



*Via Certified U.S. Mail – Return Receipt Requested*

February 23, 2017

Administrator Scott Pruitt  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
Mail Code 1101A  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**Re: Notice of Intent to File Suit Under Section 304(b) of the Clean Air Act, 42 U.S.C. § 7604(b), for Failure to Conduct Triennial Reports to Congress on Environmental and Conservation Impacts of the Renewable Fuel Standard and Failure to Conduct Anti-Backsliding Analysis or Determine if Mitigation Measures are Necessary as Required by 42 U.S.C. § 7545**

Dear Administrator Pruitt:

Pursuant to Section 304(b)(2) of the Clean Air Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. §§ 54.2, 54.3(a), I hereby provide notice of Sierra Club’s intent to file suit against the Administrator of the U.S. Environmental Protection Agency (“EPA”) for his “failure [] to perform an[] act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Specifically, the Administrator violated 42 U.S.C. § 7545 note (Sec. 204 of the Clean Air Act) by failing to assess and report to Congress on the environmental and resource conservation impacts of the Energy Independence and Security Act’s Renewable Fuel Standard Program. The Administrator also violated 42 U.S.C. § 7545(v)(1)-(2) by failing to complete the required “anti-backsliding” study to determine whether the Program’s required renewable fuel volumes adversely impact air quality.

**A. The Energy Independence and Security Act’s Renewable Fuels Program Requirements**

The Energy Policy Act of 2005 (EPAAct), which amended the Clean Air Act, created the national Renewable Fuel Standard program (RFS1). 42 U.S.C. § 7546. RFS1 required reduction and replacement of petroleum-based transportation fuel, heating oil and jet fuel with a certain volume of renewable fuel. Under the EPAAct, Congress mandated the use of a minimum of 4

billion gallons of renewable fuel in the nation's gasoline supply in 2006, and increased the threshold to 7.5 billion gallons by 2012.

The Energy Independence and Security Act of 2007 (EISA) further amended the Clean Air Act by expanding the RFS program (RFS2) in several significant ways. 42 U.S.C. § 7545(o). RFS2 increased the long-term volume goals for renewable fuels to 36 billion gallons by 2022, subdivided the total renewable fuel requirement into four categories – total renewable fuels, advanced biofuels, biomass-based diesel, and cellulosic biofuels – each with explicit qualifying criteria and standards, and established grandfathering allowances exempting existing facilities producing renewable fuels from greenhouse gas reduction requirements. 42 U.S.C. § 7545(o)(2)(B)(i)(I),(II),(III),(IV).

Under RFS2, EPA determines whether a fuel qualifies as a renewable fuel based on statutory and regulatory criteria and determines the annual volume mandate for each category of biofuel. Each fuel is subject to biomass feedstock criteria as well as a minimum lifecycle greenhouse gas emission reduction threshold as compared to the lifecycle greenhouse gas emissions of the 2005 petroleum based fuels that it replaces. 42 U.S.C. § 7545(o)(1)(C). EPA also reviews and approves new pathways for fuels using new feedstocks and advanced technologies to meet the RFS2. 40 C.F.R. 80 § 1416. Regulated parties must demonstrate compliance with the Program on an annual basis by obtaining sufficient “renewable identification numbers” (RINs), which are the credits generated when fuel is produced that reflect the volume and renewable composition of each gallon of renewable fuel. 40 C.F.R. 80 §§ 1125,1126.

In setting the annual volumetric standard for each biofuel category and corresponding compliance percentages for regulated parties, 42 U.S.C. § 7545(o)(3)(B)(i), EPA also has specific waiver authorities: the authority to waive RFS volumes, in whole or in part, (1) if there is inadequate domestic supply, or (2) if “implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States.” 42 U.S.C. § 7545(o)(7)(A). To date, EPA has only exercised its waiver authority based on an insufficient domestic supply.<sup>1</sup>

Importantly however, EISA requires EPA to conduct a triennial assessment and report to Congress on the Program's environmental and resource conservation impacts to date and likely future impacts. Specifically, the law requires, “[n]ot later than 3 years after the enactment of this section and every 3 years thereafter,” an assessment and report to Congress on the impacts to date and likely future impacts of the requirements of section 211(o) of the Clean Air Act on the following:

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<sup>1</sup> U.S. Environmental Protection Agency Office of Inspector General, “EPA Has Not Met Certain Statutory Requirements to Identify Environmental Impacts of Renewable Fuel Standard,” (Aug. 18, 2016) at 2 (hereafter IG Report).

(1) Environmental issues, including air quality, effects on hypoxia, pesticides, sediment, nutrient and pathogen levels in waters, acreage and function of waters, and soil environmental quality. (2) Resource conservation issues, including soil conservation, water availability, and ecosystem health and biodiversity, including impacts on forests, grasslands, and wetlands. (3) The growth and use of cultivated invasive or noxious plants and their impacts on the environment and agriculture ... The report shall include the annual volume of imported renewable fuels and feedstocks for renewable fuels, and the environmental impacts outside the United States of producing such fuels and feedstocks ... The report required by this subsection shall include recommendations for actions to address any adverse impacts found.

42 U.S.C. § 7545 note (Energy Independence and Security Act of 2007, Pub. L. 110-140, § 204, 121 Stat. 1492 (Dec. 19, 2007)).

EISA also requires that EPA complete an “anti-backsliding” study within 18 months of the law’s passage to determine whether the renewable fuel volumes set by RFS2 will adversely impact air quality as a result of vehicle and engine air pollutant emission changes. 42 U.S.C. § 7545(v)(1)(A). “Not later than 3 years after December 19, 2007,” EPA must “(A) promulgate fuel regulations to implement appropriate measures to mitigate, to the greatest extent achievable, considering the results of the study under paragraph (1), any adverse impacts on air quality, as the result of the renewable volumes required by this section; or (B) make a determination that no such measures are necessary.” 42 U.S.C. § 7545 (v)(2).

An analysis of the program’s environmental impacts and the unintended consequences of U.S. biofuel policy is “important given conflicting scientific opinions about biofuel impacts, potential impacts outside of the EPA’s regulatory control, and divergent RFS interest.” IG Report, “At a Glance.” This information and information about the program’s unintended air quality impacts are “needed to fully inform the EPA, Congress and other stakeholders of the environmental impacts of U.S. biofuel policy.” *Id.*

**B. EPA Failed to Conduct Its Non-Discretionary Reporting Requirements in Violation of 42 U.S.C. §§ 7545 note and (v).**

EPA has failed to meet its statutory reporting requirements under EISA.

EPA's first Triennial Report to Congress pursuant to 42 U.S.C. § 7545 note was issued late, in December 2011, rather than on or before December 19, 2010.<sup>2</sup> The Report made recommendations for future assessments that would inform RFS rulemakings and other determinations such as waiver determinations for "situations involving 'severe' environmental impact." Triennial Report at xvii. Specifically, EPA recommended that future assessments "inform and design implementation of monitoring strategies and measures for evaluating impacts ... provide the scientific bases for regulatory agencies and the biofuel industry to make environmentally conscious decisions."

Under the triennial reporting mandate, EPA was required to complete a second report no later than December 19, 2013. To date, EPA has not issued the second report or a third report, which was required no later than December 19, 2016. Although EPA indicated that its failure to complete subsequent reports was the result of resource reductions, it has made no requests to Congress for subsequent report funding, nor has it communicated with Congress regarding the reporting requirement. IG Report at 5. Without appropriate information including the recommendations of the 2011 Report, EPA's ability to assess the RFS program's environmental impacts and inform Congress of potential impacts are impeded. IG Report at 6. EPA's failure to complete and issue the second and third Triennial Reports violates EISA, 42 U.S.C. § 7545 note.

In addition, to date, EPA has not conducted the required anti-backsliding analysis, nor has it determined (based on an anti-backsliding study) if mitigation measures are necessary to prevent or reduce adverse air quality impacts pursuant to 42 U.S.C. § 7545(v)(1)-(2). EPA's 2010 Regulatory Impact Analysis (RIA) provides evidence demonstrating increased air pollutants from the RFS under a variety of different modeling scenarios. IG Report at 7. Although EPA acknowledged that the RIA did not constitute the required analysis, it committed to conducting a separate study that would analyze air quality impacts of increased renewable fuel use. *Id.* However, EPA has failed to complete that study.

As a result of the Office of Inspector General's recent investigation, EPA made commitments to complete the Triennial Report to Congress by December 31, 2017 and the anti-backsliding study by September 30, 2024. IG Report at 12. However, a 7-year and approximate 15-year delay of the Administrator's non-discretionary duties disregards the purpose of the reporting requirements – to inform EPA's annual RFS volume development and to make Congress aware of the program's impacts. Under the RFS program, ethanol production in the United States has skyrocketed from 3.9 billion gallons in 2005 to 14 billion gallons in 2011, and biodiesel has grown from 0.1 billion gallons to 1 billion gallons in the same timeframe.<sup>3</sup> Given this and the expected continued growth of biofuel production under RFS2's current mandates,

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<sup>2</sup> U.S. Environmental Protection Agency, Office of Research and Development, "Biofuels and the Environment: First Triennial Report to Congress," National Center for Environmental Assessment (December 2011) (hereafter 2011 Triennial Report).

<sup>3</sup> Congressional Research Service, "Analysis of Renewable Identification Numbers (RINs) in the Renewable Fuel Standard (RFS)," Brent D. Yacobucci, July 22, 2013 at 1.

the lack of information on potential environmental and air quality impacts to inform the Program's future is particularly troubling.

### **C. Person Providing Notice**

As required by 40 C.F.R. § 54.3, the person providing this notice is:

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If you believe any of the facts described above are in error or have any information indicating that you have not violated EISA we urge you to contact the undersigned counsel immediately. Sierra Club is interested in obtaining early and prompt resolution of these allegations, and is willing to discuss them during the 60-day notice period. However, if those discussions do not occur or if the matter is not resolved to Sierra Club's satisfaction before the end of the notice period, Sierra Club will file suit on or about the 60<sup>th</sup> day following the date of this letter.



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Devorah Ancel  
Counsel for Sierra Club

cc:

Jeff Sessions, Attorney General of the United States  
Channing D. Phillips, United States Attorney for the District of Columbia