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February 12, 2018

Administrator Scott Pruitt
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

RE: Petition for Waiver of 2017 Cellulosic Biofuel Volumetric Requirements

Dear Administrator Pruitt:

Pursuant to Section 211(o)(7)(A)(ii) of the Clean Air Act (CAA or Act), the American Fuel & Petrochemical Manufacturers (AFPM), on behalf of its U.S. refining members, hereby petitions the Environmental Protection Agency (EPA or the Agency) to waive the volumes of cellulosic biofuels required for the 2017 compliance year under the Renewable Fuel Standard (RFS) by an amount equal to the difference between the 2017 cellulosic mandate and the amount of cellulosic biofuel production in 2017 (hereinafter the Petition). EPA's data demonstrate that domestic cellulosic biofuel production in 2017 fell short of the 311 million ethanol-equivalent gallon mandate by approximately 83.6 million ethanol-equivalent gallons.¹ Accordingly, AFPM requests that EPA exercise its waiver authority to reduce the cellulosic biofuel mandate by that amount.

BACKGROUND

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. AFPM's refining members are adversely impacted by EPA's overestimate of 2017 cellulosic biofuel production and are unable to acquire the requisite amount of cellulosic biofuel Renewable Identification Numbers (RINs) to comply with EPA's 2017 cellulosic mandate under the RFS.

In December 2016, EPA promulgated the applicable volumetric requirements for various renewable fuels under the RFS for compliance year 2017.² This rulemaking established the mandated volume of cellulosic biofuel for 2017 at 311 million ethanol-equivalent gallons. In promulgating the final rule, EPA exercised its waiver authority to reduce the statutorily-prescribed amount of cellulosic biofuel from 5.50 billion gallons to 311 million gallons. In

¹ To the extent additional cellulosic RINs are available for compliance, but are not presently listed on EMTS, EPA should update EMTS and adjust this waiver request to correspond to the actual shortfall of cellulosic RINs.

² See 81 *Federal Register* 89746 (December 12, 2016).



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connection with that rulemaking, AFPM supported EPA's decision to use its cellulosic waiver authority, but cautioned EPA that even the reduced cellulosic volumes EPA was contemplating in the proposal were too aggressive and unlikely to be achieved.

DISCUSSION

According to EPA's Moderated Transaction System (EMTS), there is a significant shortfall in the quantity of cellulosic biofuels produced in 2017. EPA established the cellulosic standard for 2017 based upon its predictions that cellulosic biofuel producers would manufacture 311 million ethanol-equivalent gallons. EMTS data show cellulosic biofuel production for 2017 totaled only 227.4 million gallons, meaning EPA significantly overestimated the available domestic supply to the tune of 83.6 million gallons.³ This 25 percent shortfall, combined with other factors discussed below, supports EPA's issuance of a supplemental partial waiver of the 2017 cellulosic standard.

A. The Clean Air Act Authorizes EPA to Grant This Petition.

Congress anticipated the possibility that its aggressive renewable fuel targets might not be achievable and established several waiver provisions in the CAA that EPA could use to relieve obligated parties of the duty to comply with unachievable mandates. Under Section 211(o)(7)(A) of the CAA, any person subject to the requirements of the RFS may petition EPA to exercise its waiver authority.

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, *by any person subject to the requirements of this subsection*, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required based on a determination by the Administrator, after public notice and opportunity for comment, that *there is an inadequate domestic supply*.⁴

Thus, AFPM, on behalf of its U.S. refining members subject to the RFS, is petitioning EPA to grant a partial supplemental waiver of the 2017 cellulosic biofuel standard in an amount equal to the shortfall of cellulosic biofuel production due to "inadequate domestic supply" of cellulosic biofuel.

³ See <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2017-renewable-fuel-standard-data> (last accessed on February 12, 2018).

⁴ 42 U.S.C. §7545(o)(7)(A)(ii) (emphasis added).



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B. The Failure to Grant the Relief Requested in this Petition Will Penalize Obligated Parties for the Conduct of Unrelated Third Parties.

Apart from the statutory justification described above, a supplemental partial waiver of the cellulosic biofuel mandate is necessary under the statute to prevent imposing a penalty on obligated parties who, in the face of an inadequate domestic supply of cellulosic RINs, would be forced to purchase cellulosic waiver credits under Section 211(o)(7)(D)(ii) at an approximate cost of more than \$165 million:

Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of \$0.25 per gallon or the amount by which \$3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States.⁵

EPA has established a cellulosic waiver credit price of \$2.00 for 2017.⁶ Based on the shortfall in cellulosic biofuel production, the 2017 “phantom fuel” penalty would exceed \$165 million. This is not what Congress intended. Indeed, the D.C. Circuit has looked unfavorably upon EPA’s prior suggestion that obligated parties could purchase cellulosic waiver credits for the portion of the cellulosic mandate that was unfulfilled due to an overly-aggressive mandate that led to cellulosic biofuel production shortfalls:

Apart from their role as captive consumers, the refiners are in no position to ensure, or even contribute to, growth in the cellulosic biofuel industry. ‘Do a good job, cellulosic fuel producers. If you fail, we’ll fine your customers.’⁷

As the D.C. Circuit noted, it is unfair to penalize refiners for failing to purchase fuel that is not available. Congress recognized that such a situation could occur and granted EPA waiver authority to remedy such an inequitable situation. EPA should invoke its waiver authority here as it has done in previous years to align the cellulosic biofuel mandate to actual production volumes.

A partial waiver of the 2017 cellulosic biofuel volume obligation to reflect actual production numbers would be consistent with EPA’s prior practice over the last six years. In the past when production has fallen short of the mandated volume, EPA and the D.C. Circuit have revised the cellulosic biofuel mandate to match actual production. For 2011, EPA responded to

⁵ 42 U.S.C. § 7545(o)(7)(D)(ii).

⁶ “Notice of Cellulosic Waiver Credit Calculation for 2017,” <https://www.epa.gov/renewable-fuel-standard-program/notice-cellulosic-waiver-credit-price-calculation-2017#rule-summary>.

⁷ *American Petroleum Institute v. EPA*, 706 F.3d 474, 480 (DC Cir. 2013).



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AFPM's petition for reconsideration and petition for review by "rescinding the 2011 cellulosic biofuel applicable standard and ... refund[ing] the money paid by obligated parties to purchase cellulosic waiver credits to comply with the standard."⁸ In a challenge to EPA's 2012 cellulosic mandate, the D.C. Circuit vacated the cellulosic mandate, noting that even though EPA originally waived most of the 500 million gallon statutory cellulosic mandate (*i.e.*, establishing the mandate at 10.45 million ethanol-equivalent gallons), that mandate resulted in production shortfalls that unfairly penalized obligated parties.⁹

In 2013, EPA issued its final RFS rule approximately eight months after the compliance year had begun. In response, AFPM filed a petition for reconsideration demonstrating to the Agency that there would be a significant cellulosic production shortfall. EPA granted AFPM's petition for reconsideration and reduced the 2013 cellulosic mandate to reflect actual production.¹⁰ In support of its decision, EPA cited to its overestimation of cellulosic biofuel production and the ensuing inequitable burden on obligated parties:

Finalizing this adjusted 2013 cellulosic biofuel standard expeditiously will reduce regulatory uncertainty and avoid unnecessary cost or burden for obligated parties. Until this adjusted cellulosic biofuel standard is finalized, obligated parties will have to comply with the current and significantly higher 2013 cellulosic biofuel standard. This would likely involve a substantial purchase of cellulosic waiver credits, which EPA would subsequently need to reimburse.¹¹

Similarly, in 2014 and 2015, EPA established the cellulosic biofuel mandates to match actual production volumes. EPA did not need to issue a supplemental waiver for these years because the standards were finalized after (or near) the conclusion of the compliance years. Thus, the cellulosic biofuel volume obligations mirrored the actual number of cellulosic RINs produced in those years.¹²

The 2017 compliance year again presents a significant cellulosic biofuel production shortfall, which necessitates the issuance of a supplemental partial waiver.

C. Cellulosic Waiver Credits Are a Consumer Protection Mechanism.

The existence of the cellulosic waiver credit is not an alternative compliance mechanism to address shortfalls resulting from EPA's overly aggressive mandates. Congress included a

⁸ 80 *Federal Register* at 77419, 77508-09 (December 14, 2015).

⁹ See also 78 *Federal Register* 49794, 49828 (August 15, 2013) where, in the final RFS rule for 2013, EPA implemented the January 2013 court decision for 2012 cellulosic biofuels.

¹⁰ See 79 *Federal Register* 25025 (May 2, 2014).

¹¹ *Id.* at 25025.

¹² See 80 *Federal Register* 77420 (December 14, 2015).



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provision for obligated parties to purchase cellulosic waiver credits at a fixed price to limit the premium cellulosic biofuel producers could charge for their fuel and ensure consumers were not held hostage to purchase cellulosic RINs at prices that are uneconomical. The statute contains a formula that establishes the maximum premium that may be charged for cellulosic biofuel.¹³ The availability of these credits creates a ceiling on the price cellulosic biofuel producers may charge for their fuel. This ceiling is equal to the price of an advanced biofuel RIN plus the calculated price for the cellulosic waiver credit. This important consumer protection mechanism protects obligated parties from the obligation to purchase cellulosic biofuel regardless of its price.

Congress did not intend for EPA to treat the cellulosic waiver credit as an alternative means of complying with the statute when the cellulosic biofuel mandate exceeds the domestic supply. Indeed, the D.C. Circuit specifically rejected EPA's reliance on the cellulosic waiver credits as an alternative compliance mechanism. EPA defended against a challenge to its 2012 cellulosic standard as being too high by claiming that "the availability of waiver credits means that obligated parties *always* have the means to comply with the cellulosic standard, and at a cost that is predictable."¹⁴

The D.C. Circuit rejected this argument, noting that the cellulosic waiver credit applied in this manner would serve as an unreasonable penalty for behavior that is beyond the control of the obligated parties.¹⁵

D. EPA's Rationale for Denying AFPM's Petition to Waive the 2016 Cellulosic Standard Is Inapplicable

On December 28, 2016, AFPM petitioned EPA for a supplemental partial waiver of the 2016 cellulosic standard to address an *anticipated* 40-60 million gallon shortfall in cellulosic production that year. On January 17, 2017, EPA denied that petition, based in part on a new analysis of RINs to be attributed to late generation in December 2016. Departing from past practice, EPA rushed its denial out prior to the change in administration and did not take comment on AFPM's petition or its new analysis of 2017 cellulosic compliance options. AFPM petitioned for reconsideration based on this new information and that petition remains pending.

While AFPM does not concede the validity of EPA's reasons for denying AFPM's 2016 petition, the stated rationale for denying our 2016 waiver petition simply does not apply to the 2017 shortfall as we discuss in greater detail below.

¹³ See 42 U.S.C. § 7545(o)(7)(D)(ii).

¹⁴ *API v. EPA*, Reply Brief for Respondent EPA at 36 (filed August 20, 2012).

¹⁵ See *API v. EPA*, 706 F.3d at 480 ("Apart from their role as captive consumers, the refiners are in no position to ensure, or even contribute to, growth in the cellulosic biofuel industry. 'Do a good job, cellulosic fuel producers. Do a good job, cellulosic fuel producers. If you fail, we'll fine your customers.'").



1. The Quantity of Carryover RINs Available to Satisfy the 2017 Cellulosic Mandate is Inadequate.

EPA largely denied AFPM's 2016 petition by finding that obligated parties would not need to purchase cellulosic waiver credits because there were adequate carryover RINs available for compliance. This finding is incorrect. In its denial, EPA estimated there were 39 million cellulosic carryover RINs available for compliance. The existence of carryover RINs at the macro level, however, does not mean those RINs are actually available to all obligated parties on an open market. Because RINs are valid for two years, individual obligated parties may "bank" carryover RINs to mitigate the risks of supply fluctuations and ensure compliance in future years, rather than sell them to other obligated parties. Indeed, given EPA's history of overestimating cellulosic biofuel production, some obligated parties may be incentivized to retain these surplus RINs rather than sell them to other obligated parties. As a result, carryover RINs are not always available to all obligated parties when a surplus exists. In its denial of AFPM's petition, however, EPA failed to analyze the "real world" operation of the cellulosic biofuel RIN market and the ability of individual obligated parties to actually obtain carryover cellulosic RINs.

In addition, today, only 31.4 million 2016 cellulosic carryover RINs remain, which is wholly insufficient to offset the current production shortfall. As noted above, EMTS data show a 2017 shortfall of 83.6 million RINs. This means there is more than a 50 million RIN gap between the supply of 2016/2017 cellulosic biofuel RINs available for compliance and EPA's final 2017 standard. Simple math indicates that obligated parties will be required to purchase millions of cellulosic waiver credits to comply with the 2017 standard. As such, in the context of this Petition, EPA cannot base its decision on the existence of carryover RINs since they simply will not exist for many obligated parties or in anywhere near sufficient quantities for all obligated parties.

2. Obligated Parties Do Not Act in Concert and Are Unlikely to Suppress Cellulosic Biofuel Production.

In its denial of AFPM's 2016 petition, EPA asserted that cellulosic biofuel producers and/or blenders may be unable or unwilling to store cellulosic biofuel or hold cellulosic biofuel RINs until after the end of the compliance year.¹⁶ Whether cellulosic biofuel producers and/or blenders are willing to store cellulosic biofuel or RINs is not relevant to this Petition, and in the context of EPA's denial of the 2016 petition, the Agency has not produced any data supporting

¹⁶ EPA Denial of 2016 Supplemental Waiver Petition at 3: "[I]f obligated parties believed that such waivers would be granted even in situations where use of available carryover RINs would allow compliance with the unadjusted standard, then obligated parties may decide to postpone acquisition of cellulosic biofuel or cellulosic RINs in future years, based on hopes of a waiver, thereby potentially harming the prospects of cellulosic biofuel producers who rely on ongoing sales of their product to remain profitable and competitive and undermining the articulated goals of Congress in establishing the RFS program."



its assertion. EPA's suggestion that obligated parties would delay the purchase of cellulosic RINs in an effort to disrupt ongoing sales of cellulosic biofuel to secure a future supplemental waiver is preposterous.

The vast majority of obligated refiners do not produce cellulosic biofuel and are in no position to suppress the generation of these cellulosic RINs. Once cellulosic biofuels are produced, a corresponding amount of RINs are attached and registered on EMTS regardless of whether those RINs are purchased by an obligated party. AFPM is not requesting a waiver of the cellulosic mandate based on RINs generated and available on EMTS. AFPM is asking EPA to waive the portion of the standard corresponding to cellulosic biofuel that was *never produced*. In other words, even if obligated parties chose not to purchase RINs until the compliance date at the conclusion of the year, those unpurchased RINs would still be recorded on EMTS, available, and would not be within the scope of this Petition based on inadequate domestic supply. Because cellulosic biofuel demand is driven by the initial promulgation of the annual mandate, a supplemental waiver following completion of the compliance would not “depress the demand for” or “investment in the production of cellulosic biofuel.”¹⁷ The “investment risks already experienced by this nascent industry”¹⁸ are the same regardless if EPA issues a supplemental waiver based on the shortfall of cellulosic production during the compliance year.

3. Cellulosic Waiver Credits and Running Deficits Operate as Unnecessary Penalties on Obligated Parties Who Have no Ability to Produce or Blend Cellulosic Biofuel.

EPA should recognize that the failure to issue a supplemental partial waiver of the cellulosic biofuel standard would act as a penalty on obligated parties, who through no fault of their own would be forced to purchase cellulosic waiver credits or run a compliance deficit. Discussions with AFPM members indicate that most obligated parties do not view the deficit option as a viable compliance mechanism, as the regulations prevent obligated parties from incurring a deficit in two consecutive years, and RFS obligations have increased year-over-year. Running an RFS deficit is a risky financial decision. This leaves the purchase of cellulosic waiver credits as the only reasonable compliance path for most obligated parties.

In its denial of AFPM's 2016 petition, EPA stated:

EPA may slightly over-estimate or underestimate production from year-to-year does not establish that a slight over-estimate creates an unjust ‘penalty, just as the availability of carryover RINs from years where EPA underestimated volume when setting the standard should not be seen as an unjust boon or bonus.’¹⁹

¹⁷ EPA Denial of AFPM 2016 petition at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5.



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We acknowledge that EPA cannot be expected to predict the precise quantity of cellulosic biofuel and we do not expect EPA to adjust for *de minimis* variances; however, this year, the variance between EPA's estimate and actual cellulosic production currently puts obligated parties on the hook to purchase more than \$100 million in waiver credits.²⁰ This variance is not *de minimis* and is not what Congress intended.

* * * *

EPA should take prompt action on this Petition. While the Clean Air Act requires EPA to act on this Petition within 90 days,²¹ we respectfully request a more expeditious decision because the 2017 compliance must be assured on or before March 30, 2018 (per 40 CFR 80.1451(a)(1)), just weeks away.²²

Given the clear shortfall in cellulosic biofuels produced in 2017 and prior precedent, it is not reasonable to require the purchase of cellulosic waiver credits while EPA solicits public comment and completes other required elements of the waiver process, including consultation with the Departments of Agriculture and Energy.

If you have any questions concerning the issues raised in this Petition, please contact the undersigned.

Respectfully submitted,

Richard Moskowitz
General Counsel

cc: William Werhum
Christopher Grundler
John Weihrauch

²⁰ The current cellulosic biofuel shortfall identified in EMTS would require obligated parties to purchase approximately \$165 million in cellulosic waiver credits. Last year approximately 12 million cellulosic biogas RINs were added in EMTS after the January update. If additional 2017 biogas cellulosic RINs become available this month, the cellulosic waiver credit purchase obligation would be correspondingly reduced.

²¹ See 42 U.S.C. §7545 (o)(7)(B).

²² Note that the regulatory compliance date (March 31, 2018) is a Saturday.