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Congress of the United States
House of Representatives
Washington, DC 20515-4905

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The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Administrator Jackson:

The Renewable Fuel Standard (RFS) has had a significant impact on our country's fuel supply. When enacted, its goal was to increase the United States' domestic energy capabilities. Congress expanded the RFS with the Energy Independence and Security Act of 2007 (EISA), and the mandates took effect in 2010. The country's fuel producers, however, have struggled to meet some of the biofuel requirements.

The cellulosic biofuel requirement has been particularly problematic. EISA requires refiners to purchase 500 million gallons of cellulosic biofuels in 2012. The Act also, however, instructs the Environmental Protection Agency (EPA) to reduce that amount based on projections of actual production. EISA states:

(D) CELLULOSIC BIOFUEL— (i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, *the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year.*¹

Thus, under EISA, if the amount of commercially available cellulosic biofuel is likely to be less than EISA's minimum requirement, the Energy Information Administration (EIA) is required to provide the EPA with an estimate of the likely amount of commercially available cellulosic biofuel in the upcoming year. The EPA is then charged with projecting how much cellulosic biofuel is likely to be available and reducing the mandate accordingly.²

Requiring the EPA to reduce the mandate based on availability allowed Congress to establish ambitious thresholds without risking that refiners might be forced to violate EISA and pay associated penalties because the mandated amounts were simply unavailable. The EPA, however, has consistently set the thresholds for cellulosic biofuels above the amount that is actually commercially available. As a result, refiners are penalized for violating an Act that it is impossible for them to comply with.

¹ The Energy Independence Security Act of 2007, 42 U.S.C. §17381(7)(D)(i) (2007) (emphasis added).

² *Id.*

In 2010, the EPA estimated that 5 million gallons of cellulosic ethanol would be available. The actual amount available was zero gallons.³ Despite this, the EPA increased its projection for 2011 to 6.6 million gallons. The EPA has not released the amount of cellulosic biofuel that was available in 2011, but based on industry statements, it appears likely that, once again, there was none available. Nonetheless, the EPA again increased its projection for 2012 from 6.6 to 8.65 million gallons.

The EPA's 2012 projection is at odds with assessments of how much cellulosic biofuel will be available. The refiners who are subject to the mandate complain that there is no cellulosic biofuel available on the market. A recent opinion piece written by representatives of four major producers of cellulosic biofuel confirms this. The ethanol producers estimate that their first plants will produce fuel commercially in 24 months.⁴

The EPA's 2012 projection is a deviation even from the EIA's estimate. The EIA estimated that 6.9 million gallons would be available,⁵ but the EPA projection is 8.65 million gallons—a 25 percent increase.

The EPA maintains that it is justified in intentionally setting its projections above what it expects to be available. The EPA wrote, "basing projections only on proven production levels would be unlikely to provide the market incentives for this fuel that are needed to meet Congressional goals in establishing cellulosic biofuels as part of the RFS program."⁶

Congress' goal, however, as specifically stated in EISA, is for the EPA to reduce the projected volume to the "projected volume available." The EPA has usurped Congress' policymaking authority in order to satisfy its own goals.

The result in 2011 was that refiners paid approximately \$6.8 million in penalties for failing to buy a product that did not exist.⁷ These penalties could increase in 2012 as the EPA's projection has increased even though the amount of commercially available cellulosic ethanol appears to remain at zero.

These fines are ultimately passed directly to U.S. consumers in the form of higher gas prices. Congress can only maintain the renewable fuel mandate if it can depend on the EPA to accurately assess the amount of each fuel that is actually available and adjust its projection accordingly as it is statutorily required to do.

Please respond to the following questions by August 17, 2012:

³ Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, Environmental Protection Agency, 40 C.F.R. pt. 80 (Jan. 9, 2012).

⁴ Jan Koninckx, Adam Monroe, Javier Salgado, and Jeff Lutt, *Current Biofuels Policy Helps Drive Economy*, Politico (July 16, 2012), available at <http://www.politico.com/news/stories/0712/78544.html>.

⁵ Kris Beville, *EIA Issues 2012 Cellulosic Biofuel Predictions*, Ethanol Producers (Nov. 16, 2011), available at <http://ethanolproducer.com/articles/8355/eia-issues-2012-cellulosic-biofuel-predictions>.

⁶ Environmental Protection Agency, *Response to Petition of the American Petroleum Institute and the National Petrochemical and Refiners Association for Reconsideration of Portions of the December 9, 2010 Rule Amending the Renewable Fuel Standard Program Regulations and Response to Petitions of API, NPRA Western States Petroleum Association and Coffeyville Resources Refining & Marketing, LLC, for a Waiver of the 2011 Cellulosic Biofuel Standard* (2012).

⁷ Matthew Wald, *A Fine for Not Using a Biofuel That Doesn't Exist*, NY Times (Jan. 10, 2012), available at <http://www.nytimes.com/2012/01/10/business/energy-environment/companies-face-fines-for-not-using-unavailable-biofuel.html?nl=todaysheadlines&emc=tha25>

1. Does the EPA believe it has the statutory authority to deviate its projection of available cellulosic ethanol from the actual estimates of how much will be available? If so, how does the EPA square this with EISA?
2. If the EPA concedes that cellulosic biofuel is not being produced on a commercial level, then how do you justify having any cellulosic biofuel requirement on the refiners? Is the EPA neglecting its ethical obligation to set realistic expectations on industry?
3. What specific data did the EPA rely on to deviate from the EIA estimate? Please provide documents to support this deviation.
4. If the EPA's goal is, as it wrote, to create market incentives, how does the EPA justify a specific threshold? What data can be used to support an aspirational requirement?

Thank you for your prompt attention to this matter.

Sincerely,



F. JAMES SENSENBRENNER, JR.
Vice-Chairman, House Committee on Science, Space, and Technology

cc: The Honorable Ralph Hall
Chairman, House Committee on Science, Space and Technology

The Honorable Eddie Bernice Johnson
Ranking Member, House Committee on Science, Space, and Technology