the NODA baseless.

AFPM filed extensive comments on EPA's proposed 2018 rule that have a direct bearing on many of the issues discussed in this NODA.⁶ AFPM argued for substantially lower volumes for total renewable fuel, advanced biofuel, BBD, and cellulosic biofuel than EPA proposed and for broader use of EPA's waiver authorities. AFPM also offered specific comments regarding how EPA should treat imports of renewable fuel for purposes of calculating RFS volume requirements. In addition, EPA has received and placed in the docket many similar comments from individual parties who are regulated under the RFS. The options presented in the NODA are all well within the scope of the proposed rule and EPA should take the following actions:

- Utilize its waiver authorities to reduce the volumes of renewable fuels that EPA proposed for the 2018 compliance year based on considerations outlined in the proposed rule and comments received on the proposed rule and this NODA.
- Set 2018 volume requirements for total renewable fuel, advanced biofuel volume, and cellulosic biofuel at the levels advocated at 17.30 billion gallons of total renewable fuel, 2.856 billion gallons of advanced biofuel, and 216 million gallons of cellulosic biofuel.
- Establish the BBD volume requirements for 2018 and 2019 at 1.74 billion gallons, and utilize both general waiver authorities in CAA §211(o)(7)(A) as well as its BBD waiver authority in CAA §211(o)(7)(E) to make corresponding adjustments to the nested renewable fuel standards.

⁴ 82 Fed. Reg. 34,206 (July 21, 2017); hereinafter cited as "2018 proposed rule."

⁵ 81 Fed. Reg. 89,746 (Dec. 12, 2016).

⁶ EPA-HQ-OAR-2017-0091-3647, dated Aug. 31, 2017.



- Use its general waiver authority to focus on the domestic supply of renewable fuel. EPA must also consider domestic supply when setting BBD volumes for 2019 based on the statutory criteria for setting RFS volumes in years in which a statutory volume does not exist, *i.e.*, CAA §211(o)(2)(B)(ii).
- Consider costs with respect to setting all RFS requirements, including the effect of new import duties for BBD from Argentina and Indonesia.

We discuss each of these issues in greater detail below.

I. Current Market Conditions Dictate Lower Volume and Percentage Standards for BBD in 2018 and 2019

In prior years EPA developed the RFS volumes for BBD considering both domestic and imported supplies. AFPM does not believe it is appropriate for EPA to rely on foreign sources of biofuel when it sets the mandates under the RFS. Therefore, given EPA's prior reliance on imports to establish the RFS for 2017 and 2018, EPA must now correct this to exclude such sources of renewable fuel as well as to account for reduced imports of BBD, as discussed herein.

A. EPA Must Take Pending Duties on Imported Biodiesel Into Account When Projecting Available Supply

AFPM submitted information to EPA regarding biodiesel supply issues in 2017, particularly with respect to import volumes.⁷ In the NODA, EPA correctly notes that the assessment of estimated countervailing duties on imports of biodiesel from Argentina and Indonesia (that took effect on August 28, 2017) will substantially affect the supply and price of BBD going forward. Specifically, on August 22, 2017, the U.S. Department of Commerce announced its calculated preliminary subsidy margins ranging from 50.29 to 64.17 percent ad valorem on imports from Argentina⁸ and from 41.06 to 68.28 percent on imports from Indonesia.⁹ Initial statements from the Argentina biofuel industry indicate that exports of biodiesel to the United States will cease to exist if these duties are imposed.¹⁰

⁷ See AFPM Letter on Biodiesel Supply in 2017, EPA-HQ-OAR-2017-0091-4116, (Sept. 15, 2017).

⁸ See Biodiesel From Argentina: Preliminary Affirmative Countervailing Duty Determination and Preliminary Affirmative Critical Circumstances Determination, in Part, 82 Fed. Reg. 40,748 (Dep't Commerce Aug. 28, 2017).

⁹ See Biodiesel From the Republic of Indonesia: Preliminary Affirmative Countervailing Duty Determination, 82 Fed. Reg. 40,746 (Dep't Commerce Aug. 28, 2017).

¹⁰ See <http://www.reuters.com/article/us-usa-biodiesel/argentine-biodiesel-industry-says-u-s-duties-will-halt-exports-idUSKCN1B22AS?il=0>. Given the preliminary determination, the imposition of countervailing duties



In addition, the Department of Commerce is scheduled to announce its preliminary margins in the parallel antidumping investigations on imports of biodiesel from Argentina and Indonesia on Friday, October 20, 2017. Any preliminary antidumping margins calculated by the Department of Commerce as a result of this investigation will result in additional duty deposit requirements on those imports from Argentina and Indonesia that are additive to the already significant preliminary countervailing duty (anti-subsidy) margins announced in late August. As a result, it is likely that the volume of biodiesel imports from Argentina and Indonesia to the United States will decline substantially.

The Department of Commerce and the U.S. International Trade Commission are likely to announce their final determinations in the investigations on imported biodiesel from Argentina and Indonesia during the second quarter of 2018. In the event these agencies reach final affirmative determinations, U.S. importers will be required to post significant cash deposits on any imports of biodiesel from Argentina and Indonesia that enter the United States throughout the entire 2018 RFS compliance year. In addition to the obvious effect on imports during 2018, the Department of Commerce has already ordered preliminary duties to be collected,¹¹ thus ensuring that imports from Argentina and Indonesia during 2017 will be affected.

This is particularly relevant because biodiesel imports from Argentina and Indonesia accounted for more than 78 percent of U.S. biodiesel imports in 2016 (1.845 million metric tons out of total imports of 2.360 million metric tons).¹² Further, imports of biodiesel from Argentina and Indonesia accounted for 85.0 percent of total U.S. imports during the first eight months of 2017 (the most recent period for which import statistics are available).

While the U.S. Census Bureau has not yet published import statistics for September 2017, it appears that the imposition of a duty deposit requirement in connection with the Commerce Department's countervailing duty determination in late August is already having a very significant effect on the volume of U.S. imports of biodiesel. In particular, based on publicly available ship manifest information published by U.S. Customs and Border Protection, the volume of import shipments containing merchandise described as involving terms indicative of biodiesel declined precipitously in September 2017. Specifically, import shipments identified using biodiesel search terms during the first eight months of 2017 averaged 82,162 metric tons per month.¹³ In September 2017, however, the volume of import shipments identified using

is relatively certain and EPA must consider this fact in assessing the supplies of BBD that will be available for compliance with the RFS.

¹¹ The U.S. Department of Commerce has instructed U.S. Customs to require cash deposits for current imports based on the preliminary rates indicated in the Aug. 22, 2017 decision.

¹² See Appendix to these comments.

¹³ *Id.* Further, the volume of such imports averaged 143,539 metric tons per month between June and August 2017, reflecting increased volumes that might be expected in anticipation of the commencement of a duty deposit requirement in late August in connection with the ongoing Commerce Department investigations.



biodiesel search terms declined precipitously – falling to just 19,627 metric tons – or a level that is 76 percent less than the average monthly volume for the first eight months of 2017, or 86 percent less than the average monthly volume of imports between June and August 2017. *See id.* While this analysis of imports post countervailing duty determination includes data for only one month and, as noted above, official U.S. import statistics are not yet available for September 2017, it appears that the impact of the duty deposit requirements resulting from the Commerce Department’s preliminary countervailing duty determination is likely to be very significant. In addition, the volume of biodiesel imports from Argentina and Indonesia is likely to decline further once any additive cash deposit requirements associated with the Commerce Department’s preliminary antidumping determination are implemented in late October 2017. The impact of the preliminary duties is already evident through the decline in shipments, but also the adjustment in pricing.

In addition to the impact of new duty deposit requirements as a result of the Commerce Department’s preliminary unfair trade determinations, U.S. imports of biodiesel from Argentina and Indonesia are likely to be reduced due to significant reductions in the level of unfair trade duties assessed on such imports in the European Union (EU). Press reports indicate that the duties on Argentine biodiesel have been reduced from 22 to 25.7 percent to 4.5 to 8.1 percent (depending on the producer), following a finding by the World Trade Organization’s (WTO) appellate body that the EU’s measures were inconsistent with its obligations as a member of the WTO.¹⁴

Given that preliminary actions have been taken and that duties are now being collected, EPA may properly consider this information in decisions concerning the level of the 2018 BBD volumes included in the final RFS rule as well as resulting percentage standards. Further, the market data shows that any reduction in the mandate will come primarily at the expense of more expensive imported fuels, and not at the expense of domestic biofuel producers.

B. EPA Cannot Assume that the Biodiesel Tax Credit Will Be Available in 2018

In the proposed rule and the NODA, EPA correctly cites the expiration of the biodiesel tax credit as another reason why biodiesel supply will decline in the future. This is likely to occur in two ways. First, the most immediate impact of the expiration of the blender tax credit is that the effective price of biodiesel to blenders is now equivalent to the market price of biodiesel. The market will determine whether blenders are able to pass this increased cost to their customers;

¹⁴ “EU confirms Reduced import duties for Argentine biodiesel,” Reuters (Sept. 19, 2017) (available at: <https://www.reuters.com/article/eu-argentina-biodiesel/eu-confirms-reduced-import-duties-for-argentine-biodiesel-idUSL5N1M00Y9>); Kotrba, Ron, “EU vote to lower Argentine biodiesel duties prompts add’l action,” Biodiesel Magazine (Sept. 11, 2017) (available at: <http://www.biodieselmagazine.com/articles/2516139/eu-vote-to-lower-argentine-biodiesel-duties-prompts-addl-action>).



however, the higher the price that blenders must pay for biodiesel, the less likely they are to blend biodiesel into their finished fuel products.

Second, the price of biodiesel is currently about \$1.30/gallon more than the price of diesel derived from petroleum, and for 2017 biodiesel has priced on average \$1.50/gallon above petroleum derived diesel.¹⁵ Given this price disparity and in the absence of a tax credit, few consumers would voluntarily choose biodiesel and there would appear to be little incentive for blenders to expand the downstream market for this renewable fuel. This is especially true since large users of diesel fuel, such as the trucking industry, are very price sensitive.

It is possible that such changes in market behavior may not occur overnight. In previous years, substantial biodiesel blending occurred after expiration of the blender tax credit, largely based on the expectation that Congress would eventually restore the credit and apply it retroactively. This expectation has been at least partially validated on two occasions.¹⁶ But this expectation may become more remote the longer that no legislative action occurs on the biodiesel credit. And, while it may be permissible for the private sector to gamble on the speculative actions Congress will or will not take concerning taxes, the Executive Branch of government clearly cannot.

EPA cannot reasonably rely on a political forecast of what Congress *might* do as a basis for rulemaking.¹⁷ Moreover, there is nothing in the administrative record for the 2018 RFS rulemaking that is of probative value in projecting whether, how and when Congress might act to restore credits that are valuable to the biofuel industry. Indeed, it is possible that a tax credit will be approved, a tax credit will not be approved, or a different type of tax credit may be approved by Congress.¹⁸ Thus, EPA must discount the impact of potentially favorable tax treatment when determining final RFS standards.

In addition, EPA traditionally forecasts the economic effect of new regulations *based* on rules that are currently in effect or that will become effective during the period being analyzed. EPA's

¹⁵ Argus Media, Inc., *Argus Americas Biofuels*; (subscription), biodiesel B100 SME fob Houston rail/barge USC/USG – Houston close at: www.argusmedia.com (hereinafter “Argus Americas Biofuels”).

¹⁶ Pub. Law 112-240 retroactively authorized tax credits for 2012 and extended credits through 2013. After another extension of the blenders credit for 2014, on Dec. 15, 2015, Congress approved a tax extenders package which made credits retroactive to Jan. 1, 2015 and extended credits to Dec. 31, 2016. This extension was included within H.R. 2029, an unrelated appropriations measure.

¹⁷ Unlike the Department of Commerce's preliminary determinations of countervailing duties for imported biodiesel, the likelihood that Congress will pass legislation providing biofuel tax credits is too speculative to factor into EPA's analysis of the potential supply of BBD. *See* discussion of OMB and EPA guidance, *infra* at notes 21-22.

¹⁸ Legislation has also been introduced, H.R. 2383 and S. 944 which would change the type of tax credit that has historically been provided. The legislation would amend current law to provide for a biodiesel producers' credit rather than a blenders' credit. But EPA cannot speculate on when such an extension and/or a revision of tax credits will occur.



base case analysis relies only on rules that are “on the books” and enforceable.¹⁹ Therefore, it would be highly inconsistent for EPA, for purposes of this rule, to depart from this practice and/or otherwise presume reenactment of the credit and/or retrospective application of the credit. OMB Directives also provide for measuring a baseline assuming “no change” in regulatory programs that are in effect.²⁰ For these reasons, EPA must entirely discount the possibility that blending tax credits will be available in 2018 or subsequent years.

II. The 2018 Biomass-Based Diesel Volume Requirements Should be Reduced

EPA finalized the 2018 2.1 billion gallon volume requirement for BBD in late 2016 as part of its rulemaking to establish standards for all four renewable fuel requirements for 2017.²¹ During the public comment period for the 2017 RFS, AFPM recommended that EPA set the volume of BBD for 2018 at 1.28 billion gallons based on the expectation that the Agency would not comply with statutory provisions that require BBD requirements to be established at least 14 months prior to the start of a compliance year.²² AFPM and API also noted the substantial price differential between BBD and petroleum-based diesel. In 2017, biodiesel prices averaged \$1.50 per gallon more than petroleum diesel.²³

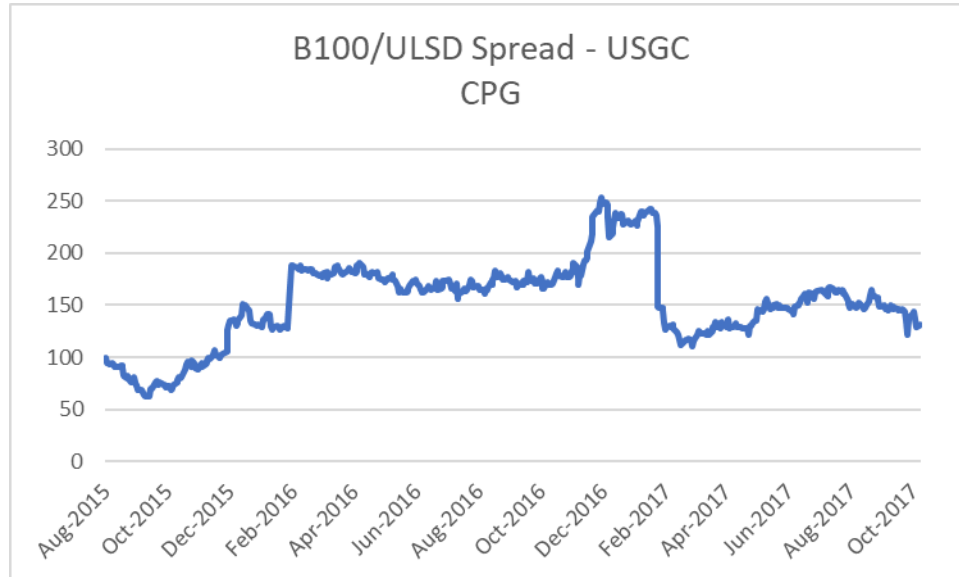
¹⁹ “A baseline is defined as the best assessment of the world absent the proposed regulation or policy action . . . In general, the most appropriate baseline will be the ‘no change’ or ‘reality in the absence of the regulation’ scenario; but in some cases, a baseline of some other regulatory approach may be considered. For example, if any industry is certain to be regulated (*e.g.*, by court order or congressional mandate) but that regulation has not yet been implemented, then a baseline including this regulation should be used.” Guidelines for Preparing Economic Analyses; EPA Office of Administrator, December 2010, at 5-1, 5-3.

²⁰ In developing a baseline to measure benefits and costs, the Office of Management and Budget provides that “[f]or review of an existing regulation, a baseline assuming ‘no change’ in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives.” OMB Circular A-4, Sept. 17, 2003.

²¹ Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016). In this rule, EPA only finalized percentage standards for BBD for 2017 and did not calculate a percentage standard for 2018 based on the volumetric requirement. *See* 40 C.F.R. §80.1405(a).

²² AFPM Comments on proposed 2017 RFS at 32.

²³ Biodiesel price source: Argus Americas Biofuels. ULSD price source: U.S. Energy Information Administration at: https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EER_EPD2DXL0_PF4_RGC_DPG&f=D.



Given this price differential and the Agency’s cursory treatment of the statutory factors it must consider to promulgate a BBD standard for 2018, AFPM argued that the level of the standard was arbitrary and capricious.²⁴

In comments filed on the proposed 2018 RFS rule, AFPM recommended that EPA set the volume of total renewable fuel volume at 17.05 billion gallons in 2018, over 2 billion gallons less than EPA’s proposed level of 19.24 billion gallons. AFPM also recommended that EPA set volume requirements for BBD in 2018 at 2.360 billion RINs or approximately 1.52 billion gallons.²⁵

Further comments on the appropriate volumetric level for BBD for the 2018 RFS compliance year are now appropriate given EPA’s examination of this issue in the NODA.²⁶ In this regard, AFPM suggests that EPA should set the volume requirement for BBD in 2018 at no higher than 1.74 billion gallons (2.61 billion RINs).²⁷ This volume preserves the amount of domestically produced biodiesel, while discounting imported biofuels.

²⁴ Along with many other petitioners, AFPM filed a petition for review of the 2017 RFS rule in the D.C. Circuit. This litigation is currently pending following a stay of proceedings based on the court’s consideration of challenges to the 2014-2016 RFS rule.

²⁵ AFPM/API Comments on proposed 2018 RFS at 3.

²⁶ See proposed 40 C.F.R. §80.1405(a); 82 Fed. Reg. at 34,242.

²⁷ This revised BBD volume recommendation is calculated by annualizing 2017 domestic BBD production in EMTS from January through August 2017. This BBD volume will continue to harm consumers by forcing expensive biodiesel into the transportation fuel supply. Moreover, given the choice, most consumers would reject



III. Adjustments to the 2018 Biomass-Based Diesel Volume Requirements Require EPA to Make Corresponding Adjustments to the Advanced and Total Renewable Fuel Categories

The anticipated reduction in BBD supply requires EPA to make corresponding adjustments to the renewable fuel categories that are based on BBD blending volumes. This means that a reduction in BBD necessitates a corresponding reduction in the advanced and total renewable fuel categories. AFPM's volumetric recommendations for the 2018 renewable fuel standards are set forth in Section V, *infra*.

Lowering the BBD volumetric level without lowering the total renewable fuel and advanced biofuel volumes would confound obligated parties' abilities to comply with the RFS mandates and undercut EPA's analysis of the achievable levels for all four renewable fuels. Consistent with previous practice, EPA attempted in the proposed rule to determine whether volumes of total renewable fuel are "reasonably attainable given assessments of individual fuel types, including biodiesel, renewable diesel, ethanol (in the form of E10 or higher ethanol blends such as E15 or E85), and other renewable fuel."²⁸ This "bottom up" analysis of individual fuel types means that adjusting nested fuels like BBD inevitably affects the "reasonably attainable" levels of other renewable fuel categories and vice versa.

Fortunately, Congress provided EPA with the tools it needs to adjust the statutory volumes of renewable fuels to address the change in circumstances related to BBD supplies. These tools take the form of "waiver authorities" and are discussed in Section IV, *infra*.

IV. EPA Has Multiple Waiver Authorities to Address Impacts on BBD Supplies

EPA has several waiver authorities that it must draw on to address the unachievable statutory mandates and the impact on BBD supply discussed in Section I, *supra*. These include a general waiver based on *inadequate domestic supply*, a general waiver based on *severe economic harm*, and a specific waiver to address anticipated shortfalls in BBD. EPA also has broad authority to reduce RFS volumes based on cellulosic biofuel shortfalls.²⁹

A. EPA May Use the Inadequate Domestic Supply Waiver to Reduce Requirements for Renewable Fuels

more expensive biodiesel, which performs poorly in cold weather and has a lower energy content than the petroleum diesel fuel it displaces.

²⁸ 82 Fed. Reg. at 34,210.

²⁹ The cellulosic waiver authority is discussed in AFPM's comments to the 2018 RFS proposed rule and is not repeated herein. See AFPM/API Comments at 21-24.



We first discuss EPA’s general waiver authority based on inadequate domestic supply. Congress included this waiver authority to address shortfalls in the supply of renewable fuel to U.S. consumers, and EPA is well within its statutory authority to apply this waiver to BBD and the nested renewable fuel categories.

1. EPA Should Exclude Imported Renewable Fuel When Calculating Supply

In *Americans for Clean Energy v. EPA*,³⁰ the D.C. Circuit held that EPA “exceeded its authority under the ‘inadequate domestic supply’ provision when it interpreted the term “supply” to allow it to consider demand-side constraints in the market for renewable fuel.”³¹ The court did not separately analyze the statutory meaning of “domestic” within the “inadequate domestic supply” waiver provision or reach any decision concerning the scope of EPA’s permissible interpretation of that term.

While the court stated that “EPA *may* consider factors affecting the availability of renewable fuel available to refiners, blenders, and importers” with respect to inadequate supply waivers and that such factors “*may include, for example* . . . the amount of renewable fuel available for import from foreign producers”³² the question of whether the “domestic supply” must be interpreted to include imported renewable fuel was not briefed in the litigation.³³ To the extent the court expressed any opinion on this issue, it is therefore dictum.³⁴

EPA may therefore exclude imports as part of the “domestic supply” of renewable fuel. Indeed, such an interpretation is supported by the statutory structure of the RFS, Congressional intent in enacting the RFS in 2005 and amending the RFS in 2007, and EPA’s multiple waiver authorities:

First, as AFPM/API’s comments on the proposed rule pointed out and as cited by EPA, the ordinary meaning of “domestic” refers to renewable fuel that originates within the United States.³⁵ Thus, to apply the inadequate domestic supply waiver in a manner that does not consider whether renewable fuel was produced domestically or abroad would be to deprive the term “domestic” of any meaning.

³⁰ *Slip Op.* No. 16-1005, D.C. Circuit (July 28, 2017).

³¹ *Id.* at 17.

³² *Slip Op.* at 29 (emphasis added).

³³ See also AFPM/API comments on proposed rule at 33.

³⁴ It should also be noted that even as dictum, the court indicated that EPA has discretion whether to include foreign-produced renewable fuel within the domestic supply of renewable fuel, *i.e.*, EPA “*may* consider factors” and “*may include, for example*” foreign-produced renewable fuel in determining RFS volume requirements.

³⁵ AFPM/API Comments at 32.



Second, the RFS applies not only in years for which an applicable volume of renewable fuel is specified (*i.e.*, 2006 to 2022) but also in “other calendar years after the calendar years specified in the tables [containing applicable volumes].” CAA §211(o)(2)(B)(ii). This part of the renewable fuels mandate requires that EPA “shall” determine applicable volumes with reference to “the impact of renewable fuels on the energy security of the United States . . . the impact of renewable fuels on the infrastructure of the United States [and] the impact . . . on other factors, including job creation . . . [and] rural economic development.”³⁶ These statutory factors all unequivocally reference domestic concerns. It would be illogical for EPA to be authorized to focus on domestic production after 2022, but not before.

Third, Congress enacted the RFS to enhance energy independence and security by reducing American fuel imports. Including foreign production of renewable fuels in the calculation of the domestic supply when setting renewable fuel volume standards does not enhance energy independence and security.

If not compelled by the statute, considering “domestic supply” to refer to domestically-produced renewable fuels is certainly a permissible construction of the statute and a far more rational interpretation of the statute than to either read out “domestic” from the waiver provision or interpret “domestic supply” to mean both the domestic and foreign supply of renewable fuel. There are several additional considerations that support this interpretation by EPA:

- The RFS was never approved by Congress as a stand-alone measure. Instead, the RFS was initially enacted in the Energy Policy Act of 2005 (“EPAct”)³⁷ and later amended and expanded in the Energy Independence and Security Act of 2007 (“EISA”).³⁸ EPAct provided for numerous programs aimed at improving energy efficiency and renewable energy resources in the United States³⁹ as well as increasing domestic oil and gas production and other domestic energy resources.⁴⁰ EISA similarly focused on increasing energy security through improved vehicle technology and the increased production of biofuels⁴¹ along with energy development and numerous research programs.⁴² Neither Act was intended to subsidize or favor foreign energy development over domestic development and production. Read in the context of its broader enactment, EPA may certainly infer that the RFS is focused on domestic sources of renewable fuel.

³⁶ CAA §211(o)(2)(B)(ii)(I),(IV),(VI).

³⁷ Pub. Law 109-58 (Aug. 8, 2005)

³⁸ Pub. Law 110-140 (Dec. 19, 2007).

³⁹ EPAct, Titles I, II.

⁴⁰ *Id.*, Title III.

⁴¹ EISA, Title I, II.

⁴² International energy programs were confined to one title of EISA and consisted of assistance from the United States to developing countries.



- Legislative history and intent supports this interpretation. Congressional consideration of EPAct focused on domestic energy production and the domestic production of renewable fuels. During final passage of EPAct by the Senate, Senator Durbin (then Senate Democratic Whip) indicated that the legislation “contains a renewable fuel standard that increases the use of *domestically produced renewable fuels* to 7.5 billion gallons by 2012. This change will be good for America’s economy, good for our energy security and good for Illinois farmers.”⁴³ When the House considered EISA, the rule providing for the adoption of the conference report for the legislation made it clear that the bill was intended to “move the United States toward *greater energy independence* and security [and] to increase the production of clean renewable fuels . . .”⁴⁴

Impending duties applying to imported biodiesel provide further support for this statutory interpretation. If, as anticipated, substantial import duties will be applied to biodiesel from Argentina and Indonesia, then basing RFS requirements on the consideration of such volumes would only serve to increase adverse economic impacts. Setting the required level of BBD higher within the nested volumes of the RFS for advanced biofuel and total renewable fuel (based on imports paying substantial duties) would force purchase and blending of these higher priced fuels.⁴⁵

Exercise of EPA’s general waiver authority to exclude consideration of imported renewable fuel is appropriate for 2018 and 2019 RFS volume requirements for BBD since, as explained in more detail above in Section I, it is clear that the domestic supply of BBD will be “inadequate” for these years without the market conditions (*e.g.*, the availability of tax credits) that existed in earlier RFS compliance years.

In addition, EPA may waive requirements for total renewable fuel and advanced biofuel on the basis of excluding imports of BBD from consideration in setting the level of the RFS. The nested nature of RFS requirements and EPA’s past implementation of RFS standards supports this result. Finally, while currently much smaller in amount, EPA should also exclude from consideration any other imported renewable fuel apart from BBD in setting volume requirements for the RFS.

⁴³ 151 CONG. REC. S9355 (July 29, 2005) (emphasis added). *See also* floor remarks of Senator Conrad (“[The bill] will also spur an increase in the production and use of domestic biofuels such as ethanol and biodiesel.”) *Id.* at S9360.

⁴⁴ H.Res. 877, 153 CONG. REC. H16651 (Dec. 18, 2007) (emphasis added). These same goals are incorporated within the Public Law version of EISA, Pub. Law 110-140.

⁴⁵ Setting aside whether imposing import duties is a good policy, EPA should consider that placing duties on imported BBD is meant to alleviate unfair competition for domestic producers and increase the domestic biodiesel industry’s ability to compete. Under these circumstances, domestic producers will benefit from the new duties and therefore have greater economic incentive and ability to produce.



2. Imported Biofuel RINs May be Used for Compliance

As AFPM explained in comments filed on the proposed rule, CAA §211(o)(5)(A)(i) provides for the generation of credits (called renewable identification numbers, “RINs”) with regard to “any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity” required of that obligated party for the year in question. EPA also has discretion in terms of how it interprets its authority within CAA §211(o)(5) to issue regulations regarding the generation and use of credits. Thus, EPA may focus on domestic production for purposes of determining annual RFS obligations while allowing the use of RINs generated through the importation of renewable fuel for compliance.

3. EPA May Consider Costs When Implementing Inadequate Domestic Supply Waiver

EPA is correct to consider cost impacts when considering whether to further utilize its waiver authorities for the 2018 Rule. Specifically, EPA can apply cost considerations to total renewable fuel, advanced biofuel, and BBD volume requirements when determining how much to adjust statutory requirements on the basis of inadequate domestic supply.

i. EPA Must Consider Costs in Establishing All Requirements for BBD

Consideration of cost is required when EPA promulgates RFS standards where there are no explicit statutory volumes provided in the statute, such as the case for BBD volumes after 2012. Pursuant to CAA §211(o)(2)(B)(ii), EPA is first required to consult with the Secretaries of Energy and Agriculture and conduct a review of the implementation of annual volumes of BBD that were specified in the statute, *i.e.*, 0.5, 0.65, 0.80 and 1.0 billion gallons. Next, EPA is required to consider six different factors in setting volume requirements, including the impact of renewable fuels on infrastructure and “the cost to consumers of transportation fuel and on the cost to transport goods.” Several other economic considerations are also to be assessed including “job creation, the price and supply of agricultural commodities, rural economic development and food prices.” Thus, consideration of costs is both an underlying evaluation that EPA must undertake with respect to the operation of the RFS program as a whole and an explicit consideration that EPA must take into account in establishing BBD volumes in 2018 and 2019.

ii. Cost Considerations for Total Renewable and Advanced Biofuel

The cost of renewable fuel to obligated parties (either incurred through direct blending or the purchase of RINs) is a necessary part of the waiver analysis required by the D.C. Circuit. EPA must look to the “supply available to refiners, blenders, and importers to meet statutory requirements.” *Americans for Clean Energy*, Slip Op. at 29. But supply is only “available” if it



is “present or ready for immediate use.”⁴⁶ Whether supply is present and ready for immediate use inherently involves consideration of the cost of the supply.

The CAA and, more specifically the RFS, does not require EPA to implement its requirements with regulatory blinders on as to the real world implications of its actions. Like other CAA programs, EPA must implement the RFS in a reasonable and rational manner. In this regard, when interpreting whether a standard for hazardous air pollutants was “appropriate” under the CAA, the Supreme Court has indicated that:

Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that “too much wasteful expenditure devoted to one problem may well mean that considerably fewer resources are available to deal effectively with other (perhaps more serious) problems.”⁴⁷

So too here, in the context of implementing the requirements of CAA §211(o), renewable fuel may only be considered available to obligated parties when consideration is given to the broader context of the RFS and its purposes including improving the energy security of the United States. This means that supply is not available if that supply is too costly or would perhaps have counterproductive results, such as a cost structure that would overly incentivize the importation of renewable fuels.

Instead, EPA must balance the costs it imposes under the RFS against other relevant considerations, including maintaining a reasonably-functioning market for renewable fuels, the E-10 blendwall, and constraints affecting the utilization of advanced biofuel, such as available infrastructure. Each of these considerations involves costs.

B. EPA May Also Waive RFS Requirements to Avert Severe Economic Harm

AFPM has already submitted comments with regard to EPA’s use of its general waiver authority to avert “severe economic harm” through the imposition of RFS volume requirements.⁴⁸ EPA’s ability to utilize this waiver authority is not time-constrained; it exists whenever the Administrator determines that implementation of volume requirements “would severely harm the economy or environment of a State, a region, or the United States.”⁴⁹ Thus, EPA’s exertion of this authority may be either forward or backward-looking. EPA might, for example, exert such

⁴⁶ Merriam-Webster online dictionary, accessed October 12, 2017.

⁴⁷ *Michigan v. EPA*, 135 S. Ct. 2699, _____(2015).

⁴⁸ AFPM/API Comments on proposed rule at 30-31.

⁴⁹ CAA §211(o)(7)(A)(i).



waiver authority after the end of a compliance year but prior to the submission of RINs for compliance in order to avoid imposing severe harm on parties that may need to purchase RINs. Or EPA might exert such waiver authority prior to or during a compliance year where it determined that previously-established requirements would, if implemented, result in severe harm.

EPA has discretion to determine what constitutes “severe economic harm.” When the Agency acted to deny a request from the State of Texas in 2008 it included “guidance” for future requests, but specifically stated that “this guidance is not a rule, and therefore is not binding on the public or EPA.”⁵⁰

Similarly, when EPA denied a request from several governors to waive RFS volume requirements due to drought conditions in 2012, the Agency did not find that conditions at the time justified a waiver, but agreed that “implementation of the RFS must necessarily occur within the context of existing market conditions, and that it is necessary and appropriate for EPA to consider the effects of RFS implementation in the context of those existing conditions.”⁵¹ EPA also indicated that it was not required to interpret “severe” harm in any particular manner but that the “circumstances [involved in the 2012 waiver request] do not demonstrate the kind of harm from RFS implementation that would be characterized as severe.”⁵²

EPA therefore retains discretion with respect to market conditions existing in 2017 to 2019 to waive RFS requirements on the basis of severe economic harm. It may do so on the basis advocated within AFPM’s comments on the proposed rule.⁵³

C. EPA May Use Authority in CAA §211(o)(7)(E)(ii) to Reduce 2018 BBD Volumes

The NODA represents the first time EPA is considering using the BBD waiver authority to address harm to obligated parties that would occur from market circumstances that increase the price of BBD.

CAA §211(o)(7)(E)(ii) allows EPA to reduce the quantity of BBD required “under subparagraph (A)”⁵⁴ on the basis of feedstock disruptions or other “market circumstances” significantly

⁵⁰ Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47,168, 47,183 (Aug. 13, 2008).

⁵¹ Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,752, 70,773 (Nov. 7, 2012).

⁵² *Id.* at 70,774.

⁵³ See AFPM/API Comments at 30-31.

⁵⁴ AFPM interprets the cross reference to “subparagraph (A)” to reference subparagraph 211(o)(2)(A) rather than subparagraph 211(o)(7)(A) since subparagraph 211(o)(2)(A) contains authority for EPA to promulgate regulations to implement the RFS program. In contrast, subparagraph 211(o)(7)(A) contains the general waiver mechanisms for requirements established under paragraph 211(o)(2). This interpretation is reinforced when one



affecting price. The requirement for a “significant” effect presents a relatively low bar to the exertion of EPA’s waiver authority.

It must be presumed that Congress acts deliberately in the development and approval of legislation. Within the BBD waiver mechanism, it is notable that Congress did not require that the price of BBD increase “substantially” but only that “the price of biomass-based diesel fuel increase significantly,” and that the EPA Administrator consult with the Secretary of Energy and Secretary of Agriculture in issuing an order to reduce the required quantity of BBD.⁵⁵

As EPA observes in the NODA, the BBD waiver is measured with respect to the annual BBD requirement (*i.e.*, “the quantity of biomass-based diesel required under subparagraph (A)”).⁵⁶ The CAA authorizes EPA to waive in a 60-day period an amount that is equivalent of up to 15% of the applicable annual requirement.

Applying this waiver provision to the annual BBD volume makes sense given that RFS volume requirements are applied in each calendar year.⁵⁷ Further, any adjustments to RFS applicable percentages are to be made with respect to a calendar year and are to “account for the use of renewable fuel during the previous calendar year” by small refineries that are exempt.⁵⁸ Since the inception of the RFS program in 2007, EPA has applied the RFS program on a calendar year basis and existing regulations require that obligated parties calculate their obligations for any year based on the amount of gasoline and diesel they produced or imported during the year.⁵⁹ EPA may therefore reasonably interpret the BBD waiver mechanism to apply in the same

considers that the BBD waiver mechanism in §211(o)(7)(E)(ii) also provides that if the Administrator waives BBD requirements in any one year, the Administrator may also reduce the applicable volume of total renewable fuel and advanced biofuel by the same or lesser volume as “established under paragraph (2)(B).” Under this interpretation, the BBD waiver provision is referring to CAA §211(o)(2)(A) and (B), which impose annual volume requirements. Alternatively, the reference to “subparagraph (A)” is either unclear, allowing EPA to reasonably interpret the provision, or constitutes a legislative drafting error, again allowing reasonable interpretation of the provision within the statutory context of CAA §211(o). Finally, it would be illogical for a BBD waiver mechanism to refer to the “quantity of biomass-based diesel required under subparagraph (A)” as meaning CAA §211(o)(7)(A) since the general waiver acts to waive requirements established elsewhere in CAA §211(o)(2).

⁵⁵ CAA §211(o) does not define “significantly” for purposes of implementing the RFS program. While EPA has not advanced binding interpretations of the Agency’s RFS waiver authorities in previous considerations of waiver requests, EPA has indicated that it might look to other CAA statutory contexts to derive the meaning of waiver requirements. For example, in its 2012 denial of a waiver request, EPA referenced CAA §181(a) use of “severe” ozone nonattainment classifications to assert that “‘severe[] harm’ [to] the economy . . . is clearly a much higher threshold than ‘significant adverse impacts.’” 77 Fed. Reg. 70, 752, 70,774 (Nov. 27, 2012). EPA explained that while “it is not required to interpret the term ‘severe’ in section 211 in the same manner as section 181(a) . . . it is ‘instructive’ to do so.” *Id.*

⁵⁶ CAA §211(o)(7)(E)(ii).

⁵⁷ CAA §211(o)(2)(B). *See also* CAA §211(o)(3)(B)(ii) (RFS obligations are to be “determined for a calendar year.”).

⁵⁸ CAA §211(o)(3)(C).

⁵⁹ 40 C.F.R. §§80.1405(c), 80.1407(a).



manner as the RFS program is implemented while accounting for statutory language that limits a single waiver to 60 days.⁶⁰

Conversely, it would be inconsistent with the intended flexible implementation of the RFS for EPA to attempt to apply the waiver of “the applicable annual requirement for biomass-based diesel” within a 60-day period. Even if EPA could develop appropriate regulatory mechanisms to do so, applying a 15% annual waiver to a constrained 60-day period would likely lead to further market disruptions and would only serve to increase uncertainty.

Finally, neither CAA §211(o)(2)(E)(ii) nor §211(o)(2)(E)(iii) prohibits the Administrator from making more than one waiver determination (with or without an extension) in a calendar year. The provisions provide for “orders” to reduce for up to a 60-day period, but do not explicitly restrict the Administrator from addressing market circumstances that only manifest themselves once a compliance year starts. Therefore, despite any reliance EPA may place on the waiver mechanism in the final 2018 RFS rule, EPA may consider additional future waivers as circumstances may warrant during calendar year 2018.

V. AFPM Recommendations on RFS Volumes After Utilization of EPA CAA §211(o) Waiver Authorities

As explained herein and in the comments AFPM/API submitted on the proposed rule for the 2018 RFS, EPA should substantially reduce required renewable fuel volumes in 2018 and BBD requirements for 2019. Specifically, EPA should:

- (1) Use its cellulosic waiver authority to reduce volumes beyond those in the proposed 2018 rule and waive total renewable and advanced biofuel volumes by the same amount as the amount waived through use of the cellulosic biofuel waiver;
- (2) Use its general waiver authority - relying on both prongs of CAA §211(o)(7)(A) related to inadequate domestic supply and severe economic harm - to waive RFS volumes for total renewable fuel and advanced biofuel beyond the level of the amount waived through use of the cellulosic biofuel waiver;

⁶⁰ EPA has calculated that it may waive 315 million gallons of BBD in 2018 using its CAA §211(o)(7)(E)(ii) waiver authority. But CAA §211(o)(7)(E)(iii) allows EPA to issue an order to extend a waiver by another 60 days and waive an additional 15% of the applicable annual BBD requirement. This extension of an existing waiver means that for the 2018 RFS compliance year, EPA has, at minimum, the authority to waive an additional 315 million gallons if warranted under the criteria specified in §211(o)(7)(E)(ii)-(iii). This would mean that EPA could lower the BBD volume requirement by a total of 630 million gallons in 2018 simply by finding that the conditions for an extension exist as part of its final 2018 RFS rule. EPA additionally indicates that “*additional incremental reductions*” may be possible if circumstances warrant. 82 Fed. Reg. at 46,179 (emphasis added).



(3) Use its separate authority to waive BBD volumes to the full extent allowed under CAA §211(o)(7)(E) to lower “nested” BBD requirements within the lowered amount of total renewable fuel and advanced biofuel for 2018; and

(4) Apply the statutory criteria contained in CAA §211(o)(2)(B)(ii) to lower 2019 BBD volumes below the level proposed, consistent with not considering imported renewable fuel for purposes of establishing RFS volume requirements.

The resulting RFS volumes that EPA should promulgate as part of the pending 2018 RFS rulemaking are as follows:

	Total Renewable (billion gallons)	Advanced Biofuel (billion gallons)	BBD (billion gallons)	Cellulosic (billion gallons)
2018 RFS	17.30 ⁶¹	2.856 ⁶²	1.74	0.216
2019 RFS	n/a	n/a	1.74	n/a

Adjusting the mandated renewable fuel volumes as recommended herein would have a beneficial impact on U.S. consumers. Indeed, upon reports that EPA would issue the NODA, affected RIN prices fell by approximately 20 percent. After reports that the White House directed EPA to abandon the reforms contemplated in this NODA, RIN prices essentially returned to their pre-NODA levels.⁶³

CONCLUSION

EPA should reduce 2018 and 2019 RFS volumes. This NODA, when considered in conjunction with the proposed rule, outlines several bases for EPA to take such action, including but not limited to the preliminary determination of countervailing duties on biodiesel imports, the

⁶¹ 17.30 billion gallons is calculated as follows: 13.96 ethanol + 0.20 nonethanol cellulosic biofuel (biogas) + 2.61 domestic BBD + 0.03 other advanced biofuel + 0.50 D6 (not advanced) biodiesel/renewable diesel.

⁶² 2.856 billion gallons is calculated as follows: 0.216 cellulosic biofuel + 2.61 domestic advanced biodiesel and renewable diesel + 0.03 other advanced biofuel.

⁶³ Source: Argus Americas Biofuels. On October 18, 2017, *Bloomberg* reported that the White House instructed EPA to abandon efforts to reduce the volumes of renewable fuels mandated. See *Bloomberg Politics, Trump Tells EPA to Boost Biofuels After Iowa Uproar*, <https://www.bloomberg.com/news/articles/2017-10-18/trump-joins-debate-on-epa-ethanol-rule-in-call-to-iowa-governor>; see also *The Courier, Trump orders EPA to back off RFS changes, report says*, http://wcfcourier.com/news/local/govt-and-politics/trump-orders-epa-to-back-off-rfs-changes-report-says/article_de0a65df-de35-5535-ae91-51a0c7ad40e6.html. A political decision to prejudice these RFS issues prior to evaluating these comments and the conclusion of the rulemaking process is arbitrary and capricious and in violation of the Administrative Procedures Act.



expiration of the biodiesel tax credit, and the need to focus on the domestic supply of renewable fuel. A significant drop in imports combined with uncertainty over how quickly domestic production can increase and at what price, requires EPA to revise downward the 2018 BBD mandate and make corresponding adjustments to the nested renewable fuel categories.

EPA's statutory authority to waive RFS requirements in 2018 and 2019, however, is not constrained to such factors. Instead, using its general waiver authority in CAA §211(o)(7)(A), its cellulosic waiver authority in CAA §211(o)(7)(D), and its BBD waiver authority in CAA §211(o)(7)(E), EPA has the ability to further reduce RFS volumes for total renewable fuel, advanced biofuel, and BBD beyond the levels outlined in the proposed rule and this NODA. AFPM therefore encourages EPA to fully review the docket for this rulemaking and to take appropriate steps to reduce RFS volumes to the levels specified above and discussed more at length in the AFPM/API comments filed with respect to the proposed rule.

Respectfully submitted,

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Attachments