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The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC

RE: Petition for Reconsideration – Docket No. EPA-HQ-OAR-2010-0133

Dear Administrator Jackson:

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 final rule entitled *Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume*.[2]

The objections raised in this Petition for Reconsideration were either impracticable to raise during the public comment period or arose after the close of the public comment period, and they are of central relevance to the outcome of the Final Rule. The Administrator must therefore "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."[3]

AFPM submits this Petition based on new facts that are material to EPA's application of the statutory criteria the agency must apply in establishing the applicable volume of biomass-based diesel to be used under the renewable fuel standard for 2013.

BACKGROUND

The federal Renewable Fuel Standard ("RFS") requires EPA to promulgate a rule establishing a specific amount of biomass-based diesel for 2013. For 2012 and beyond, Congress provided a floor of 1.0 billion gallons that was intended to provide an insurance policy to the existing

[1] AFPM is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. AFPM members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine and computers.

[2] 77 *Federal Register* 59458 (September 27, 2012) (hereinafter the "Final Rule").

[3] 42 U.S.C. § 7607(d)(7)(B).

biodiesel industry in the form of a guaranteed market for their product. Beyond 2012, EPA was given the discretionary authority to increase the biomass-based diesel mandate beyond a billion gallons, based on its evaluation of six criteria specifically enumerated in the RFS. As demonstrated below, the facts critical to the analyses and application of the statutory criteria have materially changed since the close of the comment period and warrant a reconsideration of the Final Rule.

DISCUSSION

A. The Administrator's Discretion to Increase the Biomass Based Diesel Requirements Under the RFS is Framed by the Application of Six Specific Statutory Criteria

In determining the biomass based diesel requirements for 2013, Congress instructed EPA to establish a minimum requirement of 1.0 billion gallons.[4] Congress gave the Administrator the discretion to promulgate a rule that goes beyond the 1.0 billion gallon statutory floor, based on its consideration of the following six factors: (1) environmental impact; (2) impact upon energy security; (3) expected rate of commercial production of renewable fuels; (4) impact upon fuel delivery infrastructure; (5) cost to consumers; and (6) other factors such as job creation, price and supply of agricultural commodities, rural development, and food prices.[5]

The application of these criteria to the Administrator's decision requires a fact-based analysis. As demonstrated below, the facts underlying EPA's analysis for several of the enumerated statutory factors have changed significantly and warrant reconsideration of the Administrator's decision to promulgate a biomass-based diesel mandate in excess of 1.0 billion gallons.

Before addressing the changed circumstances that warrant reconsideration of the Administrator's decision, it is important to understand the rationale underlying the statutory framework created for biomass-based diesel. At the time that the Energy Independence and Security Act of 2007 ("EISA 2007")was under debate, the National Biodiesel Board ("NBB") asked other industries to join them in supporting a specific carve-out for biodiesel that would ensure the viability of its existing brick and mortar facilities.[6] At least one consumer group who historically opposes government fuel mandates joined the NBB in supporting a 1.0 billion gallon carve-out that was intended to be an insurance policy to protect existing biodiesel facilities. At the time, the NBB represented that going forward biodiesel would be able to compete with petroleum-based diesel fuel and supported the inclusion of statutory criteria designed to prevent an increase in the biodiesel mandate if it would result in an increase in diesel fuel costs.

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[4] *See* 42 U.S.C. § 7545(o)(2)(B)(iv).

[5] *See* 42 U.S.C. § 7545(o)(2)(B)(ii).

[6] There were other elements of this compromise, such as the preemption of state biodiesel mandates, that were not included in the final legislation.

Biomass-based diesel qualifies under the advanced biofuel category of the RFS and therefore should compete with other advanced biofuels to ensure the goals of the RFS are met in the most cost effective manner. The biomass-based diesel mandate is a dedicated carve-out from the advanced biofuel category and increasing it creates a disincentive for investments in other advanced renewable fuels that may overcome some of the performance limitations associated with biodiesel. As such, the increase of the biomass based diesel mandate should be approached very cautiously as the EPA is essentially selecting winners and losers without a clear understanding of the impacts upon the capital investment in future fuels. The 2.75 billion gallon Advanced Biofuel Mandate provides more than enough incentive to grow the biodiesel industry, provided that the biodiesel industry can live up to the promises it made at the time EISA 2007 was enacted. If the industry cannot meet these expectations, then other advanced biofuels should be used to meet consumers' needs in the most cost effective manner possible. The six statutory criteria are designed to force EPA to consider these variables.

B. New Information Critical to the Administrator's Analysis Compels Reconsideration of the Final Rule

The public comment period for the rulemaking that is the subject of this Petition closed on August 11, 2011.[7] During the time between the conclusion of the public comment period and the promulgation of the Final Rule, several facts changed that significantly impact the statutory criteria enumerated above. We believe that these facts compel the promulgation of a lower biomass-based diesel volumetric requirement for 2013.

1. The Drought

The Agency could not have anticipated the drought our Nation is experiencing when the comment period closed in August 2011. This drought has led to a dramatic reduction in corn and soybean supplies, which has increased livestock and food production costs. The drought has made it very difficult for these industries to plan and remain profitable and has led to multiple waiver requests of the ethanol requirements under the RFS. Soybean crops, the primary feedstock for biodiesel production, have been similarly impacted and the Administrator's discretionary decision to increase the biomass-based diesel component of the RFS mandates warrants reconsideration.

Millions of tons of soybean oil meal are used annually by animal producers. The large increase in soybean oil meal price means hundreds of millions of dollars in increased production costs for these industries. This financial hardship will be exacerbated by the discretionary 28 percent increase in the requirement for biomass-based diesel. This new fact is directly relevant to the statutory criteria Congress created to inform EPA's decision of appropriate biomass-based diesel quantities. At several points in the preamble to the Final Rule, EPA acknowledged that

[7] *See* 76 *Federal Register* 38844 (July 1, 2011) (hereinafter the "Proposed Rule").

the drought will have an impact upon the supply and price of agricultural commodities; however, EPA stopped short of considering its impact in establishing the biomass-based diesel volumetric requirement for 2013:

> Cost estimates do not account for projections in recent trends in crop yields and grain prices resulting from drought conditions that are occurring in many areas of the country.[8]
>
> * * * *
>
> It should be noted that the projections in Table III.B-1 do not account for recent trends in crop yields and grain prices resulting from drought conditions that are occurring in many areas of the country. Given the wide range of feedstocks from which biodiesel can be produced, the ultimate impact of these drought conditions on the mix of biodiesel feedstocks in 2013 is difficult to predict at this time.[9]

The agency states that it "cannot predict the exact impact that these increases in soybean and soybean oil prices will have on food prices in general;" however, that is exactly what Congress requires of the agency *before* it decides to increase the mandate for biomass-based diesel.[10]

Setting the biomass-based diesel mandate at 1.0 billion gallons for 2013, the statutory minimum, allows fair competition between the biofuels and livestock/food industries for soybean supplies. The Administration should not favor soybean biodiesel producers at the expense of the livestock/food industries and the U.S. consumer. The price impacts on agricultural commodities and the current drought are sufficient justification for the Administration to reconsider the renewable fuel volume for biomass-based diesel in 2013.

The preamble to the final rule also contains a discussion of the price of soy oil in 2013 and estimates that its price will be $0.45 per pound under the mandate instead of $0.42 under the billion gallons. This 7 percent increase is significant and as a food source is a factor that Congress mandated EPA to consider in its establishment of the 2013 biomass-based diesel mandate. In the category of new information that is available since the Administrator made her decision, we note that the soy oil futures prices are significantly higher (10 percent) for 2013 than the Administrator's 45 cent estimate.[11] This new information concerning soy oil prices is

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[8] 77 *Federal Register* at 59459, note 3.

[9] *Id.* at 59463/2.

[10] *Id.* at 59465/1.

[11] Soy oil futures prices for 2013 currently vary from 49 cents to 50.5 cents. *See* Commodities Futures prices at: www.cnbc.com, last accessed on November 8, 2012.

directly relevant to the statutory criteria EPA applies in determining the appropriate amount of biomass-based diesel for 2013.[12]

2. RIN Fraud

EPA is now well aware of the fact that biodiesel producers have inflated the amount of biodiesel actually produced under the RFS mandate. A significant portion of this fraud stems from biodiesel producers generating Renewable Identification Numbers ("RINs") that do not correspond to the gallons of biodiesel they have produced. Another potential source of significant fraud is the failure to retire RINs that correspond to the number of gallons of biomass-based diesel that are exported.

To date, EPA has initiated enforcement actions based on 140 million fraudulent RINs. These RINs represent between 6 and 12 percent of the entire biodiesel market and raise a serious question as to the true amount of biodiesel that has been produced. Moreover, we are aware of several ongoing investigations into additional biodiesel producer fraud that would have a material impact on EPA's estimate of the amount of gallons actually produced. While the existence of RIN fraud was unknown during the public comment period, EPA now recognizes that it is a materially significant problem and is considering regulatory changes to address the predicament.[13] The large number of invalid RINs represents a serious disparity in the estimates of expected commercial rate of biodiesel production and also impacts EPA's conclusion that an increase to 1.28 billion gallons represents only a "moderate" increase in the biomass-based diesel mandate.

3. Diesel Fuel Exports - Impact on Domestic Energy Security

The Administrator mistakenly concludes that the 2013 increase in biomass-based diesel beyond the billion gallon statutory floor will improve U.S. energy security.

> This final standard will assure an increased use of biomass-based diesel in the U.S. and help to improve U.S. energy security. Reducing U.S. petroleum imports and increasing the diversity of U.S. liquid fuel supplies lowers both the financial and strategic

[12] On November 16, 2012, EPA denied multiple petitions to waive the RFS requirements for ethanol based upon the impact of the drought. We note that the legal standard for reviewing RFS waiver petitions differs from the statutory criteria EPA must consider in establishing the BBD volumetric requirements for 2013. The standard for waiving the RFS is one of severe economic harm, while the criteria for establishing the BBD volumes include *inter alia* an analysis of the supply of agricultural commodities.

[13] U.S. Environmental Protection Agency, *Public Release of Draft Quality Assurance Plan Requirements*, EPA-420-B-12-063 (October 31, 2012). http://www.epa.gov/otaq/fuels/renewablefuels/documents/420b12063.pdf.

> risks caused by potential sudden disruptions in the supply of imported petroleum to the U.S.

This quote represents a fundamental misunderstanding of the difference between petroleum crude oil and finished transportation fuels. The increase in biomass-based diesel use in the U.S. from 1.0 billion gallons to 1.28 billion gallons will not displace a single barrel of imported crude oil. This is primarily because biomass-based diesel is a substitute for finished diesel fuel and has no impact upon the U.S. demand for gasoline.

Each barrel of oil refined yields approximately 19 gallons of gasoline and 11 gallons of diesel fuel, as well as 12 gallons of other petroleum-derived products.[14] While these proportions can be adjusted on the margins, in manufacturing gasoline the United States generates more diesel fuel than it can consume domestically.[15] As such, the U.S. has become a net exporter of diesel fuel. For this reason, any requirement to blend biomass-based diesel will not reduce the amount of crude oil imported into the U.S., it simply will cause an increase in the amount of exported diesel fuel it displaces. Thus, the Final Rule's increase in biomass-based diesel of 280 million gallons will result in a corresponding increase in the export of petroleum-derived diesel fuel of 280 million gallons. It will have no impact upon the amount of crude oil imported and therefore will have no impact on domestic energy security. These facts have a direct impact on the Administrator's analysis of the statutory criterion of energy security and warrants reconsideration of the decision to extend the biomass-based diesel mandate beyond the 1.0 billion gallon statutory threshold.

The preamble to the Final Rule suggests that the Administrator extrapolated perceived energy security benefits from the RFS generally and applied that analysis to this rulemaking.

> Thus, on balance, each gallon of fuel saved as a consequence of the renewable fuel standards is anticipated to reduce total U.S. imports of petroleum by 0.95 gallons.[16]

As demonstrated above and based on the fact that we export diesel fuel, this extrapolation produces an erroneous conclusion with respect to the impact on energy security from increasing the biomass-based diesel mandate in 2013.[17]

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[14] *See* Energy Information Administration, *Products Made for a Barrel of Crude Oil*, http://www.eia.gov/energyexplained/index.cfm?page=oil_home.

[15] According to the Energy Information Administration, from January 2012 to August 2012, the U.S. exported more than 213 million barrels of distillate fuel. http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MDIEXUS1&f=M

[16] 77 *Federal Register* at 59470/2.

[17] The Final Rule includes an energy security benefit of $0.15 per gallon derived from the macroeconomic disruption and adjustment costs component of the energy security premium. *See* 77 *Federal Register* at 59471/3. For the reasons stated herein, this benefit is illusory.

The Agency acknowledges that "the U.S. is projected to be a net exporter of diesel fuel in 2013." Notwithstanding this realization, the Agency has ignored Congress' instruction to analyze the energy security impact of this specific Final Rule.

> Our energy security analysis does not evaluate the energy security benefits of individual finished petroleum products; rather, our analysis takes into account the energy security benefits of overall net petroleum product imports.

Congress did not give the Administrator the authority to ignore one of the six statutory criteria in her determination of whether to increase the biomass-based diesel mandate beyond the 1.0 billion gallon statutory threshold.

Although we believe that the Agency acted arbitrarily in extrapolating its overall RFS energy security analysis to the Final Rule affecting only the biomass-based diesel mandate, we note a significant change in facts underlying the Agency's original analysis of U.S. energy security. Following the close of the comment period the National Petroleum Council released an 18-month study of North American natural gas and oil resources.[18] This study demonstrates that the United States has much greater access to North American sources of energy than previously thought and warrants reconsideration of the Administrator's conclusions on the impact this rule and the RFS will have on U.S. energy security.

4. Job Creation

EPA's conclusions on the employment benefits associated with an increase in biomass-based diesel from 1.0 billion gallons to 1.28 billion gallons are overstated given the recent closures of certain biodiesel facilities and the underutilization of facilities that have maintained operations. Here again EPA is using biased information provided by the NBB rather than conducting its own analysis. EPA is aware that many of the biodiesel producers are operating at a reduced rate, some have been idled, and others have permanently closed. Reliance on a prior study as to the overall benefits to rural employment under the RFS ignores some of the current facts concerning biodiesel plant utilization that would have a material impact on EPA's conclusions with respect to job creation. EPA should have reviewed the 200 biodiesel producers provided on the NBB list and determined the status and current utilization rates of these facilities as part of its obligation to analyze the statutory criteria. It is far more economical to expand production at an existing plant that is underutilized than it is to bring idle biodiesel plants back on line. Unfortunately, the number of jobs that will be created by increasing the throughput at an

[18] National Petroleum Council, *Prudent Development: Realizing the Potential of North America's Abundant Natural Gas and Oil Resources*, (September 2011).

already operational plant is nowhere near the NBB estimate of 30 to 40 people.[19] Other estimates of employment provided by NBB are similarly overstated and EPA should independently investigate these facts. For example, some plants are fed by pipeline while most others are located very close to their feedstock source, rendering NBB's estimate of additional transportation workers unrealistic, since it assumes that each driver can make only one delivery per day.[20]

We also note, that it is improper to consider only the positive employment benefits associated with an increase in the biomass-based diesel mandate and simultaneously acknowledge that the corresponding loss in employment in other economic sectors is not quantifiable and therefore may be ignored.

5. Costs and the Impact on the Consumer

EPA's legal requirement to blend biomass-based diesel will result in increased production and/or imports of this fuel, as obligated parties must comply with the mandate. The question remains, however, at what cost can this fuel be produced under the mandate.

EPA acknowledged the need to restrain the growth of the biomass-based diesel mandate.

> In the NPRM we indicated that, based on the limited information available on the current and historical operation of the RFS program, it would be prudent for 2013 to consider only *moderate increases* in biomass-based diesel above the statutory minimum of 1.0 billion gallons.

Notwithstanding this pronouncement, EPA went on to promulgate a 28% increase in the volumetric mandate. This percentage increase during a time of slow economic growth is very aggressive and difficult to justify under the banner of moderate growth.[21]

EPA estimates that the cost of increasing the biomass-based diesel mandate from 1.0 billion to 1.28 billion will add between $253 million and $381 million to consumers transportation fuel bill in 2013. We note that this addition to the Nation's transportation fuel bill comes at a time when economic conditions in the country are poor and millions who depend upon transportation fuels remain out of work or underemployed.

At the close of the comment period, EPA had no way to predict the state of the economy in 2013 or whether the $1 per gallon blending credit would be extended by Congress; however,

[19] On a somewhat related issue, our discussions with a well-known biodiesel plant auditor indicate that the average employment is closer to 25 individuals per plant.

[20] *See* 77 *Federal Register* at 59477/1.

[21] 77 *Federal Register* at 59461/1 (emphasis added).

at the time the Final Rule was issued, EPA should have done everything in its power to lower the costs of transportation fuels for consumers and under no circumstances should have exercised its discretion to mandate the use of biodiesel, a fuel that is significantly more expensive than ULSD. Indeed, Congress requires EPA to consider the cost to consumers as one of the statutory criteria that frames its annual decision to set the biomass-based diesel volumetric requirement.

6. Potential Carbon Reductions

Under the statutory criteria, EPA must consider the environmental impact of its decision to expand the biomass-based diesel mandate by 280 million gallons. We note that because biomass-based diesel operates as a requirement nested within the advanced biofuels mandate, the likely impact of this decision is to ensure the use of additional biomass-based diesel at the expense of ethanol derived from sugar cane. Focusing on the carbon emissions associated with these two fuels, soy-based biodiesel has an average carbon intensity that is ten percent greater than ethanol derived from sugarcane, resulting in the likely increase in carbon emissions from EPA's decision to increase biomass-based diesel by 280 million gallons.[22]

C. The Statutory Factors Must be Applied Annually

EPA has chosen to downplay the statutory requirement to apply these factors annually for each year that it promulgates a biomass-based diesel quantity following 2012 and instead has relied upon the long-term RFS economic analysis, which is contrary to Congress' intent in specifying the six factors to be examined each year.

> The statute is forward-looking in that it created a program whose energy and environmental benefits are intended to grow over time. To evaluate the program on the basis of only one early year's impacts, as part of near-term implementation, would be to paint an unbalanced and incomplete picture.[23]

In substituting the long-term costs and benefits in place of the specific statutory criteria that are to be applied to biomass-based diesel volumes each year following 2012, EPA has ignored the consumer safeguards that Congress wrote into the statute for each year in which EPA is required to establish a biomass-based diesel volumetric requirement. To safeguard consumers and other interested parties, Congress intended EPA to adjust the volumetric requirement annually based on factors that change each year. Relying on a long-term analysis that ignores the specific variables that change on a more frequent basis is a significant departure from Congressional intent.

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[22] *See* 75 *Federal Register* 14669, 14790-91 (March 26, 2010).

[23] 77 *Federal Register* at 59482/3.

Congress intended to provide an insurance policy to the biodiesel producing industry by creating a floor of 1.0 billion gallons of biomass-based diesel that must be blended each year.[24] Any decision to exceed that floor is a discretionary decision that must be is based upon the annual application of the enumerated statutory factors as directed by Congress.

CONCLUSION

At the close of the comment period, EPA could not foresee whether Congress would eliminate the $1 per gallon biodiesel blending credit, the impact of the drought on feedstock supplies and prices, the extent of RIN fraud in the biodiesel industry, and the growth of diesel exports ameliorating the energy security benefits from biodiesel, all of which have a material impact upon EPA's analyses of the statutory criteria underlying the establishment of the annual biomass-based diesel requirement. Based upon these changed facts and new information, the Administrator must reconsider her decision to require a 28 percent increase in biomass-based diesel above the statutory minimum established by Congress.

Respectfully submitted,

Richard Moskowitz
General Counsel

cc: Gina McCarthy
Chris Grundler
Byron Bunker
Paul Machiele

[24] *See* 42 U.S.C. § 7545(o)(2)(B)(ii)(v).