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October 11, 2012

**Via Electronic Filing**

Air and Radiation Docket  
Environmental Protection Agency  
Mailcode: 6102T  
1200 Pennsylvania Avenue NW.  
Washington, DC 20460

ATTN: Docket ID No. EPA-HQ-OAR-2012-0632

Re: Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 52,715 (Aug. 30, 2012); Extension of Comment Period, 77 Fed. Reg. 57,565 (Sept. 18, 2012)

Dear Sir or Madam:

The National Biodiesel Board (NBB) appreciates the opportunity to offer comments on letters requesting a waiver of the renewable fuel standard (RFS). EPA's notice specifically references requests by the States of Arkansas and North Carolina, which merely request a waiver of the "appropriate" and "applicable" volume of renewable fuel. 77 Fed. Reg. 52,715, 52,716 (Aug. 30, 2012).<sup>1</sup> While the letters are not clear as to the extent of the relief requested, they appear to seek only a waiver of the conventional biofuel portion of the program as they are largely based on the increased prices in corn due to the recent drought conditions in the United States, and the asserted related increases in feed prices affecting the livestock and poultry industries. In 2008, EPA properly denied a request by the State of Texas to waive a portion of the RFS program based on similar grounds. 73 Fed. Reg. 47,168 (Aug. 13, 2008). As with Texas' 2008 request, the letters submitted here do not present adequate (if any) support for a waiver. Indeed, NBB believes the requests should have been denied outright. As EPA has recognized, the failure to provide any of the required analyses outlined in EPA's denial of Texas' 2008 request in the first instance undermines the purpose of the public notice and comment requirement, and wastes much needed public resources. *Id.* at 47,183.

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<sup>1</sup> The Governors of Delaware, Maryland, Georgia, Texas, Virginia and New Mexico have also submitted letters supporting a waiver, and the National Pork Producers Council (among others) have similarly requested that the Administrator utilize her authority to waive the RFS volume requirement.

In any event, there are significant reasons for EPA to deny a request for any waiver, and maintain its obligation to ensure the *minimum* statutory volumes envisioned by Congress are required for 2012 and 2013. EPA provided additional flexibility in its regulations to account for the possibility of short term feedstock disruptions, and a waiver will not effectively address the harms alleged by these industries. On the other hand, a waiver will significantly adversely affect, among others, farmers, the biofuels industry, and the general public. More important they would undermine the clear policy choice by Congress to promote renewable fuel use and reduce this country's dependence on foreign oil. These waiver requests have created uncertainty in the marketplace, even with respect to the biomass-based diesel and advanced biofuel requirements, which do not appear to be the targets of these requests. As such, these unsubstantiated requests for a waiver of the RFS should be denied as soon as possible.

NBB is the national trade association representing the biodiesel industry as the coordinating body for research and development in the United States, founded in 1992. The NBB is a comprehensive industry association which coordinates and interacts with a broad range of cooperators, including industry, government and academia. NBB's membership is comprised of state, national and international feedstock and feedstock processor organizations, biodiesel suppliers, fuel marketers and distributors and technology providers.

Biodiesel is a renewable, low-carbon diesel replacement fuel made from an increasingly diverse mix of feedstocks, including, but not limited to, recycled cooking oil, agricultural oils such as soybean and canola oil, animal fats, algae and other biogenic waste oils, and our industry has significant flexibility in dealing with potential disruptions in supply such as may be caused by a drought. New feedstocks are being added as approved for biodiesel every year (camelina, pennycress and cottonseed oil, for example, are currently under review with the EPA), and most biodiesel producers can switch from one feedstock to another if prices rise or supplies are short. Therefore, for biodiesel, the drought's impact on any one commodity market is significantly reduced. Indeed, diversification of feedstocks was one of the main purposes Congress had in mind when establishing the RFS and the biomass-based diesel and advanced biofuel requirements. Biodiesel is the first and currently the only EPA-designated advanced biofuel that is produced on a commercial scale across the country. It meets a strict ASTM fuel specification and is used in existing diesel engines without modification. In 2011, the biodiesel industry produced nearly 1.1 billion gallons of biodiesel in plants across the country, from California to Florida, and blended that fuel into the 55 billion gallon petroleum diesel market. In 2012, it is on track to produce more than the 1.0 billion gallon minimum requirement of the RFS (according to the EPA, 757 million gallons have been produced through August).

The parochial politics of petroleum, livestock, poultry and ethanol have likely forever clouded the true policy benefits of renewable fuels and domestic energy policy. Critics of the RFS -- most of them with vested interests in the debate -- are seizing on this year's severe drought to call for paring back renewable fuels. But Congress created the RFS with overwhelming bipartisan support for good reason -- to reduce U.S. reliance on fossil fuels and foreign oils thus improving our energy security. The bigger picture is that the RFS is working

just as Congress intended to diversify our energy supplies and create American jobs. This was demonstrated last year where the biodiesel industry's record production of nearly 1.1 billion gallons of fuel supported more than 39,000 jobs.

The politically motivated RFS waiver requests are hurting the marketplace for U.S. biodiesel producers. The fuels marketplace has softened, and obligated parties have in many cases stopped buying biodiesel as they wait for EPA to make its determination in mid-November. The uncertainty created by the threats of seeking a waiver and now the submission of waiver requests has had a negative impact on the economy and domestic energy policy by sending negative signals to the investors and entrepreneurs who are building this new American industry. It is clear that any setbacks to the RFS -- even to the conventional portion -- will hurt the development of advanced biofuels.

While the livestock and poultry industries are seemingly pushing for a waiver, EPA must remember that the drought has also affected farmers and other sectors of the agricultural industry, and we encourage the EPA to not let the politics of the moment shut down a positive job-producing sector of the economy -- the domestic biodiesel sector. Additionally, it would be wrong to let this waiver request weaken our commitment to diversifying our fuel supplies and reducing our dependence on foreign petroleum markets that threaten our energy security and economic prosperity.

I. The RFS is Working, and EPA Must Ensure the Goals and Purposes of the RFS Program are Fulfilled.

When Congress enacted the RFS in 2005 and then expanded it in 2007, it determined that promoting renewable fuels is critical to this Nation's environmental, energy, economic and security goals. Among the express purposes of the Energy Independence and Security Act of 2007 (EISA) was to "increase the production of clean renewable fuels." *NPRA v. EPA*, 630 F.3d 145, 156 (D.C. Cir. 2010) (quoting Pub. L. No. 110-140, 121 Stat. 1492 (2007)). To effectuate these goals, Congress required EPA to "ensure" that specified *minimum* volumes of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel are used in the United States. 42 U.S.C. § 7545(o)(2)(A)(i), (B); *see also NPRA*, 630 F.3d at 153. Although Congress did provide very limited authority to EPA to waive the volumes "in whole or in part," the flexibilities provided in the statute and EPA's RFS regulations are intended to address price fluctuations and localized economic impacts. The waiver provisions are simply not intended to address the price fluctuations at issue here, which have not been shown to be due to the RFS, but rather, the economic harm is due to recent drought conditions, which have affected more than just the livestock and poultry industries. As EPA indicated in 2008, EPA must provide "the necessary level of stability for this program that Congress intended," even in context of considering a waiver request. 73 Fed. Reg. at 47,183.

The RFS provides for a graduated increase in the volumes of renewable fuels sold in the United States through 2022. During this time, an increasing amount of advanced biofuels is required, showing Congress' goal of diversifying feedstocks. *See S. Rep. No. 110-65 at 2-3 (2007)* ("Diversifying feedstocks to include a broader array of renewable biomass can promote

regional diversity in biofuels production and distribution, spreading economic benefits to rural communities across the country and relieving pressure on corn commodity prices. In addition, it can lead to greater efficiency in the fuel-production process and help save on fossil fuel emissions.”). While corn ethanol in practice makes up the vast majority of the “conventional” biofuel portion that is minimally required under the RFS, the RFS does not specifically require corn ethanol. Other biofuels, including advanced biofuels, can also apply toward this portion, and waiver of the overall standard based on an isolated consideration of corn prices could affect the ability to look to these other fuels and allow the biofuel industry to continue toward greater feedstock diversification and increased use of advanced biofuels. EPA must consider the signals it sends to investors in advanced biofuels, and the potential long-term impacts on these other biofuels when considering the waiver requests, even if the waiver being considered is just for the conventional biofuel portion of the program.<sup>2</sup>

While we do not dispute the potential for shortages in certain feedstocks as a result of the recent drought conditions that are considered by some to be the worst in recent decades, the statute included and EPA has provided flexibilities in the RFS program to address these short term disruptions.<sup>3</sup> It is important to recognize that the certainty created by the RFS and the economic benefits that it provides to farmers has allowed for an increase and an efficiency in crops planted on eligible acres. The market demand has also encouraged greater productivity with the RFS supporting continued efforts to increase crop yields. Nonetheless, Congress established a national program and required a credit trading system to address local concerns raised and to ensure that a national market would exist to address expected economic variations among regions in the country related to renewable fuels production and sales. *See, e.g.,* S. Rep. No. 109-74, at 7 (2005) (S. 606). Moreover, compliance is addressed through an annual average obligation. EPA kept this in mind in designing the RFS: “One of our guiding principles in designing the RFS program was to preserve the market mechanisms that keep renewable fuel costs to a minimum.” EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program -- Summary and Analysis of Comments*, EPA420-R-07-006 (hereinafter “EPA RFS Response to Comments”), at 5-24 (Apr. 2007). Congress also provided for a deficit carryover to the extent an obligated party could not meet its obligations in any one year. 42 U.S.C. § 7545(o)(5)(D).

More significant, EPA’s regulations provide for a 20% “rollover” of prior year RINs, which allows obligated parties to use excess production in the prior year toward meeting their requirements for the compliance year. Despite recognizing the potential for rollover to *reduce* the actual amount of renewable fuel used, EPA’s rationale for allowing a rollover was to, among other things, account for potential disruptions in feedstock in any given year as a result of, e.g., a drought. 72 Fed. Reg. 23,900, 23,933, 23,935 (May 1, 2007); *see also id.* at 23,926-23,927

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<sup>2</sup> Congress expected, over time, for advanced biofuels to make up a greater part of the RFS program, and the “conventional” biofuel portion of the RFS has much smaller increases over the next few years. The floor for this portion of the program rises to 15 billion gallons by 2015, where it remains through 2022.

<sup>3</sup> It is noteworthy that none of the requests assert that there will be a lack of adequate domestic supply of renewable fuels despite raising concerns of low crop yields as a result of the drought conditions, implicitly indicating that, even at these reduced yields, the corn production may still be sufficient to meet demands.

(rejecting requests for temporary hardship exemptions to address unforeseen circumstances such as natural disasters). EPA stated: “The 12 month valid life creates some flexibility in the market to help mitigate price fluctuations. The renewable fuels market could also experience a significant drop in supply if, for instance, a drought were to limit the production of the feedstocks needed to produce renewable fuel. Obligated parties could use banked credits to comply rather than carry a deficit into the next year.” *Id.* at 23,933. The 20% cap was based on a drought situation that occurred in 1996, where 1996 ethanol production was 21% less than it had been in 1995. *Id.* at 23,935. Thus, EPA already provides for potential fluctuations in supply as a result of natural disasters without having to resort to a waiver of any of the volumes. Secretary of Agriculture Tom Vilsack has stated that the market is already making adjustments to an anticipated short supply of corn and soybeans; “We should let the market work.” Jerry Perkins, *USDA Secretary Tom Vilsack Addresses ACE Conference in Omaha, NE*, *Biofuels Journal* (Aug. 10, 2012), available at [http://www.biofuelsjournal.com/articles/USDA\\_Secretary\\_Tom\\_Vilsack\\_Addresses\\_ACE\\_Conference\\_in\\_Omaha\\_\\_NE-125380.html](http://www.biofuelsjournal.com/articles/USDA_Secretary_Tom_Vilsack_Addresses_ACE_Conference_in_Omaha__NE-125380.html). He also noted that the 2012 harvest is still projected to be the eighth largest corn crop in history. *Id.*

Given the structure of the statute and EPA’s regulations, it is clear that the limited waiver authority provided in Section 211(o)(7)(A) should be used sparingly to address unexpected and *severe* circumstances associated with the RFS volume mandate and costs associated with the renewable fuel, not potential impacts on feedstocks. In passing the RFS, Congress intended to address economic hardships from the dependence on foreign sources of oil. *See, e.g.*, 151 Cong. Rec. S6601, S6613 (daily ed. June 15, 2005) (Statement of Sen. Jeffords). Under Section 211(o)(7)(A), EPA “may” waive the RFS2 volume requirements “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 under paragraph (2).” 42 U.S.C. §7545(o)(7)(A) (emphasis added). In order to issue a waiver EPA must determine if:

- (1) implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or
- (2) there is an inadequate domestic supply.

*Id.* A waiver determination by EPA also requires public notice and comment and consultation with the Departments of Energy and Agriculture. *Id.* Thus, Congress imposed various significant procedural and substantive hurdles to limit these waivers, placing the burden on the petitioner to provide adequate information to support a waiver. As such, EPA found that “Congress’s clear intent was to limit EPA’s authority to provide relief under the state waiver provision of section 211(o)(7).” EPA RFS Response to Comments at 11-7. Moreover, EPA has found that it is not required to issue a waiver even if the criteria are met. 73 Fed. Reg. at 47,172.

With respect to advanced biofuels specifically, the RFS program is working. The biodiesel industry, in particular, produced a record of nearly 1.1 billion gallons of fuel in 2011

and supported more than 39,000 jobs. It has clearly met the statutory goal of diversification of feedstocks, utilizing an increasingly wide-ranging mix of feedstocks, such as recycled cooking oil, agricultural oils such as soybean and canola oil, animal fats, and other biogenic waste oils, with more on the horizon, including algae, camelina, pennycress, and cottonseed oil. Moreover, the biodiesel industry has met and exceeded Congress' expectations, and excess production from 2011 remains available for use in 2012. For 2012, EPA found that there were sufficient sources of advanced biofuels, and for 2013, EPA recognized the diversity in biodiesel feedstocks and has finalized a 1.28 billion gallon biomass-based diesel requirement. Because of the ability of the biodiesel industry to utilize a wide, diverse variety of feedstocks, the recent drought conditions do not change these analyses. Moreover, biodiesel production promotes rural economies, and actually reduces the costs of meal used for feed by the livestock industry. There simply are no grounds to waive any portion of the advanced biofuel requirements. Nonetheless, these waiver requests have brought uncertainty to the marketplace, and EPA must, consistent with this Administration's policy goals, effectuate the intent of Congress and promptly deny requests for any waiver of the RFS.

II. The Letter Requests Submitted do not Meet the Requirements for a Waiver Petition.

EPA's notice states that the letters submitted by Arkansas and North Carolina are seeking a waiver under Section 211(o)(7)(A), referencing "this year's drought, crop price increases, and impacts in various economic sectors, including the poultry and cattle sectors." 77 Fed. Reg. at 52,716. As EPA recognizes, it denied a waiver request by the State of Texas in 2008. 73 Fed. Reg. 47,168. This waiver request raised economic concerns virtually identical to those that are being raised now. In 2008, rather than drought conditions, corn prices had spiked significantly to over \$8 a bushel based on predictions that corn supplies could fall to its lowest level since 1996 due to flooding in the Midwest. *See Sue Kirchoff, Midwest Floods send corn prices soaring past \$8 a bushel, USA Today, June 20, 2008, [http://www.usatoday.com/money/industries/food/2008-06-16-corn-prices-jump\\_N.htm](http://www.usatoday.com/money/industries/food/2008-06-16-corn-prices-jump_N.htm); see also 73 Fed. Reg. at 47,182; Comments submitted by State of Texas, EPA-HQ-OAR-2008-0380-0502, at 1 ("Wet weather and flooding in the Midwest promise to cause a substantial shortfall in the 2008 corn harvest. Upcoming forecasts most likely will drive the price of corn even higher, if the mandates remain at current levels. Such current and future corn prices, together with the increases in the price of transportation fuels, are causing a severe harm to the economies of Texas and the Nation, especially to the livestock industry.").* EPA requests comment on its determination with respect to the 2008 Texas request "in the context of the 2012 waiver requests." 77 Fed. Reg. at 52,716. As in 2008, EPA must deny the waiver requests pending before it.

A. EPA may and should deny the requests based on the inadequate information provided.

In its 2008 denial of Texas's request, EPA provided guidance on the type of information that should be included in any petition. The information needed for EPA to assess a waiver request includes "information and analyses that address what is the impact of implementation

of the RFS, and what is the nature and degree of harm associated with the impact of the RFS” and a “comprehensive and robust analytical basis for any claim that the RFS itself is causing harm, and the nature and degree of that harm.” 73 Fed. Reg. at 47,183. Because waivers must be granted or denied within 90 days of a petition, the burden is clearly on the petitioning State to provide adequate evidence demonstrating severe harm in its petition. The letters submitted to EPA requesting a waiver for 2012/2013, to date, wholly fail to provide this information or analyses. They rely on unsupported claims, assert back of the envelope calculations, and fail to cite to or provide the underlying analyses for the public to meaningfully review and comment.

EPA has the authority to deny a petition “that is not supported by an appropriate level of information and analysis.” 73 Fed. Reg. at 47,183. EPA has long interpreted other provisions seeking waivers of statutory requirements to place the burden on the petitioner to provide adequate information in the first instance. *See, e.g.*, 43 Fed. Reg. 11,258, 11,258 (Mar. 17, 1978) (“Applications which are not accompanied by any evidence [regarding section 211(f)(4) waiver requests] will be denied.”). EPA must again inform the public that such requests are insufficient for purposes of Section 211(o)(7)(A) and require more information in the first instance rather than require the public to look into a crystal ball to identify all the potential issues that might be raised and considered by EPA.

Uncertainty in the marketplace caused by the letters requesting waivers have once again caused plants to have difficulty accessing operating capital. They send inconsistent signals to the marketplace, undermining investor confidence in the industry. Thus, NBB requests EPA promptly deny the requests. EPA should not waste its time or public resources to conduct the analyses that should have been provided in the petition. It should also send clear signals to the market that such unsubstantiated petitions will not be entertained.

- B. None of the substantive criteria required under Section 211(o)(7)(A) has been met.

In 2008, EPA provided interpretations on the statute’s requirements for a waiver. NBB supports these interpretations and, although identified as guidance, they should continue to govern EPA’s consideration of the issues. Specifically, EPA correctly found that a petitioner must show:

- 1) “implementation of the RFS program itself must be the cause of the severe harm” (73 Fed. Reg. at 47,171 (emphases added));
- 2) a “high degree of confidence that severe harm would occur from implementation of the RFS,” such that the waiver would “provide effective relief from that harm” (73 Fed. Reg. at 47,171-47,172 (emphasis added));
- 3) a “severe” harm “that is quite far along a continuum of harm, though short of extreme” (73 Fed. Reg. at 47,172); and

- 4) the RFS “would severely harm the overall economy of a State, region, or the U.S.” (73 Fed. Reg. at 47,172).

As it did in 2008, EPA must deny the waiver requests based on the alleged harms from the drought conditions and the potential effects on commodity prices. It is clear that compliance with the RFS will not severely harm the economy of Arkansas, North Carolina, other States, a region, or the United States.

1. It has not been shown that the alleged harms are *caused by* the RFS.

In 2008, EPA properly found that Section 211(o)(7)(A) requires a showing that the RFS actually causes the alleged harms. 73 Fed. Reg. at 47,170-47,171. EPA rejected the notion that the RFS need only “significantly *contribute* to severe harm” to support a waiver. *Id.* at 47,171. EPA properly considered the plain meaning of the statute, which states that a waiver may be based on a finding that “implementation of the requirement **would** severely harm” the economy, compared to other provisions in the Clean Air Act that expressly used the term “contribute.” *Id.* (emphasis added); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citation omitted) (alteration in original). EPA further correctly found that merely requiring the RFS be a contributing factor to the harm would result in a broader waiver provision than envisioned by Congress. 73 Fed. Reg. at 47,171. As EPA found, Congress imposed limited authority to waive the required volumes, and EPA must exercise its limited authority in a manner that best effectuates “Congress’ overall desire to promote the use of renewable fuels, reflected in enacting the expanded RFS program and mandating the increased utilization of renewable fuels over a number of years.” *Id.*; *NPRA*, 630 F.3d at 153 (recognizing statute’s requirement that “at least” the specified volumes be sold signals Congress’ “intent that volumes not be reduced, at least not in the first decade of the renewable fuel program”).

The calls for a waiver focus on the increase in prices in corn. The letters submitted to EPA recognize that the cause of the increased corn prices are the drought conditions being experienced in certain parts of the United States, resulting in estimated reduced crop yields and speculation resulting in increased prices. *See, e.g.*, Arkansas Letter (EPA-HQ-OAR-2012-0632-0002); North Carolina letter at 2 (EPA-HQ-OAR-2012-0632-0003); Maryland/Delaware letter at 2 (EPA-HQ-OAR-2012-0632-0010); New Mexico Letter (EPA-HQ-OAR-2012-0632-0207); Georgia Letter at 1-2 (EPA-HQ-OAR-2012-0632-0208); Texas letter at 1 (EPA-HQ-OAR-2012-0632-0218); Letter from Robert F. McDonnell, Governor of Virginia, to EPA, Aug. 27, 2012, at 2; *see also* NPPC Letter at 1, 7-8 (EPA-HQ-OAR-2012-0632-0012). The waiver letters assert that “it is not in dispute that a waiver would put downward pressure on corn pricing.” Maryland/Delaware Letter at 2 (EPA-HQ-OAR-2012-0632-0010). The asserted difference between the petitions today and the petition filed by Texas in 2008 is that the alleged magnitude of the contribution of ethanol production due to the increased volume for the RFS requirements may be higher.

Even if true, however, that is not the standard imposed by Congress for granting a waiver, as outlined by EPA.

2. The letters requesting a waiver make virtually no attempt to show that the alleged harms would occur and that the waiver would provide effective relief.

Although we all recognize that there are drought conditions occurring in key agricultural areas in the United States that have impacted crops, EPA recognized that the statute requires a strong showing that the RFS program “would” actually result in the alleged harms. 73 Fed. Reg. at 47,171 (citing 42 U.S.C. § 7545(o)(7)(A)); cf. 42 U.S.C. § 7545(o)(8) (allowing waiver of 2006 volume if DOE study showed program “will likely result in significant adverse impacts on consumers”). Moreover, the petitioner must “clearly demonstrate” that the waiver would provide effective relief. 73 Fed. Reg. at 47,172. Such is not the case here.

In 2008, EPA determined that the RFS would be “binding” with respect to ethanol in scenarios where “crude oil prices **and** corn production are relatively low.” 73 Fed. Reg. at 47,174. EPA also recognized the availability of other fuels not dependent on corn and RINs earned from excess production in prior years also make the RFS mandate less binding. *Id.* The excess ethanol production also illustrated that the RFS was not the primary driver of ethanol production and, thereby, corn prices. *Id.* at 47,175.<sup>4</sup> Crude oil prices are not relatively low today. See Wallace E. Tyner, et al., *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, Purdue University, at 12 (Aug. 2012) (“To the extent that little short-run flexibility exists among refiners and blenders, the waiver does little to change the status quo.”); see also Scott Irwin and Darrel Good, Department of Agricultural and Consumer Economics, University of Illinois, *Ethanol-Does the RFS Matter?*, FarmDoc Daily (Aug. 2, 2012), <http://www.farmdocdaily.illinois.edu/pdf/fdd020812.pdf>. Moreover, it has been found that the number of ethanol RINs from 2011 potentially available to be rolled into 2012 “means that relaxing the mandate further would have modest impacts on corn prices.” Bruce Babcock, *Preliminary Assessment of the Drought’s Impacts on Crop Prices and Biofuel Production*, CARD Policy Brief 12-PB-7, at 8 (July 2012). An updated analysis shows that the flexibility of the RFS2 “significantly lowers the economic impacts of a short crop.” Bruce Babcock, *Updated Assessment of the Drought’s Impacts on Crop Prices and Biofuel Production*, CARD Policy Brief 12-PB-8, at 8 (Aug. 2012) (“CARD Aug. 2012 Policy Brief”).

As explained above, the letters from the States merely cite the fact that corn prices have spiked, and that it “is conceivable” companies will be paying more than \$9.50 per bushel. Maryland/Delaware letter at 2 (EPA-HQ-OAR-2012-0632-0010). Even if the RFS may contribute to an increase in price and a waiver could mitigate the harms, a waiver would only, at most,

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<sup>4</sup> Even those studies that purport to find reduction of the RFS mandate could mitigate the magnitude of price spikes in the grain markets found “available evidence does **not** suggest that biofuel demand has been a major driver in agricultural price spikes during 2007/8 and more recently in 2010/11.” Chris Durham, et al., *Can Biofuels Policy Work for Food Security? An Analytical Paper for Discussion*, United Kingdom Department for Environment, Food and Rural Affairs at 24 (June 2012).

provide minimal relief (an estimated 7.4% in reduced corn prices).<sup>5</sup> Indeed, the National Pork Producers Council, et al., stated that “[i]t is also critical to point out that even if a waiver is granted and corn prices drop dramatically, corn prices will still be at or above the record high season average levels of the last several years.” NPPC Letter at 11 (EPA-HQ-OAR-2012-0632-0012). In Arkansas, for example, reports indicate it is the loss of grass due to the drought conditions that have significantly affected cattle ranchers. Karen Brown, *Drought decimates Arkansas’ famed cattle industry*, CBS News (Aug. 1, 2012), [http://www.cbsnews.com/2102-201\\_162-57484966.html?tag=contentMain;contentBody](http://www.cbsnews.com/2102-201_162-57484966.html?tag=contentMain;contentBody). Thus, the waiver will not address the economic hardships that the poultry or livestock industries in these States may be facing.

Given the number of factors at issue, it simply cannot be clearly demonstrated that a waiver will provide effective relief. A recent study found the cattle sector to be most affected by the drought conditions in Arkansas, due largely to hay and pasture conditions, but that prices for cattle are nonetheless expected to increase. Nathan Kemper et al., *Impact of the 2012 Drought on Field Crops and Cattle production in Arkansas, Preliminary Report*, University of Arkansas Division of Agriculture Research & Extension, at 3, 9 (Aug. 2012), *available at* [http://www.uaex.edu/depts/ag\\_economics/publications/Ark\\_Drought\\_Report\\_August2012.pdf](http://www.uaex.edu/depts/ag_economics/publications/Ark_Drought_Report_August2012.pdf) (“University of Arkansas Report”).<sup>6</sup> On the other hand, that same study showed that field crops have been able to withstand drought conditions through irrigation, and 2012 corn and soybean production are forecasted to be *higher* than in 2011.<sup>7</sup> *Id.* at 3. There simply is no indication that a waiver would provide effective relief to address the harms attributed to the recent drought conditions. See Wallace E. Tyner, et al., *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, Purdue University, at 12 (Aug. 2012) (“What should be clear is that high uncertainty remains on the possible impact of an EPA partial waiver of the RFS.”). This “high uncertainty” as to the effects of a waiver to address the claimed harms is wholly insufficient to meet the showing required under Section 211(o)(7)(A).

More important, while we do not read the waiver requests to include the biomass-based diesel or the advanced biofuel requirements, it has been found that a waiver of these mandates would, in fact, have a significant adverse impact on the biodiesel industry and, moreover, on feed costs. EPA has found that the increase in demand for soybean oil for biodiesel production is “expected to have a small impact on the price of soybeans.” 77 Fed. Reg. 59,498, 59,465 (Sept. 27, 2012). But, the use of soybean oil for biodiesel production can have a significant, downward effect on soybean meal prices. Moreover, while yields in some

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<sup>5</sup> Bruce Babcock, *Updated Assessment of the Drought’s Impacts on Crop Prices and Biofuel Production*, CARD Policy Brief 12-PB-8, at 8 (Aug. 2012).

<sup>6</sup> The Obama Administration recently announced more than \$16 million in financial and technical assistance to help crop and livestock producers in 19 states cope with the adverse impacts of the historic drought. USDA, NRCS Arkansas, *Agriculture Secretary Vilsack, Obama Administration Deliver New Drought Assistance to America’s Producers* (Aug. 8, 2012), [http://www.ar.nrcs.usda.gov/news/2012\\_arkansas\\_drought\\_funding.html](http://www.ar.nrcs.usda.gov/news/2012_arkansas_drought_funding.html).

<sup>7</sup> This study also recognized that food prices are minimally impacted by increasing commodity prices. University of Arkansas Report at 7. “The majority of costs are expenses for food processing, packaging, retail trade, energy, and transportation.” *Id.* NBB agrees that the real driver of rising food costs continues to be increased oil prices. Diversity in our fuel supplies will alleviate these ongoing price spikes.

areas are down because of the drought, the size of the soybean crop planted this year was larger than last year's. In addition, soybean production and harvest is later in the growing season than corn production and harvest. Although drought conditions persist over a large section of the Midwest, rainfall in the later part of the season has a more significant influence on soybean yields.

Even assuming a reduction in the biomass-based diesel program (and therefore reduced biodiesel production) will have an impact on soybean prices, any such impact will not provide any relief to the livestock and poultry industries, as biodiesel production actually eases feed prices and therefore, lowers their costs. Protein meal from soybeans, a staple in animal diets, is less expensive today because of the demand for biodiesel. Without biodiesel production, the higher soybean meal prices could have cost the livestock industry an additional \$1.4 billion in 2007 and a total of \$4.8 billion from 2005 to 2009. Centrec Consulting Group, LLC, *Economic Impacts of Biodiesel Production on the Soybean Sector, Revisited*, at 4 (Dec. 2010), available at [http://www.ilsoy.org/\\_data/mediaCenter/files/1185.pdf](http://www.ilsoy.org/_data/mediaCenter/files/1185.pdf). Due to increased supply, soybean meal prices were \$16 to \$48 per ton less than they would have otherwise been from 2005 to 2009. *Id.* at 7. Also, with reduced ethanol production comes reduced distiller grains. Generally, distiller grains increase the volume of protein supplies in the market and reduced ethanol production will put "upward" pressure on protein prices. However, the larger volume of soybean meal available in the market today, some obviously due to biodiesel demand, will help moderate this upward pressure.<sup>8</sup>

CARD estimated that, if there is a waiver of the RFS in its entirety, "practically all biodiesel production from vegetable oil would be stopped," even though the price of soybean oil would be expected to decrease. CARD Aug. 2012 Policy Brief at 8. While there have been passing references to the increased price of soybean crops by some supporters of a waiver,<sup>9</sup> "the price of soybean meal would rise by \$21 per ton because of *decreased supplies of meal.*" *Id.* (emphasis added); see also Centrec Consulting Group, LLC, *Soybean Oil and Meal Economics: How Livestock Producers Benefit from Biodiesel Production*, at 4 (Feb. 2011), available at [http://www.ilsoy.org/\\_data/mediaCenter/files/1282.pdf](http://www.ilsoy.org/_data/mediaCenter/files/1282.pdf) (finding, if there is reduced biodiesel production, "Soybean meal prices would increase; livestock producers could possibly pay anywhere from \$34 to \$50 per ton more for their soybean meal by MY15").

Biodiesel also is produced from canola oil, and canola meal can similarly be used by livestock and poultry producers as feed. Canadian growers are expected to harvest a record 20.76 million acres of canola; up almost 13% from last year. According to the USDA, U.S. canola plantings are up to 1.6 million acres -- the largest U.S. canola crop ever (most canola grown in

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<sup>8</sup> Furthermore, the business of agriculture is a global business. Any supply issues caused by the drought of 2012 should be corrected within the next six months, as South America's farmers react to the drought conditions in the United States. With record levels of production anticipated, soybean production in Brazil and Argentina is expected to increase 1.1 billion bushels in 2013, which would more than address the estimated drop in U.S. production. This production expansion quickly reduces the increase in commodity prices, dropping feedstock costs.

<sup>9</sup> See, e.g., NPPC Letter at 12 n.38 (EPA-HQ-OAR-2012-0632-0012).

the U.S. is produced in areas not significantly impacted by drought conditions this year). Increased demand for agricultural oils leads to larger supplies of protein-rich meal, which suppresses livestock protein prices. In addition, the livestock sector has benefitted from more ethanol plants removing corn oil from distiller grains to provide a feedstock for biodiesel and advanced biofuels.

Animal fats are also used as a feedstock for biodiesel production, which increases the value of animal agriculture. Centrec Consulting Group, LLC has established that the “price correlations between crude soybean oil (SBO) and tallow, choice white grease (lard) and poultry fat have all increased since January 2007.” Centrec Consulting Group, LLC, *Biodiesel Demand for Animal Fats and Tallow Generates an Additional Revenue Stream for the Livestock Industry*, at 2 (Sept. 2012). The more correlated price relationships hint at an increased alignment of utilization across these feedstocks (e.g., they are increasingly used for the same purpose such as biodiesel production) and that they are impacted by similar market forces such as changes in demand for biodiesel production. “While these by-products are not primary drivers in determining the prices paid for poultry, fed cattle and market hogs, they do affect the profit margins in these industries by increasing the by-product ‘drop value.’ As a result, the increased prices received for the animal fats and tallow has helped support or increased the prices paid for the animals.” *Id.*

The analysis conducted by Centrec in 2012 summarized the increase in drop value for steers based upon values in 2007 compared to 2012. The value of edible and inedible tallow increased by \$16.79 per steer. It is conceivable that biodiesel demand for tallow could have contributed between \$10 to \$12 per head of the increased drop value (approximately 60 to 72% of the difference). Using 2011 slaughter numbers for beef steers and heifers only (representing 78% of the total cattle slaughtered), total contribution of biodiesel demand could possibly have ranged from \$262.6 MM to \$315.2 MM. Analyses of pork and poultry also showed positive impacts.

A number of livestock production groups are on record supporting biodiesel production. For example, the Western Organization of Resource Councils have recognized the benefits of biodiesel for cattle producers. See Western Organization of Resource Councils, *Biodiesel Benefits for Cattle Producers*, <http://www.worc.org/Biodiesel-Benefits/>. The Iowa Cattlemen’s Association has also expressed support for biodiesel production, recognizing the environmental benefits of using animal byproducts for renewable fuel generation and the benefits to rural economies. ICA Policy, Business Issues Committee, *available at* <http://iacattlemen.org/policy-making.aspx>. Even the National Pork Producers Council, in the context of these waiver requests, has expressed its support for “incentives for ... the use of bio-diesel and renewable diesel made from animal fats.” NPPC, *Biofuels Development*, <http://www.nppc.org/issues/environment-energy/biofuels-development/>.

Finally, recycled cooking oil, animal fats, other biogenic waste oils and algae qualify as feedstocks for the RFS. The supply and availability of waste grease (“yellow grease”) is more difficult to quantify than for virgin agricultural oils. Most yellow grease is produced by

restaurant and food operations as they recycle cooking oils. Consequently, yellow grease output is directly tied to the number and type of restaurants in a given location (the typical McDonald's changes their cooking oils about every two weeks). For example, New York State produces roughly 180 million pounds of yellow grease annually. If all of this were used for biodiesel production, this would provide 24 million gallons of biodiesel. As Congress recognized, the requirement creates incentives to continue to seek out and develop these other feedstocks.

Thus, a waiver of the biomass-based diesel and advanced biofuel requirement would actually exacerbate the concerns raised by the waiver requests. Indeed, as the corn market adjusts to the expected crop production, more use of advanced biofuels to meet the RFS may occur, continuing to move this country toward the goals set by Congress. A waiver is simply not the answer.

3. The letter requests cannot establish a "severe" harm to the economy.

A State must show that implementation of the RFS will "severely" harm the economy. EPA properly determined that Congress' use of the term "severe" must indicate a high threshold for granting a waiver. In 2008, despite finding a waiver could reduce the price of corn, EPA found that the evidence "clearly does not meet the criterion of a high threshold for severe economic harm." 73 Fed. Reg. at 47,183. While the required volumes are higher today than in 2008, as in 2008, the RFS mandate simply cannot be shown to be causing a "severe" harm to the economy of any State. This is true even if the RFS is a contributing factor to increased prices in corn.

Although some argue that "EPA cannot create an insurmountable test for obtaining a waiver or require an amount of documentation and support that makes it unavailable for States and regulated parties to submit successful waiver provisions," NPPC Letter at 15 (EPA-HQ-OAR-2012-0632-0012), the pending requests wholly fail to meet any minimal threshold. That these industries are experiencing economic harms and that such harms may be in the millions of dollars does not automatically make it "severe." By comparison, the biodiesel industry has faced many challenges in its short commercial history, and it will be devastated by extreme loss of production caused by a waiver of the RFS. EPA has estimated that approximately 71% of biodiesel producers are located in rural areas, and a 30-million gallon plant will spend nearly \$140 million on goods and services. 77 Fed. Reg. at 59,477. The loss of production, and even shutting down of a plant that might occur as a result of a waiver, would be devastating to these communities, as opposed to the mere reduction in profits margin for the poultry and livestock industries. The impacts of the drought are being felt by many industries, and the waiver provisions were not intended to alleviate the impacts to one over another. Congress already made that decision. Moreover, it is not EPA that is creating an "insurmountable test," rather it is Congress that expressed its intent that any waivers of the RFS program be limited to "severe" cases, recognizing the goals and purposes of the program to promote use of renewable fuels.

4. A waiver cannot be based solely on alleged harms to particular sectors of the economy, as EPA would be reweighing the policy analysis conducted by Congress.

The letter requests cannot show the RFS would severely harm the overall economy of a State or region.<sup>10</sup> In enacting the RFS, Congress understood the costs and benefits of the RFS. Congress determined that promoting rural economies was a key purpose of the RFS. *See, e.g.*, 151 Cong. Rec. S6601, S6603 (daily ed. June 15, 2005) (Statement of Sen. Nelson) (“I mentioned this legislation is a win for farmers in rural communities. ... Merging the realities of agricultural economics and farm policy into energy legislation is the type of responsible legislation the voters sent us here to enact.”). Congress made a determination that increased use of renewable fuel was important and necessary for this country’s energy independence and security, environment, and economy. Congress carefully considered the potential costs against the numerous benefits. It would be nonsensical for the waiver provision to then allow EPA to reweigh these costs and benefits and focus on one particular industry in isolation. *See* Wallace E. Tyner, et al., *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, Purdue University, at 12 (Aug. 2012) (“In considering a waiver, EPA cannot change the loss, but can only redistribute it among the affected parties—ethanol producers, livestock producers, corn growers, and ultimately domestic and foreign consumers.”).

Congress carefully chose its words in requiring a “severe” harm to the “economy” for a waiver to occur. Elsewhere in the statute, Congress expressly provides for consideration of impacts on consumers and, specifically, on the price and supply of agricultural commodities. *See* 42 U.S.C. §§ 7545(o)(2)(B)(ii)(VI), (o)(8)(A). This further illustrates that, in the waiver provision, where such considerations are absent, Congress was concerned with the overall economic impacts from the price of renewable fuel, not indirect economic impacts on other industries. Moreover, Congress included procedural safeguards, including requiring consultation with the Departments of Energy and Agriculture and public notice and comment. If EPA was limited to considering the costs of the program on one sector, these procedures would be virtually meaningless.

In 2008, EPA also determined that, despite the potential decrease in feed costs that may be attendant with a waiver of the RFS, the impacts were not severe when compared to the overall economy. 73 Fed. Reg. at 47,177. EPA compared Texas’ \$1 trillion dollar economy to the modeled \$53-207 million in reduced feed costs. *Id.* These impacts were still deemed small even when compared just to the “over \$10 billion livestock industry.” *Id.* Only Georgia can even assert that it provided information to address this issue, providing general information to the size of the agricultural industry in the state and unsupported estimates of potential

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<sup>10</sup> EPA declined to determine if this was the appropriate test for considering a waiver, but found that, even if it could consider whether the RFS caused a severe harm to a sector of the economy, it “would still evaluate the overall impacts on the economy and other factors before exercising its discretion under the ‘may’ clause to grant or deny the waiver request.” 73 Fed. Reg. at 47,172. NBB believes EPA must consider the economy as a whole and, in any event, EPA should deny the waiver even if it finds an impact on the specific sectors addressed in the States’ letters.

additional costs.<sup>11</sup> Even under its unsupported estimate of \$516 million in extra costs “due to the drought and the upward pressure on corn prices caused by the demand created by the RFS for ethanol,” this is compared to the \$5.4 billion poultry industry that has \$20 billion total economic impact to the State for a State with almost \$720 billion in total economy. University of Georgia, *Ag Snapshots: A Brief Focus on Georgia’s Agricultural Industry*, at 4, 19 (2012). Furthermore, volatility in feed prices is nothing new to the livestock and poultry industries, which, like any other business facing the potential consequences of the drought conditions, must adapt to the market conditions, including reduced demand, and can take steps to minimize the costs, such as by using distiller by-products for feed. None of the letter requests for a waiver provide sufficient information for the public to understand the potential impacts on the overall economies of these States, but EPA must keep in mind the strength of these industries compared to the need of the mandate for supporting domestic biofuel production that Congress determined was necessary for this Nation’s policy goals.

- C. Even if EPA could consider the alleged adverse effects on one sector of a State’s a region’s economy when considering a waiver, EPA must consider the broader impacts of a waiver and the benefits of the RFS.

Calls for a waiver of the RFS focus solely on the alleged reduction in corn and soybean prices and, therefore, the potential reduction in feed costs. But, EPA must consider the potential ramifications of a waiver, including the overall benefits of the RFS in considering a waiver request. The RFS has, in fact, provided numerous benefits to rural economies and to consumers by reducing the need for fossil fuels.

The biomass-based diesel and advanced biofuel requirements have helped achieve Congress’ policy goal of creating jobs while increasing the production and use of biodiesel in the U.S. In 2004, before the incentive was initially enacted, the U.S. produced 25 million gallons. In 2011, the first full year of a strong RFS program, the industry produced nearly 1.1 billion gallons. The industry is on pace for a similar level of production in 2012. NBB estimates that the U.S. biodiesel industry supported more than 39,000 jobs in 2011, in all sectors of the economy, and added more than \$3.8 billion to the Nation’s Gross Domestic Product, and we will do so again in 2012. John M. Urbanchuk, Cardno Entrix, *Economic Impact of Removing the Biodiesel Tax Credit for 2010 and Implementation of RFS2 Targets Through 2015*, at 6 (June 8, 2011). A 1.3 billion gallon requirement would support more than 50,000 jobs, and add more than \$4.9 billion to the GDP.<sup>12</sup> *Id.* As Congress recognized, the presence of biofuel companies provide significant benefits to the rural economies. The State Energy Conservation Office of Texas, for example, has long recognized the benefits of biofuel production to local communities in Texas in terms of employment and the tax base. See State Energy Conservation Office, *Texas Ethanol Plants*, [http://www.seco.cpa.state.tx.us/re\\_ethanol\\_plants.htm](http://www.seco.cpa.state.tx.us/re_ethanol_plants.htm); see also State Energy Conservation Office, *Biodiesel Fuel*, [http://www.seco.cpa.state.tx.us/re\\_biodiesel.htm](http://www.seco.cpa.state.tx.us/re_biodiesel.htm). The State agency further noted that, in Texas -- the nation’s second-leading agricultural-producing

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<sup>11</sup> The letter merely states “[a]ccording to the University of Georgia.” Georgia Letter at 2 (EPA-HQ-OAR-2012-0632-0208).

<sup>12</sup> EPA finalized a 1.28 billion gallon biomass-based diesel requirement for 2013.

state, its farmers and ranchers are increasingly being challenged due to unpredictable weather and economic uncertainty: “Ethanol and biodiesel production offers rural communities the greatest opportunity for economic growth...” State Energy Conservation Office, *Crops for Fuel*, <http://www.seco.cpa.state.tx.us/energy-sources/biomass/agriculture.php>.

Biodiesel has also fulfilled Congress’ goals of energy independence and addressing climate change. Biodiesel continues to play a major role in expanding domestic refining capacity and reducing our reliance on foreign oil. The 4.6 billion gallons of biodiesel produced in the U.S. since 2005 have displaced an equivalent amount of diesel fuel with a clean-burning, efficient fuel that the EPA estimates reduces lifecycle greenhouse gas emissions by as much as 86 percent compared to petroleum diesel fuel and creates 5.5 units of energy for every unit of energy that is required to produce the fuel. Biodiesel is an environmentally safe fuel, and is the most viable transportation fuel when measuring its tailpipe emissions, lifecycle carbon emissions and energy balance. Since 2005, biodiesel has reduced lifecycle greenhouse gas emissions by 57.5 billion pounds, the equivalent of removing 5.07 million passenger vehicles from America’s roadways (based on 4.3 billion gallons of biodiesel production from January 1, 2005 through August 31, 2012). EPA has found that increasing the biomass-based diesel volume requirement by 280 million gallons “is expected to reduce imports of petroleum by about 242 million gallons.” 77 Fed. Reg. at 59,470.

Moreover, tailpipe emissions from traditional diesel -- primarily from trucking fleets, school buses and other vehicles -- are a significant health and air quality concern. In its National-Scale Air Toxics Assessment, EPA “concluded that diesel exhaust is among the substances that may pose the greatest risk to the US population.” EPA Fact Sheet, *National-Scale Air Toxics Assessment for 2005*, at 4 (2011), available at [http://www.epa.gov/ttn/atw/nata2005/05pdf/nata2005\\_factsheet.pdf](http://www.epa.gov/ttn/atw/nata2005/05pdf/nata2005_factsheet.pdf). Thousands of trucks and buses hit the road every day burning traditional diesel fuel. Substituting higher amounts of biodiesel for traditional diesel fuel is the simplest, most effective way to immediately improve emissions. Recognizing, for example, the air quality benefits of biodiesel over diesel fuel, several of the States asking for a waiver today have incentives for increasing biodiesel use or production in their own State, including Arkansas, Maryland, Virginia, and New Mexico. See, e.g., Ark. Code § 15-13-202; MD Agriculture Code § 10-1505; Maryland State Fin. & Proc. § 14-408; VA Code Ann. § 58.1-439.12:02; VA Code Ann. § 2.2-1111; N.M.S.A. 1978, § 57-19-29.

A waiver would eliminate these benefits envisioned by Congress and, thus, EPA must consider the broader ramifications of a potential waiver.

III. Even if EPA Somehow Determines that the Unsubstantiated Letters Raise Significant Concerns, a Waiver Would Cause More Harm than Benefit, Undermining the Purposes of the Program, and the Requests Must Be Denied.

In 2008, EPA determined that it has discretion to grant or deny a waiver request, “even in instances where EPA finds that implementation of the program would severely harm the economy or environment of a State, region or the United States, or where there is inadequate domestic supply.” 73 Fed. Reg. at 47,172. It recognized that it must look “broadly at all the

impacts of implementation of the program, and all of the impacts of a waiver.” *Id.* This is appropriate given that the waiver would be of “statutory requirements designed to require the expanded use of renewable fuels.” *Id.* In denying the recent request for a waiver of the 2011 cellulosic biofuel volume, EPA reiterated its discretion to consider other circumstances even where the criteria in the statute can be established. EPA May 22, 2012 Denial of API/AFPM/WSPA Waiver Request at 16 n.52. EPA noted that “EPA will consider such circumstances on a case by case basis,” and “there may be circumstances where inadequate domestic supply is a result of short term natural disaster or infrastructure disruption that would reasonably be expected to be corrected in sufficient time to allow obligated parties to comply with their obligations through use of the deficit carry forward provision.” *Id.* at 16-17 n.52. Thus, EPA must consider the implications of a waiver and whether a waiver would be appropriate given the clear intent of Congress. In so doing, the only rational decision would be to deny the waiver requests, even if EPA finds sufficient evidence to indicate a waiver could mitigate the asserted harms and such harms are “severe” and “caused” by the RFS.

As noted, the purpose of the EISA was to increase production of renewable fuels. One of the key benefits was to stimulate economic growth in the rural sector. Any evaluation of a waiver request must consider not only the alleged impacts of the waiver on the livestock and poultry industries, but also the negative impacts on farmers, jobs and fuel prices that would be created by a waiver. Congress was aware that there may be some growing pains as a result of its requirements to increase renewable fuel production and use, but still established mandatory *minimum* volumes in the statute, and, while EPA is permitted to set the volume levels subsequent to the program establishment period based on specific factors (which include costs on consumers and commodities), Congress retained a minimum statutory level for biomass-based diesel throughout the life of the program. 42 U.S.C. § 7545(o)(2). The RFS and its expansion in 2007 provide the incentives needed to promote advanced biofuels and reduce government subsidies.

None of the letters address the potential impacts of a waiver, except for an unsupported claim that “as the waiver request is limited in scope, any resulting impact on the biofuels industry would be minimal.” Maryland/Delaware at 2 (EPA-HQ-OAR-2012-0632-0010). This is far from the truth for the biodiesel industry.<sup>13</sup>

Biodiesel is America’s first advanced biofuel and when compared to gasoline, diesel and ethanol, it is at a fundamentally different stage of development and should be treated as a new fuel in the marketplace. The biodiesel industry has had commercial-scale production for only about six years, and has had a working RFS program for only two full years. Biodiesel is an up-and-coming industry and is in a far more fragile stage of development. Many biodiesel producers are also small companies that are already being significantly impacted in today’s economy.

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<sup>13</sup> Indeed, for this statement to be true, the market would result in continued purchase of renewable fuels, indicating that the RFS is not the driver of its use and any waiver would not address the alleged harms.

As described above, the harms to the biodiesel industry can be significant if a waiver is contemplated. Just the mere requests for a waiver have created uncertainty in the marketplace, affecting demand for biodiesel and placing significant strains on producers, particularly small producers. As noted above, some analyses find that, a waiver of the RFS, would substantially reduce the biodiesel market by eliminating demand for biodiesel refined from soybean oil, a significant portion of production. It cannot be that EPA could utilize its limited waiver authority to remove biodiesel from use in the transportation sector and cause the industry to take several steps backwards. This is the complete opposite of the intent of the program to spur development and promote a strong domestic biofuel industry. Moreover, as outlined above, the biodiesel industry helps lower feed costs, despite increased soybean prices as a result of the drought. Thus, a waiver here would be significantly more detrimental to the biodiesel industry and would substantially undermine the intent of Congress, far from the intent of the waiver provision. Such harm would clearly outweigh any minimal benefit to the livestock and poultry industry that could result if corn and soybean prices are somewhat eased through a waiver. As such, EPA must use its limited discretion and deny any such waiver requests.

IV. The Waiver Requests do not Address the Biomass-Based Diesel or Advanced Biofuel Requirements and, on those grounds alone, These Volumes Should Not be Included as part of EPA's Consideration of a Waiver.

It is apparent that the waiver requests are concerned with the conventional biofuel portion of the RFS. As noted above, however, corn ethanol is not required under the statute, and any advanced biofuel can also meet this portion of the RFS. As such, EPA must only consider whether, and to what extent, the conventional portion of the RFS should be reduced (if at all) based on corn ethanol's expected contribution to the program. In so doing, EPA can and should consider the availability of advanced biofuels, such as biomass-based diesel and sugar ethanol, above the 2 billion gallons required for 2012 and the 2.75 billion gallons required for 2013. Biodiesel, in particular, has had excess production in both 2010 and 2011 above the statutory required volumes. Excess RINs from 2011 can also be used for compliance of the "conventional" biofuel portion.

In any event, EPA should not, and cannot, reduce the advanced biofuel or biomass-based diesel portions of the overall program. The statute allows EPA to grant a waiver of the requirements "in whole or in part," indicating that EPA could reduce only one of the volume mandates, while leaving the others intact. In other words, EPA could reduce the overall renewable fuel standard, while maintaining the advanced biofuel and biomass-based diesel statutory volumes intact. This is further evidenced by the specific waivers provided for cellulosic biofuel and biomass-based diesel where EPA *may* also reduce the volumes in the other categories "by the same or a lesser volume," indicating that EPA can consider each category separately. 42 U.S.C. § 7545(o)(7)(D)(i), (E)(ii). This indicates that Congress anticipated that one volume may be waived, while others stay as set forth in the statute. EPA implicitly recognized its authority to waive only one category in considering (though denying) the request for a waiver of the 2011 cellulosic biofuel volume. This is also consistent with the

purposes of the statute to promote diversification and use of renewable fuels, and EPA's obligation to "ensure ... at least the applicable volume" of each of the categories are met. *Id.* § 7545(o)(2)(A)(i). Moreover, the waiver letters simply provide no grounds to reduce these mandates only asking for a waiver of the "appropriate" or "applicable" volumes. Nor are there any such grounds.

Despite the drought conditions, biodiesel production will not contribute to the spikes in prices, nor should there be a shortage in production. Biodiesel is made from an increasingly diverse mix of feedstocks, including, but not limited to, recycled cooking oil, agricultural oils such as soybean and canola oil, animal fats, algae and other biogenic waste oils. New feedstocks are being added every year (camelina, pennycress and cottonseed oil), and most biodiesel producers can switch from one feedstock to another if prices rise or supplies are short. Use of these other feedstocks has increased, with soybean oil only projected to make up 47% of the feedstock for biodiesel production in 2013. See John R. Kruse, PhD, IHS Global Insight, *Biodiesel Production Prospects for the Next Decade*, (Mar. 11, 2011) (EPA-HQ-OAR-2010-0133-0125). Therefore, for biodiesel, the drought's impact on any one commodity market is insignificant. Because of that, and because of flexibility built into the RFS, the impact of biodiesel production on commodity markets is minimal.

EPA has provided limited guidance on what inadequate domestic supply means. In the final RFS2 rule, EPA noted "that it is ultimately the availability of qualifying renewable fuel, as determined in part by the number of RINs in the marketplace, that will determine the extent to which EPA should issue a waiver of RFS requirements on the basis of inadequate domestic supply." 75 Fed. Reg. 14,670, 14,698 (Mar. 26, 2010). EPA also indicated it would look at the production outlook reports and other information in considering waiver petitions. *Id.* at 14,729. In denying the recent waiver request of the 2011 cellulosic biofuel volume based on inadequate supply, EPA again indicated that "[f]or most biofuels EPA believes that a demonstration by a petitioner that there were insufficient RINs available from the previous year (subject to the 20% carry-over limitation) and the current year's production to allow for compliance with the standard could be a basis for finding that there was an 'inadequate domestic supply.'" EPA May 22, 2012 Denial of API/AFPM/WSPA Waiver Request at 16. Because the waiver requests do not address these mandates, EPA need not address these issues here. Nonetheless, EPA recently finalized a biomass-based diesel volume of 1.28 billion gallons for 2013 (1.92 ethanol equivalent volumes), based on its belief that there will be sufficient volumes of biodiesel available. 77 Fed. Reg. 59,498.

In finalizing the biomass-based diesel volume for 2013 at 1.28 billion gallons, which is a modest increase from the 1 billion gallon level required for 2012, EPA concluded "the volume we are finalizing today is feasible and consistent with the overall analytic approach to the RFS2 program **and also consistent with the overall intent of the Act to expand the use of renewable fuels through the year 2022.**" 77 Fed. Reg. at 59,459 (emphasis added). EPA also found that the biomass-based diesel industry "is already producing at a rate consistent with an annual volume of about 1.3 billion gallons." *Id.* EPA further found that requiring an increasing amount of biomass-based diesel creates "greater certainty for both producers of biomass-based diesel

and obligated parties and increasing certainty that the intended GHG emissions reductions and energy security benefits associated with the use of advanced biofuels will be realized.” *Id.* at 59,462. NBB agrees. While EPA assumes the increased requirements will be met with biodiesel from soybean oil,<sup>14</sup> EPA recognized the continued investment and innovation that is occurring in the industry. *See id.* at 59,459, 59,461-59,462. NBB believes the industry will continue to diversify its feedstocks and the drought conditions will have minimal impact, if any, on biodiesel production. As noted, nothing in the waiver requests address or even purport to raise any concerns with the advanced biofuel mandates. Thus, EPA should reject any attempts to use the public comment period here as a vehicle to ask EPA to reconsider or reassess this determination, as outside the scope of this proceeding.

V. EPA Must Provide Enforceable Requirements to Guard Against Baseless Waiver Requests in the Future, Which Only Serve to Cause Instability in the Market.

EPA must provide a *meaningful* opportunity for the public to comment to the extent it determines a waiver is appropriate. While NBB appreciates the opportunity to submit comments on the letters submitted by various States, it remains concerned with EPA’s failure to require the States purportedly petitioning EPA to waive the RFS to provide adequate support for its request in the first instance. Section 211(o)(7)(A) gives EPA authority to waive, in whole or in part, the RFS “on petition by one or more States, . . . or by the Administrator on his own motion,” based on a determination by the Administrator “after public notice and opportunity for comment” that implementation of the requirement would severely harm the economy. 42 U.S.C. § 7545(o)(7)(A) (emphasis added). EPA must approve or disapprove the petition within 90 days after the date on which the petition is received. *Id.* § 7545(o)(7)(B). In order for the public to have a meaningful opportunity to comment, however, the petition and notice must provide the evidentiary support and grounds for a waiver. The Arkansas and North Carolina letters cited by EPA in its notice wholly fail to meet this minimum threshold.<sup>15</sup>

In 2008, Texas submitted a similar request. As EPA found, “the initial submission by the State of Texas provided little analytical or evidentiary basis for their request.” 73 Fed. Reg. at 47,183. While EPA provided for notice and comment on the 2008 Texas Request, given that it was the first such request under the program, EPA recognized that more analysis should be provided in the first instance, not during the public comment period as was done in 2008. *Id.* at 47,183-47,184. “This is not the most efficient use of EPA’s or the public’s resources, especially given the short time specified in the Act for EPA to make a decision.” *Id.* at 47,184. Indeed,

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<sup>14</sup> EPA determined that there would be significantly more soybean oil available than would be necessary to meet the soybean-based biodiesel portion of the 1.28 billion gallon mandate. 77 Fed. Reg. at 59,465. This remains true even using USDA’s more recent estimate of U.S. supply of soybean oil for 2012/2013. *See* USDA, ERS, *Oil Crops Outlook* (Sept. 13, 2012), available at <http://www.ers.usda.gov/publications/ocs-oil-crops-outlook/ocs12i.aspx>. The forecasted soybean oil supply in the September 2012 report for 2012/2013 crop year (20,060 million pounds), *id.* at 11, would still provide more than enough for estimated domestic non-biodiesel use (14,200 million pounds) and the approximately 4,530 million pounds needed to meet the soybean-based biodiesel portion of the 1.28 billion gallon mandate in 2013. 77 Fed. Reg. at 59,465.

<sup>15</sup> The other letters submitted by the States in support of a waiver similarly provided no analysis except for back of the envelope numbers.

unlike the 2008 Texas request, it is entirely unclear what specific remedy the States are requesting, particularly where the 2012 compliance year is almost 3/4 completed. Arkansas merely refers to a waiver of “an appropriate volume of renewable fuel,” while North Carolina requests “the applicable volume of renewable fuel be waived.” 77 Fed. Reg. at 52,716. The paucity of information submitted with their requests make it impossible to provide the public with any meaningful opportunity to comment. As EPA found, submission of information during the public comment period to support a waiver does not give the public the opportunity to respond to the substantive grounds until after the comment period had closed. 73 Fed. Reg. at 47,184. Thus, to the extent that EPA determines a waiver may be warranted, NBB requests that it provide the public with an adequate time to comment on the specific action and the specific grounds. This is particularly true given the fact that none of the letters addresses biomass-based diesel or advanced biofuels, and the biodiesel industry should be given the opportunity to address any specific claims that may arise during the comment period or EPA’s consideration of these requests.

In other words, if EPA wished to take action based on information that was not part of the record when the initial public notice was issued, EPA would be required by the statute to provide a new notice and comment period and consult again with DOE and USDA. Indeed, the requests essentially place the burden on EPA to make its own motion to waive. If that is the case, it must provide notice and comment on the basis for that motion, as EPA has required for other types of waiver requests. *See, e.g.*, 43 Fed. Reg. at 11,259 (“Substantive amendments (other than technical corrections of information already received by EPA) may be considered to be new applications, and the date such amendments are received may be treated as the beginning of the [statutory time frame for which to respond].”). The notice requesting general information is not sufficient to give the public a meaningful opportunity to comment. Nonetheless, for the reasons outlined above, NBB believes the petitions do not, and cannot, establish adequate grounds for any waiver of the RFS.

EPA must also give the public notice and an opportunity to comment on any changes in interpretation of the waiver provisions that it may consider. Despite no challenges to the denial of the Texas waiver petition, NPPC’s request seeks to have EPA re-interpret the waiver requirements, referring to the 2008 denial as mere guidance. It first asserts that EPA’s prior interpretation allowing it to consider the RFS’s impacts on harms to the economy generally, as opposed to a particular sector of the economy, is not authorized under the statute, arguing EPA can consider a sector of the economy based on the use of the term “region” and asserting that “many different pork, beef, milk and poultry producing regions have been severely impacted by the implementation of the RFS applicable volume for renewable fuel.” NPPC Letter at 14-15 (EPA-HQ-OAR-2012-0632-0012). It also contends that the “harm is manifest and supported in this request for a waiver,” and “EPA cannot create an insurmountable test for obtaining a waiver or require an amount of documentation and support that makes it unavailable for States and regulated parties to submit successful waiver petitions.” *Id.* at 15. As described above, EPA’s 2008 interpretation is correct, and, in any event, EPA must provide a rational explanation for any change in interpretation. If necessary, EPA should promulgate a regulation to ensure that the public’s opportunity to comment is meaningful, and they need not respond to

baseless requests, which only serve to create instability in the market, contrary to Congress' intent.

VI. To the Extent EPA does deem a Waiver is Necessary, Any Such Waiver Must be Limited in Time and Must Be Prospective Only.

Any waiver issued by EPA is time limited. A waiver cannot exceed one year, unless renewed by EPA, after consultation with DOE and USDA. 42 U.S.C. §7545(o)(7)(C). In its denial of the Texas petition, EPA indicated petitioners should state the requested start date and duration of the waiver, and submit petitions at least six months in advance (or an explanation as to why this timeline could not be met). 73 Fed. Reg. at 47,184. EPA also indicated that a request for an extension of a waiver should be submitted three months before the waiver period ends and include an update of the information and rationale originally submitted. *Id.* None of the letter requests specifically identify the time frame, though do reference 2012 and 2013. These requests were not submitted until August of this year, and EPA's decision is not due until November. Any requests for a waiver of the 2012 volumes should, therefore, be denied. This could impact contracts already entered for the remainder of this year, and significantly upset the market. As EPA itself has stated, it should "avoid the disruption and lack of certainty in the program that could follow if EPA readily re-opened the annual standard to revision during the single year." 76 Fed. Reg. 38,844, 38,882 (July 1, 2011). Thus, while NBB does not believe that a waiver is appropriate, any such waiver should be prospective only.

VII. Summary and Conclusion

Congress intended the RFS to further incentivize U.S. production and use of advanced biofuels, including biomass-based diesel. These unsubstantiated calls for a waiver by some with vested interests in seeing the program fail should not be entertained by EPA. They only serve to create uncertainty in the marketplace.

Again, NBB appreciates having the opportunity to comment on the letters requesting a waiver of the RFS. In short, the letters simply do not provide any support for EPA to use its very limited authority to waive any portion of the program. And, while we appreciate the work of the EPA in the ongoing implementation of the RFS program, we do not believe that, given the lack of information provided in the letter requests, the notice here has provided the public with a meaningful opportunity to comment. As such, to the extent EPA does determine a waiver may be necessary, it should treat it as its own motion under Section 211(o)(7)(A) and give the public an opportunity to comment on the proposed waiver and grounds in support.

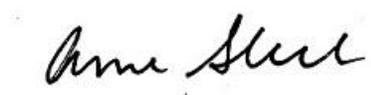
In any event, there simply are no grounds to waive the biomass-based diesel or advanced biofuel mandates, and any waiver would have significant adverse impacts on these industries. Biodiesel is America's only domestic, commercial-scale advanced biofuel, and the U.S. biodiesel industry stands ready to meet the RFS requirements, despite the recent drought conditions and economic difficulties that have arisen as a result. With a waiver, however, all the progress that has been made and the benefits, as envisioned by Congress, realized will be gone. These benefits include, among other things, reduction in greenhouse gas and other air

emissions from the transportation sector; increased energy security and fuel diversification; reduced dependence on foreign oil; job creation and infusion of investment into the U.S. economy, particularly in rural areas; and promotion of sustainable agricultural practices.

As such, NBB requests that the waiver requests be denied, and EPA promptly and unequivocally issue a determination that it will require and enforce the mandated statutory volumes for 2012 and 2013, including its recent regulatory determination for 1.28 billion gallons of biomass-based diesel.

Please do not hesitate to contact me if you have any questions regarding the foregoing.

Sincerely,

A handwritten signature in black ink that reads "Anne Steckel". The signature is written in a cursive, flowing style.

Anne Steckel  
Vice President of Federal Affairs  
National Biodiesel Board