



Robert L. Greco, III
Group Director
Downstream & Industry Operations

1220 L Street, NW
Washington, DC 20005-4070
USA
Telephone 202-682-8167
Fax 202-682-8051
Email greco@api.org
www.api.org

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VIA EMAIL

The Hon. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Legal Authority To Increase 2014 Biomass-Based Diesel Fuel Standard

Dear Administrator McCarthy:

It has come to our attention that the U.S. Environmental Protection Agency (EPA) is considering an increase to the biomass-based diesel standard for the 2014 compliance year. The American Petroleum Institute (API) reminds EPA that it: (a) lacks the authority to increase the biomass-based diesel standard in 2014 and (b) is legally required to follow the express language of the Clean Air Act when setting the final standards for 2014.¹

Section 211(o)(2)(B)(ii) of the Clean Air Act sets a one billion gallon floor for biomass-based diesel after 2012 and requires EPA to establish the subsequent annual volume requirements based on an analysis of six statutory criteria (*i.e.*, environmental impact, energy security, expected production, impact on infrastructure, cost to consumers, and certain other factors, such as food prices and rural development). Because the volumes for biomass-based diesel are not specified in the statute and an evaluative process is required, section 211(o)(2)(B)(ii) expressly compels EPA to provide a 14-month lead time when modifying the mandate. Specifically, this provision requires the EPA Administrator to “promulgate rules establishing the applicable volumes under this clause **no later than 14 months before the first year for which such applicable volume will apply.**” (emphasis added)

Therefore, pursuant to the Clean Air Act’s unambiguous language, EPA was required to have finalized any increase to the 2014 biomass-based diesel mandate by October 31, 2012. Because this deadline has passed by almost two years and the required six-factor analysis was not undertaken in the proposed 2014 RFS, the Clean Air Act prohibits EPA from increasing the biomass-based diesel

¹ API is the national trade association representing more than 600 member companies involved in all aspects of the oil and natural gas industry. API’s members include the obligated parties under the Renewable Fuel Standards – refiners and importers of fuel – who will be adversely affected by any increase in the 2014 biomass-based diesel standard. Our members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. Since 2000, the industry has invested over \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

requirement from the 2013 biomass-based diesel standard of 1.28 billion gallons. In other words, any higher applicable volume for biomass-based diesel for 2014 (or percentage standard based on this volume) would be a clear violation of EPA's statutory authority. Unfortunately, political gamesmanship has further delayed the 2014 requirements, and as a result EPA's authority to increase the 2016 biomass-based diesel standard is soon to pass. It is irrelevant if more than 1.28 billion gallons of biomass-based diesel has been produced this year because the RFS imposes obligations on individual companies, not the industry as a whole, and changes to individual company obligations clearly harms these obligated parties.

Congress establishes statutory deadlines for a reason – they provide certainty to the regulated industries. Here, Congress recognized the fundamental difference in setting the biomass-based diesel standard and the other biofuel standards by providing the 14-month lead time to give obligated parties sufficient notice to make the necessary operational, logistical, and investment decisions to meet any increase in the biomass-based diesel standard. A court will likely find any increase in the biomass-based diesel standard to be both statutorily barred and a breach of good government, especially when EPA itself admitted that it lacked the legal authority to increase the mandate by clearly acknowledging in the 2014 RFS proposal that “the statute **requires** that we finalize these biomass-based diesel volume requirements no later than 14 months before the first year for which that volume requirement will apply.”² (emphasis added)

Please feel free to contact me or Patrick Kelly of my staff (202-682-8192) should you have any questions or concerns regarding this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Greco, III". The signature is fluid and cursive, with a large initial "R" and "G".

Robert L. Greco, III
Group Director, Downstream & Industry Operations
American Petroleum Institute

cc: Shaun Donovan, Howard Shelanski, Janet McCabe, Christopher Grundler

² 2014 Standards for the Renewable Fuel Standard Program, 78 Fed. Reg. 71737 (Nov. 29, 2013).