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EPA Docket Center

In the Matter of:
Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards
Final Rule, 75 Fed. Reg. 76790 (Dec. 9, 2010)
EPA Docket No. EPA-HQ-OAR-2010-0133

PETITION FOR RECONSIDERATION OF THE FINAL RULE

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (“CAA”), 42 U.S.C.

§ 7607(d)(7)(B), the American Petroleum Institute (“API”) and the National Petrochemical and Refiners Association (“NPRA”) hereby petition the United States Environmental Protection Agency (“EPA”) for reconsideration of elements of its December 9, 2010 Final Rule, Regulation of Fuels and Fuel Additives: 2011 Renewable Standards, 75 Fed. Reg. 76790 (Dec. 9, 2010) (hereinafter, “the Final Rule”).

I. INTRODUCTION

API is a national trade association representing more than 450 member companies involved in all aspects of the oil and natural gas industry. NPRA’s more than 450 members own or operate virtually all U.S. petroleum refining capacity and include most of the nation’s petrochemical manufacturers, which supply the chemicals necessary to produce products ranging from pharmaceuticals to fertilizers to Kevlar. The members of API and NPRA are dedicated to meeting environmental requirements while economically developing and supplying energy resources to consumers.

Given the current and projected global demand for energy, the United States needs all sources of commercially viable energy, as well as greater energy efficiency. Biofuels, including ethanol, are an important resource, and will have an increasingly important role as a blendstock of transportation fuel. Today, approximately 90% of all gasoline produced in the United States includes ethanol.

API and NPRA filed comments in response to EPA's Notice of Proposed Rulemaking on proposed volumes and changes to the 2011 Renewable Fuels Standard (RFS). API and NPRA appreciated the opportunity to comment on the proposed rule, but believe that three aspects of the Final Rule merit reconsideration:

First, EPA's 2011 cellulosic biofuel volume requirement of 6.6 million gallons (6.0 million ethanol-equivalent gallons) is unrealistically high. EPA appears to have set the 2011 cellulosic biofuel volume requirement based on aspirations rather than a realistic estimate of production. Moreover, EPA lacked a sufficient basis for departing from the 3.94 million gallon projection of the United States Energy Information Administration ("EIA").

Second, EPA should reduce the advanced biofuel requirement for 2011 to account for the reduction in the cellulosic biofuel requirement, which is a component of the advanced biofuel requirement.

Third, EPA's treatment of delayed RINs injects undesirable uncertainty into the regulatory environment, and is contrary to the basic regulatory framework established by Congress.

II. THE 2011 VOLUME REQUIREMENT FOR CELLULOSIC BIOFUEL SHOULD BE REDUCED.

Under Section 211(o)(3)(A) of the CAA, EPA is required to determine the volume of cellulosic biofuel "projected to be sold or introduced into commerce in the United States" for the following year. 42 U.S.C. § 7545(o)(3)(A). If the projected volume is less than the statutory volume requirement for that year, the standard for cellulosic biofuel must be based on the projected available volume. *See* CAA § 211(o)(7)(D)(i), 42 U.S.C. § 7545(o)(7)(D)(i). The CAA directs EPA to project the amount of cellulosic biofuel that will actually be sold or introduced into commerce in the following year, not amounts that the agency hopes or wishes to

see produced. EPA is not authorized to set volume requirements that exceed the amounts that it reasonably projects will actually be sold or introduced into commerce.

In the Final Rule, EPA correctly recognized that the projected volume for 2011 is far less than the statutory requirement of 250 million ethanol-equivalent gallons of cellulosic biofuel set by Section 211(o)(2)(B)(i)(III) of the CAA. *See* 42 U.S.C. § 7545(o)(2)(B)(i)(III). Despite an estimate from EIA that the available volume of cellulosic biofuel in 2011 will be 3.94 million gallons, the Final Rule projects a much larger volume of 6.6 million gallons (6.0 million ethanol-equivalent gallons). The Final Rule states that EPA is projecting this larger volume in order to “provide[] an incentive for developing cellulosic biofuel facilities to come on line as expeditiously as possible, and to provide a reasonable assurance that there will be a market for their product if they do.” Final Rule, 75 Fed. Reg. at 76797. EPA’s decision to project the 2011 cellulosic biofuel volume at an aspirational level, rather than the level that EPA reasonably projects will actually be achieved, is contrary to the clear language of the statute. For this reason, EPA should reconsider the cellulosic volume requirement set forth in the Final Rule.

A. EPA based its cellulosic biofuel requirement on an unduly optimistic assessment of industry production capability.

EPA adopted the 6.6 million gallon requirement for cellulosic biofuel after reviewing the production capacity of both domestic and foreign sources of cellulosic biofuel. *Id.* at 76792. Based upon this review, EPA “determined that five U.S. facilities have the potential to make volumes of cellulosic biofuel commercially available for transportation use in the U.S. in 2011.” *Id.* Among the factors that EPA considered were (1) whether companies “were actually in a position to produce and make available any commercial volumes of cellulosic biofuel in 2011,” (2) “the current and expected state of funding,” (3) “the status of the technology and

contracts for feedstocks or product sales,” and (4) “progress towards construction and production goals.” *Id.*

Recent developments concerning two biofuel companies—Bell BioEnergy and Cello Energy—illustrate the pitfalls of basing projections of actual production on unproven business plans. In the Notice of Proposed Rulemaking, EPA identified both Bell BioEnergy and Cello Energy as potential producers of cellulosic biofuel in 2011. *See* Notice of Proposed Rulemaking, Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards, 75 Fed. Reg. 42238, 42244 (July 20, 2010) (describing Bell BioEnergy as a “potential producer of cellulosic biofuel in 2011”); *id.* at 42261 (“We expect that Cello will be able to produce some volume of cellulosic biofuel in 2011.”). But by the time the Final Rule was issued, however, Bell BioEnergy’s production project had been terminated and the company was “exploring other options for locations for their first commercial facility, as well as potential sources of funding.” Final Rule, 75 Fed. Reg. at 76795. Similarly, Cello’s 2011 production plans were derailed by “feedback preparation and handling issues that need to be resolved before they will be able to again attempt startup and production” and, separately, by “[l]itigation related to contract issues.” *Id.* Cello has since filed for Chapter 11 bankruptcy. *Id.*

The experiences of Bell BioEnergy and Cello underscore the instability in the industry and the uncertainty surrounding the 2011 production projections.¹ Cellulosic biofuel

¹ Even Range Fuels—a company that both EIA and EPA expect to produce cellulosic biofuel in 2011—has experienced “repeated inability to meet stated production goals.” *See* Letter from Richard G. Newell, Administrator of EIA, to Lisa Jackson, Administrator of EPA (Oct. 20, 2010). Indeed, Range Fuels recently confirmed its intention to shut down one of its plants—after making just a single batch of ethanol—due to technical and financial problems. *See* Uccilia Wang, *Report: Range Fuels to Shut Down Plant*, Jan. 14, 2011, available at <http://www.reuters.com/article/2011/01/14/idUS154341571120110114>.

production is an emerging field that poses enormous financial, technological, legal, and organizational complexity. As the Final Rule acknowledges:

The task of projecting the volume of cellulosic biofuels that could be produced in 2011 is challenging. Announcements of new projects, changes in project plans, project delays, and cancellations occur with great regularity. Biofuel producers face not only the challenge of the scale-up of innovative, first-of-a-kind technology, but also the challenge of securing funding in a difficult economy.

Id. at 76794. It was precisely because of this uncertainty and complexity that API submitted comments urging that projections be based on companies that had successfully produced cellulosic biofuels for at least three months. *See* Letter from Patrick Kelly, Policy Advisor at API, to the Air and Radiation Docket and Information Center at EPA (Aug. 19, 2010).

Rather than relying on demonstrated production capability, the Final Rule relies on the *potential* production capabilities of five companies—DuPont Danisco, Fiberight, KL Energy Corporation, Range Fuels, and KiOR—each of which had *no* or, at most, *de minimis* production in 2010. Final Rule, 75 Fed. Reg. at 76795. EPA set the 2011 cellulosic biofuel requirement at an aspirational level that assumes that these domestic would-be producers can and will respond to the production incentives that EPA created in the Final Rule. *See, e.g., id.* at 76794. API and NPRA agree with EPA that increased domestic production and use of cellulosic biofuel is a critical component of a forward-looking national energy policy. For 2011, however, there is an insufficient basis for concluding that 6.6 million gallons of commercially usable cellulosic biofuel can be produced in the United States, even with the production incentives that the Final Rule seeks to establish.

The unrealistic 2011 cellulosic biofuel requirement harms members of API and NPRA because any shortfall will result in fees owed by obligated parties to EPA. As the Final Rule explains, if the actual volume of cellulosic biofuel RINs available in 2011 falls short of the

6.0 million ethanol-equivalent-gallon RINs used to calculate the 2011 cellulosic biofuel requirement, obligated parties must either purchase cellulosic biofuel waiver credits from EPA or (subject to certain regulatory conditions) carry over a deficit from 2011 into 2012. *Id.* at 76798. By setting the 2011 cellulosic biofuel standard at a level unlikely to be reached, the Final Rule all but ensures that obligated parties will owe fees to EPA for circumstances outside their control. Congress did not authorize EPA to impose such fees.

B. EPA lacked a reasonable basis for departing from EIA’s estimate of 2011 cellulosic biofuel production.

EIA is responsible “for carrying out a central, comprehensive, and unified energy data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information which is relevant to energy resource reserves, energy production, demand, and technology . . . or which is relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation’s economic and social needs.” 42 U.S.C.

§ 7135(a)(2). EIA is “the Nation’s premier source of energy information” and “the primary Federal Government authority on energy statistics and analysis.” About EIA, Mission and Overview, http://www.eia.gov/abouteia/mission_overview.cfm (last visited Jan. 21, 2011).

Section 211(o)(3)(A) of the CAA requires EIA to provide to EPA “an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel fuel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.” 42 U.S.C. § 7545(o)(3)(A). In turn, EPA’s determination of the cellulosic biofuel requirement for a given year must be “based on the estimate provided” by EIA. CAA § 211(o)(7)(D)(i), 42 U.S.C. § 7545(o)(7)(D)(i).

For 2011, EIA estimated that industry would produce 3.94 million gallons of cellulosic biofuel. *See* Letter from Richard G. Newell, Administrator of EIA, to Lisa Jackson,

Administrator of EPA (Oct. 20, 2010) (“EIA Letter”); *see also* Final Rule, 75 Fed. Reg. at 76796. In reaching this estimate, EIA relied on an “analysis of publicly available information . . . including information regarding numerous cellulosic biofuel projects at various stages of development shared in discussions among our respective staff” and “the small number of cellulosic biofuel plants currently in production, as well as those anticipated to reach mechanical completion in 2010.” *Id.* EIA based its projection on four of the same companies as EPA, but EIA determined that the production capability of these companies is considerably less than is reflected in EPA’s projections. *Compare* EIA Letter *with* Final Rule, 75 Fed. Reg. at 76797.

EPA’s projection is 67% larger than EIA’s estimate. In EPA’s view, EIA set its estimate at a level which has “a high certainty” of being reached. Final Rule, 75 Fed. Reg. at 76797. EIA itself did not suggest that its estimate was conservative. Moreover, EPA did not find that its own, much higher estimate is likely to be reached. Adopting a projection that is highly unlikely to be reached is inconsistent with EPA’s statutory mandate.

The CAA requires that EPA’s volume requirement be “based on” the EIA estimate. This makes sense, given that EIA is the government’s leading expert when it comes to making the sort of energy-production projections at issue in the Final Rule. Yet EPA appears to have construed the “based on” clause of CAA § 211(o)(3)(A) as requiring only that EPA give “consideration” to the EIA estimate. *Id.* at 76796. EPA justifies this interpretation of the statute by contending only that “[i]f Congress intended that EPA simply adopt EIA’s projection without an independent evaluation, it would not have specified that the projection is ‘determined’ by EPA.” *Id.* at 76797. It is equally true, however, that if Congress had intended only that EPA give “consideration” to EIA’s estimate, it would not have required the EPA’s projection be “based” on that estimate.

EPA offered no explanation of *how* its 6.6 million gallon projection is “based on” the EIA estimate of 3.94 million gallons, or exactly why EPA was rejecting the various determinations that entered into EIA’s expert estimate. Accordingly, EPA should reconsider its projected volume of 6.6 million gallons of cellulosic biofuel in 2011, and reduce the projected volume for cellulosic biofuel to no more than 3.94 million gallons in 2011.²

III. THE FINAL RULE SHOULD HAVE REDUCED THE REQUIREMENT FOR ADVANCED BIOFUEL.

Section 211(o)(2)(B)(i)(II) of the CAA sets the applicable volume of advanced biofuels for 2011 at 1.35 billion ethanol-equivalent gallons. 42 U.S.C. § 7545(o)(2)(B)(i)(II). Because EPA reduced the 2011 cellulosic biofuel requirement from 250 million to 6 million ethanol-equivalent gallons, it had discretion to reduce the volume requirement for advanced biofuel by the same or a lesser amount. *See* CAA § 211(o)(7)(D)(i), 42 U.S.C.

§ 7545(o)(7)(D)(i). EPA should reconsider its decision not to exercise this discretion. Cellulosic biofuel is used to satisfy both the cellulosic biofuel standard *and* the advanced biofuel standard. Approximately 1.2 billion gallons of the statutory requirement of 1.35 billion gallons of advanced biofuel would be satisfied by the (reduced) cellulosic biofuel and biomass based diesel standards. Final Rule, 75 Fed. Reg. at 76798. That leaves a shortfall of approximately 144 million ethanol-equivalent gallons of advanced biofuels. *Id.*

EPA elected not to reduce the advanced biofuel and total renewable fuel requirements. *Id.* at 76799. Instead, EPA determined that any shortfall in cellulosic biofuel could be made up through the possible importation of Brazilian advanced biofuel (specifically, sugarcane ethanol), the existence of an excess of biodiesel, and “other potential sources of

² API and NPRA believe that EIA’s projection of 3.94 million gallons in 2011 is overly optimistic, and that a lower projection is supported by the evidence.

advanced biofuels that could contribute to compliance with the advanced biofuels standard in 2011, such as diesel fuel additives made from waste cooking oil or restaurant grease.” *Id.* These determinations lack adequate factual support.

First, EPA’s reliance on Brazilian imports of sugarcane ethanol is speculative. As the Final Rule noted, ethanol imports dropped sharply in 2009, and dropped to “nearly zero in the first half of 2010.” *Id.* Speculation that “it *may* once again be economical” for Brazilian producers to export advanced biofuels to the United States, *id.*, is not a sufficient basis for declining to reduce the volume requirement.

Second, there is no persuasive reason to expect that EPA’s prediction of excess biodiesel will come true. As the recent price increases of bio-based diesel RINs demonstrate, biodiesel production lags demand.

Third, EPA’s reference to “other potential sources of advanced biofuels” is inappropriately speculative. EPA neither projects an expected volume of advanced biofuels to come from these sources nor identifies any producer of advanced biofuels from such “potential” sources.

For these reasons, the advanced biofuel requirement for 2011 should be reduced by 144 million ethanol-equivalent gallons.

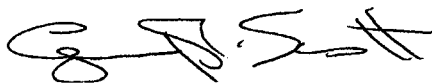
IV. THE FINAL RULE’S TREATMENT OF DELAYED RINS INTRODUCES UNCERTAINTY INTO THE REGULATORY ENVIRONMENT.

The Final Rule made delayed RINs available for volumes of biofuel pathways that meet the appropriate greenhouse gas criteria and “that were commercially available at the start of the RFS2 program, but which EPA was unable to address in time for RINs to be generated at the start of the program.” *Id.* at 76818. The delayed RINs provision “is limited to biofuel pathways

in use as of July 1, 2010 for the primary purpose of producing transportation fuel, heating oil, or jet fuel for commercial sale.”³ *Id.*

Delayed RINs are problematic because they inject uncertainty into the regulatory system and the RIN market. Congress created a regulatory structure in which EPA’s rules provide a defined, stable period for compliance with known rules. Delayed RINs are inconsistent with that regulatory approach, and require obligated parties to develop compliance plans under conditions of uncertainty. Accordingly, EPA should reconsider the provisions of the Final Rule that allow for delayed RINs.

Respectfully Submitted,



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³ Additionally, a delayed RIN will be available only if “[a] complete petition seeking approval of the pathway is submitted to EPA pursuant to § 80.1416 by January 31, 2011.” Final Rule, 75 Fed. Reg. at 76819.