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November 24, 2009

The Honorable Lisa P. Jackson
EPA Administrator
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Dear Administrator Jackson:

On behalf of the National Biodiesel Board (NBB), the trade association of the U.S. biodiesel industry, we appreciate the Environmental Protection Agency's (EPA) efforts to implement the expanded Renewable Fuels Standard (RFS2) as required in the Energy Independence and Security Act (EISA) of 2007 (P.L. 110-140).

The NBB strongly supports EPA's proposal to have an effective date of January 1, 2010 for the RFS2 program. However, given the number of comments the Agency received, the limited number of days remaining in the year, and in spite of the assurances made by EPA to complete the rule before the end of the year¹, we are concerned that the Agency may not succeed in finalizing the RFS2 implementing regulations this year.

Further delay of the Biomass-based Diesel requirement, a vital part of the program, will continue to bring severe economic harm to the U.S. biodiesel industry. This is contrary to EISA's statutory requirements and the intent of Congress. To mitigate this harm and fulfill

¹ In an October 7, 2009 response to a letter from Senator Conrad and 23 additional Senators expressing their concern regarding the delay in implementing the Biomass-based Diesel mandate, Gina McCarthy, EPA Assistant Administrator, Office of Air and Radiation, EPA, stated:

"Despite the extension of the comment period by two months, the Agency's intent is to complete the rule and implement the full RFS2 standards in 2010."

We recognize the importance of the RFS2 biomass-based diesel volume requirements to the biodiesel industry. It is for this reason that, in our proposed RFS2 rulemaking... we described our proposal to address how both the 0.5 billion gallon requirement for 2009 and the 0.65 billion gallon requirement for 2010 would be met. In short, there would be a single compliance period determination at the end of 2010 covering both years. This approach is intended to allow the 2009 and 2010 biomass-based diesel volume mandates in EISA to be implemented despite the fact that the rulemaking would not be completed until later." (Emphasis added.)

EPA's statutory directive, EPA must issue a notice outlining the renewable volume obligations for 2010 before the end of the year. The notice must include the following:

- (a) A renewable volume obligation specifically for Biomass-based Diesel for 2010; together with, the renewable volume obligation for renewable fuel;
- (b) The 2010 renewable volume obligation for Biomass-based Diesel must also include the 2009 Biomass-based Diesel volume with the 2010 volume as proposed by EPA; and
- (c) EPA must again affirm that renewable identification numbers (RINs) generated for biodiesel and renewable diesel under the current program can be used to show compliance for Biomass-based Diesel.

The current RFS program can be used to enforce the Biomass-based Diesel requirement, and EPA has already found that it has authority to allow biodiesel and renewable diesel generated under the current program to show compliance for 2010.

Background

With enactment of the RFS in 2005, Congress expressed its intent to promote the use of biodiesel in the United States. This intent was affirmed in P.L. 110-140, in which Congress established a specific volume mandate for Biomass-based Diesel. Specifically, Congress required the use of 500 million gallons of Biomass-based Diesel in 2009; 650 million gallons in 2010; 800 million gallons in 2011; 1 billion gallons in 2012; and at least 1 billion gallons thereafter. These targets are modest given that biodiesel production in the United States was at 500 million gallons in 2007 and 690 million gallons in 2008, and that current domestic production capacity is estimated at 2.69 billion gallons.² When implemented, this program will promote significant economic, environmental and energy security benefits associated with the domestic production and use of biodiesel.

By statute, the Biomass-based Diesel requirement was to begin on January 1, 2009, and EPA is required to issue a renewable volume obligation to ensure this mandated volume is met. To date, EPA has failed to meet its obligation regarding Biomass-based Diesel. As a result, the biodiesel industry in the United States, which Congress sought to promote, has faced substantial economic difficulty, and production will be much lower in 2009 than it was in either 2007 or 2008, largely due to the delay in implementing the RFS Biomass-based Diesel mandate.

With thousands of comments on EPA's proposal submitted during the public comment period, which ended September 25, 2009 (over 7,000 in support of EPA implementing the 2009/2010 Biomass-based Diesel requirement), we recognize and appreciate the effort required to review and respond to comments and concerns raised by stakeholders. As such, we are

² NBB, *U.S. Biodiesel Production Capacity*, June 22, 2009, available at http://www.biodiesel.org/pdf_files/fuelfactsheets/Production_Capacity.pdf.

concerned that the final rule may not be completed this year, and NBB is writing this letter to reaffirm its request in its September 25, 2009 comments on EPA's proposed rule (EPA-HQ-OAR-2005-0161-2249) that EPA implement the Biomass-based Diesel volume mandates and issue a renewable volume obligation as required on November 30, 2009, even in the event the effective date is delayed beyond January 1, 2010. As noted in its comments, this is a non-discretionary duty of EPA, 42 U.S.C. § 7604(a), and the current RFS regulations are sufficient to implement this volume requirement until the RFS2 rule is finalized.

EPA Has a Non-Discretionary Duty to Implement the RFS Volumes.

EISA amended the RFS to include four separate, nested volume mandates for Renewable Fuel, Advanced Biofuel, Cellulosic Biofuel, and Biomass-based Diesel. Section 211(o)(2) outlines the annual volume requirements for each of these categories, beginning in 2009 for Biomass-based Diesel. 42 U.S.C. § 7545(o)(2). Section 211(o)(3)(B) provides that EPA "shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met." *Id.* § 7545(o)(3)(B). In addition, EPA's regulations must ensure the volume mandates are met. *Id.* § 7545(o)(2)(A).

For 2009, EPA issued a renewable volume obligation for the overall RFS, recognizing its obligation to ensure the *volumes* mandated by Congress are met. 73 Fed. Reg. 70,643, 70,643/3 (Nov. 21, 2008) ("Since EISA modified the required volumes in this section of the Clean Air Act, the new statutory renewable fuel volume must be used under the RFS1 regulations to generate the standard for 2009. Therefore, we are using the new total renewable fuel volume of 11.1 billion gallons as the basis for the 2009 standard, and not the 6.1 billion gallons that was required by EPA Act."). But EPA declined to issue a renewable volume obligation for Biomass-based Diesel, noting that the RFS1 regulatory structure does not provide a mechanism for implementing the EISA requirement for use of 0.5 billion gallons of Biomass-based Diesel and indicating that it intended to defer compliance with this requirement by adding the 2009 volume to the 2010 volume mandate. *Id.* EPA noted that it would "behoove" obligated parties to purchase biodiesel and renewable diesel in the interim until it finalizes its regulations to implement the EISA's changes to the RFS program. *Id.*

Although EPA "expect[ed] the 11.1 billion gallons of renewable fuel required in 2009 to include approximately 0.5 billion gallons of biodiesel and renewable diesel", 73 Fed. Reg. at 70,643/1, obligated parties have not, and will not purchase such RINs without an enforceable obligation. As a result of the delay in implementing the Biomass-based Diesel requirement, domestic biodiesel producers face a practically non-existent domestic marketplace. Currently, 70% of U.S. biodiesel production capacity is idle. Domestic production is expected to be less than 50% of last year's levels and numerous bankruptcies loom for the industry. A similar approach for 2010 is not acceptable, and does not fulfill EPA's statutory mandate to ensure the

minimum volumes of Biomass-based Diesel are consumed *each year* or Congressional intent to promote biodiesel use in the United States.³

EPA Must Issue a Renewable Volume Obligation for Biomass-Based Diesel, Even if the RFS2 Rule is Delayed Beyond January 1, 2010.

On May 26, 2009, EPA issued its proposed rule to implement the EISA's changes to the RFS program, effective January 1, 2010. 74 Fed. Reg. 24,904. As indicated in its 2008 notice, EPA did propose to implement the 2009 volume mandate for Biomass-based Diesel in 2010. *Id.* at 24,957-24,958. EPA also proposed renewable volume obligations for 2010, *id.* at 24,955, and to allow RINs generated for biodiesel and renewable diesel under the current program, identifiable through an RR code of 15 or 17 respectively, to apply to the 2010 Biomass-based Diesel obligations. *Id.* at 24,957. Obligated parties, therefore, have been provided substantial notice, and opportunity to comment, on EPA's proposal to meet its obligation to implement the annual requirements for Biomass-based Diesel.⁴ None of these requirements are dependent on EPA finalizing the entire rule. Thus, EPA must, and can, take action to ensure that obligated parties purchase biodiesel and renewable diesel to meet the 2009 and 2010 Biomass-based Diesel requirements and implement EISA's statutory requirements.

In particular, EPA must issue a November 2009 notice with the renewable volume obligations for 2010, and such notice must:

- (a) Include a renewable volume obligation for Biomass-based Diesel for 2010, not just the obligation for Renewable Fuel;
- (b) Include the 2009 Biomass-based Diesel volume in the renewable volume obligation for 2010; and

³ Further deferral of the 2009 volume for Biomass-based Diesel runs contrary to the deficit carryover provisions of the Act. 42 U.S.C. § 7545(o)(5)(D). *See also* 74 Fed. Reg. 24,904, 24,959/3 (May 26, 2009).

⁴ Obligated parties provide no valid opposition to EPA's proposal regarding the 2009 volume mandate for Biomass-based Diesel. *See, e.g.,* Comments of the American Petroleum Institute, at 14-16 (Sept. 25, 2009) (EPA-HQ-OAR-2005-0161-2393.1). Obligated parties contend that biodiesel production in 2009 is reduced from prior years, ignoring the fact that production is down due to a lack of market as a result of the action (or inaction) of obligated parties, capacity remains substantially higher than the volume mandates, and production in prior years evidences that U.S. biodiesel plants can easily produce the volumes required under the Act. The obligated parties also provide no authority for EPA to ignore the mandates of Congress, which require EPA to ensure that the annual volume requirements are met, and provide no evidence that supply will be inadequate. Obligated parties further acknowledge that EPA indicated in 2008 that they should acquire biodiesel and renewable diesel RINs, and now request that EPA ignore the 12 month life limitation in the standard and give such RINs unlimited life in the event an obligated party did comply with EPA's guidance. In fact, the only way to ensure the mandates and limits of the statute are met are for EPA to issue renewable volume obligations for 2010, allowing RINs for biodiesel and renewable diesel to be used toward compliance and implementing the requirements through the current RFS program until the revisions to the program are finalized.

- (c) Affirm that RINs generated for biodiesel and renewable diesel under the current program can be used to show compliance for Biomass-based Diesel.⁵

Each of these elements was in the proposed rule, and EPA can and must finalize a renewable volume obligation for Biomass-based Diesel even if it is prior to issuing the final rule.

The current RFS regulations are sufficient to implement the Biomass-based Diesel requirements, and EPA has consistently indicated that RFS1 biodiesel and renewable diesel RINs can be used to show compliance with the RFS2 Biomass-based Diesel requirement. In fact, biodiesel production in 2008 was higher than the volume mandate for 2009 and 2010, and Congress expressly sought to retain and increase this market.

* * *

Again, NBB appreciates EPA's efforts in this important endeavor. In particular, we appreciate EPA's willingness to consider our comments on the lifecycle analysis and look forward to continuing to work with EPA on its revised analysis. These efforts, however, should not delay issuance of appropriate renewable volume obligations for 2010.

Thank you in advance for your consideration on this important matter.

Sincerely,



Manning Feraci
Vice President of Federal Affairs
National Biodiesel Board

Cc: The Honorable Kent Conrad
The Honorable Charles Grassley
The Honorable Peter Orszag
Director of the Office of Management and Budget
The Honorable Gina McCarthy
Assistant Administrator, Office of Air and Radiation, EPA
Margo T. Oge
Director, Office of Transportation and Air Quality, EPA
Sarah Dunham
Acting Director, Transportation and Climate Division, EPA
Air and Radiation Docket (Docket No. EPA-HQ-OAR-2005-0161)

⁵ EPA may issue a renewable volume obligation for all four mandates, including Cellulosic Biofuel. In the alternative, the notice could also defer implementation of the 2010 Cellulosic Biofuel requirement as it chose to do for the 2009 Biomass-based Diesel volume requirement. Unlike the case for Biomass-based Diesel, the Cellulosic Biofuel mandate may require additional regulations in the event EPA determines a waiver is necessary.