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December 28, 2016

Administrator Gina McCarthy  
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 2016 Cellulosic Biofuel Volumetric Requirements

Dear Administrator McCarthy:

Pursuant to Section 211(o)(7)(A)(ii) of the Clean Air Act (CAA or Act), the American Fuel & Petrochemical Manufacturers (AFPM) submits this petition requesting the Environmental Protection Agency (EPA) to waive the volumes of cellulosic biofuels required for the 2016 compliance year under the Renewable Fuel Standard (RFS) due to an inadequate domestic supply of such fuel (hereinafter the Petition).

## **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 2016 cellulosic biofuel production and are unable to acquire the requisite amount of cellulosic biofuel Renewable Identification Numbers (RINs) to comply with EPA's 2016 cellulosic mandate under the RFS.

In December 2015, EPA promulgated the applicable volumetric requirements for various renewable fuels under the RFS for compliance years 2014-2016.<sup>1</sup> This rulemaking established the mandated volume of cellulosic biofuel for 2016 at 230 million ethanol-equivalent gallons. In promulgating the final rule, EPA exercised its waiver authority to reduce the statutorily-prescribed amount of cellulosic biofuel under the RFS from 4.25 billion gallons to 230 million gallons. In connection with that rulemaking, AFPM commented that the reduced cellulosic volumes EPA was contemplating in the proposal were too aggressive and unlikely to be

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<sup>1</sup> See 80 *Federal Register* 77420 (December 14, 2015).



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achieved. AFPM also filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit.<sup>2</sup>

## DISCUSSION

Although the 2016 compliance year is not complete, it is now obvious that there will be a significant shortfall in the quantity of cellulosic biofuels available for compliance. Indeed, the EPA Moderated Transaction System (EMTS) data posted through October (the most recent data available) confirms that the cellulosic biofuel industry has not produced enough qualified product to enable compliance with the 2016 cellulosic standard. In fact, analyzing the amount of cellulosic fuel produced through November results in a 2016 annualized cellulosic biofuel production rate between 173.8 and 190 million gallons, approximately 40-60 million gallons short of EPA's estimated target.<sup>3</sup>

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

Congress foresaw the possibility that the renewable fuel targets might not be achievable and established several waiver provisions in the CAA. Under section 211(o)(7)(A) of the CAA, a waiver petition may be submitted by any person subject to the requirements of the RFS.

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*.<sup>4</sup>

Thus, AFPM, on behalf of its U.S. refining members, is petitioning EPA to grant a partial supplemental waiver of the 2016 cellulosic biofuel standard in an amount equal to the shortfall of

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<sup>2</sup> See *American Fuel & Petrochemical Manufacturers v. EPA*, Case No. 16-1047 (D.C. Circuit), consolidated with *Americans for Clean Energy v. EPA*, Case No. 16-1005.

<sup>3</sup> See <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2016-renewable-fuel-standard-data> (last accessed on December 20, 2016). Note we present a range of cellulosic RINs available in 2016 to account for the potential increase in biogas RINs that may become available in December 2016. An increase in biogas RINs was observed in December 2015.

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



cellulosic RINs available for compliance.<sup>5</sup> The justification for this request is “an inadequate domestic supply” of cellulosic biofuel RINs, as discussed above.<sup>6</sup>

**B. The Failure to Grant the Relief Requested in this Petition Will Penalize Obligated Parties for Conduct of Unrelated Third Parties and is a Violation of Petitioners’ Due Process Rights.**

Apart from the statutory justification described above, a supplemental partial waiver of the cellulosic biofuel mandate is required under the statute to prevent an unjust 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):

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.<sup>7</sup>

EPA has established a cellulosic waiver credit price of \$1.33 for 2016. Based on the expected shortfall in cellulosic biofuel production, unless EPA grants this petition and waives the amount of the cellulosic biofuel mandate equal to the production shortfall, the 2016 “phantom fuel” penalty would amount to be approximately \$50 - \$75 million.<sup>8</sup> The D.C. Circuit has looked unfavorably upon EPA’s prior suggestion that obligated parties could purchase cellulosic waiver credits representing the portion of the cellulosic mandate that was unfulfilled due to an unachievable mandate:

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<sup>5</sup> Note in this instance, AFPM would support EPA calculating the exact amount of the cellulosic biofuel shortfall at the end of the compliance year (December 31, 2016) and issuing the supplemental waiver to correspond to the actual cellulosic biofuel RINs shortfall rather than the annualized estimate provided herein.

<sup>6</sup> EPA has interpreted “inadequate domestic supply” in light of the definitions of ‘renewable fuel’ and ‘additional renewable fuel’ and the requirements of CAA section 211(o)(2)(A)(i) that require the fuel be ‘used to replace or reduce the quantity of fossil fuel’ or in ‘home heating oil or jet fuel’ in the United States.” 80 *Federal Register* at 77,436. The Agency has further stated that “[w]e believe that interpreting this waiver provision as authorizing EPA to consider the adequacy of supply of renewable fuel to the ultimate consumer and appropriately allows consideration of upstream supply constraints to all relevant parties, including the adequacy of supply of biofuels to obligated parties and blenders, as well as the ability to deliver qualifying renewable fuels to the consumer.” *Id.* This waiver petition is consistent with EPA’s interpretation of “inadequate domestic supply.” In this petition, AFPM does not necessarily adopt EPA’s interpretation of “inadequate domestic supply” but instead asserts that an inadequate supply of cellulosic biofuel RINs is only one of several reasons or conditions that allow EPA to issue a waiver under CAA section 211(o)(7)(a)(ii).

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

<sup>8</sup> Note we present a range to reflect the uncertainty associated with biogas RINs produced in December 2016.



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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.’<sup>9</sup>

EPA and the D.C. Circuit have previously acted to reduce EPA’s cellulosic biofuel mandates to match actual cellulosic biofuel production. For 2011, EPA responded to 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.”<sup>10</sup> 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.<sup>11</sup>

In 2013, EPA issued its final RFS rule approximately 8 months after the compliance year had begun. Shortly after EPA’s regulatory action, AFPM filed a petition for reconsideration presenting evidence to the Agency that there would be a significant cellulosic production shortfall. EPA then granted AFPM’s petition for reconsideration and revised the 2013 cellulosic mandate downward to reflect actual production.<sup>12</sup> EPA cited 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.<sup>13</sup>

Similarly, in 2014 and 2015, EPA set the cellulosic biofuel mandate to coincide with actual production. In these years, however, no supplemental cellulosic biofuel waiver or adjustment was necessary since these standards were finalized at the conclusion of the compliance years and EPA promulgated a cellulosic standard that equaled the actual amount of cellulosic RINs available for compliance.<sup>14</sup>

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<sup>9</sup> *American Petroleum Institute v. EPA*, 706 F.3d 474, 480 (DC Cir. 2013).

<sup>10</sup> 80 *Federal Register* at 77508-509.

<sup>11</sup> See 78 *Federal Register* 49794, 49828 (August 15, 2013), implementing the D.C. Circuit decision for the 2012 cellulosic biofuel mandate.

<sup>12</sup> See 79 *Federal Register* 25025 (May 2, 2014).

<sup>13</sup> *Id.* at 25025.

<sup>14</sup> See 80 *Federal Register* at 77429-30.



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The 2016 compliance year again presents a substantial cellulosic biofuel production shortfall necessitating not only the reduction of the applicable volume of cellulosic biofuel pursuant to section 211(o)(7)(D)(i), but also the issuance of a supplemental waiver pursuant to section 211(o)(7)(A)(ii).

**C. EPA Should Act Promptly to Address the 2016 RFS Compliance Deadline in the Context of This Petition.**

The Clean Air Act requires EPA to act on this petition within 90 days<sup>15</sup> and we respectfully request an expeditious decision because cellulosic biofuel waiver credits for 2016 must be purchased and RFS compliance must be assured on or before March 30, 2017.<sup>16</sup> We recognize the time necessary for EPA to comply with its obligation to solicit public comment on the merits of this petition and therefore request that the Agency defer the requirement to purchase cellulosic biofuel waiver credits for 2016 until EPA can formally act on this Petition. Given the clear shortfall in cellulosic biofuels produced in 2016 and prior precedent, it is not reasonable to require the purchase of cellulosic credits while EPA solicits public comment and consults with the Departments of Agriculture and Energy.

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If you have any questions concerning the issues raised in this Petition, please contact the undersigned at (202) 552-8474.

Respectfully submitted,

Richard Moskowitz  
General Counsel

cc: Secretary Ernest Moniz  
Secretary Tom Vilsack  
Janet McCabe  
Avi Garbow  
Christopher Grundler  
John Weihrauch

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<sup>15</sup> See 42 U.S.C. §7545 (o)(7)(B).

<sup>16</sup> See 40 CFR § 80.1451(a)(1).