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Environmental Protection Agency

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**Re: Letters Seeking a Waiver of the Renewable Fuel Standard
Docket ID No.EPA-HQ-OAR-2012-0632**

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On behalf of the Competitive Enterprise Institute (CEI), a non-profit public policy group specializing in regulatory issues, I respectfully submit this comment letter in support of petitions requesting a waiver of the Renewable Fuel Standard (RFS).¹

Since the RFS was adopted, corn use for ethanol tripled from 1.6 billion bushels in 2005/2006 to 5.0 billion in 2011/2012. Not coincidentally, corn prices tripled from \$2.00 a bushel in 2005/2006 to \$6.00 a bushel in 2011/2012.² With the corn crop depressed by the worst drought in 50 years, corn prices hit records highs in August, reaching \$8.29 per bushel.³ Those high prices impose significant hardship on poultry, beef, pork, and dairy producers, who use corn as animal feed. By pre-allocating an ever-growing share of the nation's corn crop for ethanol manufacture, the RFS intensifies and prolongs price spikes when drought or other adverse conditions reduce supply.

Waiving the RFS would help calm corn futures markets and, in some measure, alleviate widespread economic distress in the petitioning States.

Unfortunately, the EPA has adopted a reading of the waiver provision that imposes an almost impossible burden of proof on petitioners, prejudging the issue against them. CEI cautions the EPA that failure to adjust the RFS blending requirements in light of the reasonable requests of seven governors, every major livestock industry,⁴ 156 House members, and 25 senators will vindicate criticism that the RFS is an inflexible, arbitrary, wealth-transfer scheme. Denying the waiver petitions will build support for RFS reform or even outright repeal.

Livestock Producers and State Economies Are Experiencing Severe Harm

Seven governors have petitioned the EPA to waive the RFS in whole or in part.⁵ Each presents a picture of a State economy in distress due to the impact of high grain prices on livestock producers. Two examples will make this clear.

“Virtually all of Arkansas is suffering from severe, extreme, or exceptional drought conditions,” reports Gov. Mike Beebe, and accelerating corn prices are “having a severe economic impact” on the State’s livestock producers. Agriculture accounts for “nearly one-quarter” of Arkansas’s economic activity, and livestock sectors hit hard by rising corn prices “represent nearly half” of the State’s farm sales.

“While the drought may have triggered the price spike in corn,” Beebe acknowledges, an “underlying cause” is the RFS, which mandates “ever increasing amounts of corn for fuel.” Since the RFS was enacted in 2005, “the cost of corn for use in food production has increased 193 percent,” corn stocks are tighter, and prices are more volatile.

In Georgia, reports Gov. Nathan Deal, agriculture accounts for 15.7 percent of State output, has an annual impact of \$68.9 billion, and provides 380,000 jobs. Poultry and livestock “represent over 50 percent of Georgia’s farm gate value, while broilers alone account for over 40 percent of farm gate value.” An estimated 98,000 jobs depend directly or indirectly on the State’s poultry industry. Because of rising corn prices, Deal estimates, the State’s poultry producers spend an extra \$1.4 million a day – an additional \$516 million per year if present conditions continue. Even during the three years previous to the drought, “over one-third of the U.S. broiler industry experienced bankruptcy, sale, or closure” due in part to rising feed costs.

Like Beebe and the other governors, Deal draws two reasonable conclusions. (1) The RFS – a huge politically-imposed diversion of increasing quantities of corn from feed to fuel – puts “upward pressure” on corn prices. (2) Waiving the RFS will relieve some of that pressure by freeing up grain stocks for uses other than ethanol manufacture.

Simply put, the RFS authorizes the renewable fuel industry to hog an ever-expanding share of a drought-diminished commodity. Without a waiver, industry petitioners contend, the drought combined with the RFS “will so reduce the supply of corn and increase its price that livestock and poultry producers will be forced to reduce the size of their herds and flocks, causing some to go out of business and jobs to be lost.”⁶

The RFS Is a Cause of Harm

“There is no doubt that the diversion of what amounts to 15% of world corn supply into fuel has put significant upward pressure on food prices,” writes Tufts University economist Timothy Wise in a new report published by ActionAid.⁷ Wise draws on his own detailed review of the literature.⁸ He also cites the National Research Council’s review of 11 studies on the 2007-2008 food price spikes. According to the NRC, biofuel expansion accounted for 20 – 40% of corn price increases during 2007-2008.⁹

Partly in response to the dramatic increase in the blending and sale of ethanol required by the 2007 RFS, two things happened: (1) Ethanol's share of the U.S. corn crop has increased from less than 15% to almost 40%; (2) global corn (maize) prices increased and became more volatile, spiking in 2008, 2010-2011, and 2012.

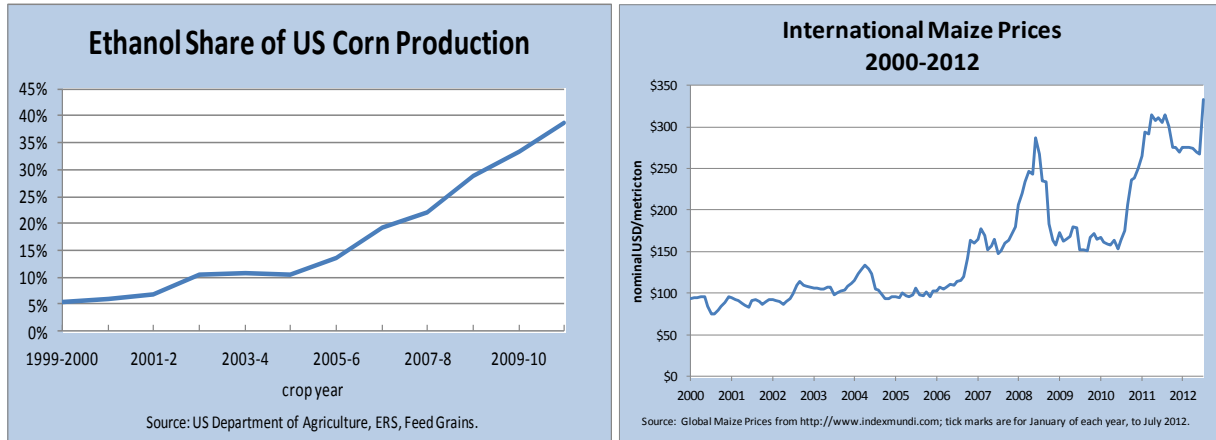


Figure Source: Wise, *Fueling the Food Crisis*

In 2009, the Congressional Budget Office estimated that ethanol accounted for a 28 to 47 percent increase in the price of corn from April 2007 to April 2008.¹⁰ As food industry petitioners note, that price increase occurred when the U.S. harvested a record 13.1 billion bushels of corn. The USDA announced today (Oct. 11, 2012) that U.S. farmers this year will harvest 10.71 billion bushels of corn, with total corn supply estimated at 11.77 billion bushels.¹¹ Yet, although corn production in 2012 is almost 2.4 billion bushels smaller than in 2008, the RFS requires corn consumption for ethanol to expand from 8.52 billion gallons in 2008 to 13.40 billion gallons in 2012 – a 57 percent increase.¹²

Parsing out the precise impact of the RFS on corn and feed prices is difficult. Use of carry-over Renewable Fuel Identification Numbers (RINs) to meet blenders' renewable volume obligations (RVOs) for 2012 or 2013 could potentially reduce the quantity of corn converted to ethanol in those years by more than 900 million bushels.¹³ But, notes the National Chicken Council in its comment on the waiver petitions, the estimated 2.6 billion gallons of accumulated RINs equal 19 percent of the 2013 ethanol blending requirement, and "conventional wisdom holds that refiners and blenders are likely to hold onto their RINs to offset the 'blend wall' that is fast approaching, the point at which ethanol will completely saturate the E10 blend market and gasoline producers will be unable to incorporate the increasingly higher levels of ethanol into their fuels."¹⁴

More importantly, although comparatively little ethanol would be sold as *motor fuel* without the RFS, billions of gallons of ethanol would still be sold as an *oxygenate* and octane-boosting *additive* as long as ethanol remains cheaper than gasoline by volume. Purdue University researchers¹⁵ suggest that even without the RFS, refiners would blend gasoline with 10 percent ethanol unless cheaper additives are available. If that is so, then, in the researchers' words, "in the near term, the impact of a waiver would be very small or nil."

Note, though, the same reasoning implies that, from 2005 through 2012, the *RFS had little or no impact on ethanol production and the associated demand for corn*. It is doubtful that either the EPA or waiver

opponents would want to take ownership of that proposition. If the RFS has had little or no impact on corn prices or ethanol sales, then the Renewable Fuels Association, Growth Energy, and the National Corn Growers Association might as well support a waiver just to prove that the RFS does not inflate feed prices or harm livestock producers. But I digress.

Again, the NRC study estimated that biofuel expansion, driven in significant part by the RFS according to both sides of the waiver controversy, accounted for 20-40 percent of the rise in corn prices in 2007/2008. At the low end of the NRC's range, Bruce Babcock of Iowa State University estimated that corn prices would have been almost 21 percent lower in 2009/10 had U.S. biofuel production remained at 2004 levels.¹⁶ However, Babcock's estimates do not cover 2010/2011 or 2011/2012, when the drought struck.

In addition, as Wise points out, corn inventories have been "hard hit by rapid rise in corn use for ethanol," and "McPhail and Babcock have estimated elsewhere that US biofuels policies make corn markets more susceptible to price volatility by reducing the price elasticity of demand for corn and gasoline."¹⁷ McPhail and Babcock state in the abstract of their study: "We show that RFS mandates and the blend wall both reduce the price elasticity of demand for corn and gasoline and therefore increase the price variability when supply shocks occur to the markets. This has important implications for policy actions with respect to maintaining or changing the current RFS mandates and/or blend wall in the US." A supply shock is exactly what the 2012 drought has inflicted on the U.S. corn market.

The EPA Misreads the Waiver Provision

Section 211(o)(7) of the Clean Air Act (CAA) authorizes the EPA to waive all or part of the RFS blending targets for one year if Administrator determines, after public notice and opportunity for comment, "that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States."¹⁸ Only once before has a governor requested an RFS waiver. When corn prices soared in 2008, Gov. Rick Perry of Texas requested that the EPA waive 50% of the mandate for the production of corn ethanol.¹⁹ Perry, writing in April 2008, noted that corn prices were up 138% globally since 2005. He estimated that rising corn prices had imposed a net loss on the State's economy of \$1.17 billion in 2007 and potentially could impose a net loss of \$3.59 billion in 2008. At particular risk were the family ranches that made up two-thirds of State's 149,000 cattle producers. Bush EPA Administrator Stephen Johnson rejected Perry's petition in August 2008.²⁰

In the EPA's Request for Comment on the 2012 waiver petitions, the agency indicates it will use the same "analytical approach" and "legal interpretation" on the basis of which Johnson denied Perry's request in 2008. Specifically, according to the EPA, petitioners must show that the "RFS itself" would cause severe economic harm, not merely "contribute" to it. Petitioners therefore must also show that the relief sought will "remedy the harm" – achieve a substantial reduction in the prices of corn, feed, and food.

This reading of the statute prejudices the issue, imposing a burden of proof that may be impossible to meet under almost any realistic scenario. Major changes in economic conditions typically result from a combination of factors, not a single cause. An ethanol mandate that causes little economic harm when unemployment rates are low, corn production is booming, corn stocks are high, and China's demand for U.S. corn imports is low could inflict severe harm when the opposite conditions obtain — as they do today.²¹

If Congress wanted the EPA to grant a waiver only when the RFS *alone* causes severe economic harm, it could have easily said so. The statute specifies no such limitation. Rather, CAA Section 211(o)(7) says the Administrator may grant a waiver if she determines that “implementation” of the RFS would cause severe harm. *Implementation* always occurs *within a context of market conditions*. Whether or not implementation causes harm depends decisively on other factors. It is not possible to make a reasonable determination without considering other factors that also affect food and feed prices. There is no warrant in the statute for the Administrator to don analytical blinkers and ignore, for example, the worst drought in 50 years, its effects on corn stocks, and the price effects of the interaction of the RFS with the drought-induced supply shock.

The EPA’s stipulation that the waiver be a remedy for the harm also stacks the decks against petitioners. By law, the EPA may grant a waiver for only *one year* at a time. Although a series of waivers might significantly reduce corn and feed prices,²² a one-year waiver may have little impact on markets shaped by RFS’s 15-year (2008-2022) production quota schedule and the associated expectations of a quick return to even higher mandated levels of corn-ethanol production. So even if a multi-year waiver would provide a complete remedy, the EPA would likely reject an equivalent number of one-year waivers on the grounds that none of them individually solves the problem.

Note: The EPA argues in the opposite vein when the issue is not whether to grant regulatory relief but whether to pull a regulatory trigger. In such cases, even small contributions to an alleged harm are considered sufficient grounds for regulation, and even minute regulatory contributions to the hoped-for solution are deemed fully justified.

Take, for example, the EPA’s heavy-duty truck greenhouse gas (GHG) emission standards. The EPA estimates that the standards for model year (MY) 2014-2018 heavy-duty vehicles will reduce atmospheric carbon dioxide (CO₂) concentrations by 0.732 parts per million, which in turn will avert an estimated 0.002-0.004°C of global warming and 0.012-0.048 centimeters of sea-level rise by the year 2100.²³ Such changes would be too small for scientists to distinguish from the “noise” of inter-annual climate variability. The EPA acknowledges no obligation to demonstrate either that heavy-truck GHG emissions *alone* harm public health and welfare or that regulating MY 2014-2018 heavy-truck GHG emissions would take significant bites out of global temperatures and sea-level rise.

When proposing its Utility MACT Rule, the EPA argued that “it is not necessary to show that a problem will be entirely solved by the action being taken, nor . . . is it necessary to cure all ills before addressing those judged to be significant.”²⁴ The EPA’s proposed GHG emission standards for fossil-fueled power plants takes that argument a step further. The EPA does “not anticipate any notable CO₂ emissions changes resulting from” the GHG emission standards and, thus, concludes that “there are no direct monetized climate benefits in terms of CO₂ emission reductions associated with this rulemaking.”²⁵ In short, the standards would not even make a negligible contribution to a solution, yet the EPA proposed them anyway.

In stark contrast, when the issue before the EPA is whether to suspend part or all of the RFS blending requirements, then the regulation *itself* must be shown to cause severe harm, and even temporary relief must be shown to cure all ills (or most of them). It is difficult to make sense of this apparent inconsistency, especially since, as discussed above, the text of CAA section 211(o)(7) does not stipulate either that the “RFS itself” apart from other relevant conditions must be the cause of severe harm, or that the waiver be a silver bullet.

Denying a Waiver Will Build Support for Basic Reform or Repeal

The big picture is that the RFS pre-allocates billions of bushels of corn per year to ethanol production regardless of any unexpected and significant changes in crop yields, corn stocks, and corn prices that may occur. This is an obvious recipe for disaster unless managed by an agency that is willing to adjust the blending requirements when circumstances warrant.

Corn producing States have been hit with the worst drought in 50 years. The depressed yields and stocks, combined with the RFS, have pushed corn prices to record highs. The price effects of that combination are devastating livestock producers in several States. If there were ever a situation justifying a waiver, this is it. If not now, when?

If the EPA refuses to balance the interests of corn farmers against those of other industries and consumers, it will vindicate criticism that the RFS is an inflexible, arbitrary, wealth-transfer scheme. Especially if the drought persists into 2013, an EPA that won't heed the reasonable requests of domestic livestock producers, seven governors, 156 House members,²⁶ 26 Senators,²⁷ the head of the UN Food and Agriculture Organization,²⁸ and a growing segment of the general public will build support for RFS reform — or repeal.

¹ Environmental Protection Agency (EPA), *Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard*, 77 FR 52715-52716, August 30, 2012, <http://www.gpo.gov/fdsys/pkg/FR-2012-08-30/pdf/C1-2012-21066.pdf>.

² Thomas D. Elam, *The RFS, Food and Fuel Prices, and the Need for Statutory Flexibility*, FarmEcon LLC, Aug. 16, 2012, p. 18, <http://www.globalwarming.org/wp-content/uploads/2012/07/RFS-issues-FARMECON-LLC-7-16-12.pdf>.

³ Reuters, "Commodities -- Corn hits record high; Brent oil up fifth day," Aug. 9, 2012, <http://www.reuters.com/article/2012/08/09/markets-commodities-idUSL2E8J9HH020120809>.

⁴ National Chicken Council, National Cattleman's Beef Association, National Pork Producers Council, National Turkey Federation, American Sheep Industries Association, California Dairy Campaign, Dairy Producers of New Mexico, Dairy Producers of Utah, Idaho Dairymen's Association, Milk Producers Council, Nevada State Dairy Commission, Northwest Dairy Association, Oregon Dairy Farmers Association, Southeast Milk, Inc., Washington State Dairy Federation, North American Meat Association, United Dairymen of Arizona, American Feed Industry Association, American Meat Institute, *Petition for Waiver or Partial Waiver of Applicable Volume of Renewable Fuel*, July 30, 2012, <http://www.nppc.org/wp-content/uploads/20120730-mf-Final-RFS-Waiver-Petition.pdf>; hereafter *Food Industry Petition*.

⁵ Gov. Mike Beebe, Maryland (Aug. 13, 2012, <http://www.epa.gov/oms/fuels/renewablefuels/documents/arkansas-rfs-waiver-request.pdf>); Gov. Jack Markell, Delaware, and Gov. Martin O'Malley, Maryland (Aug. 9, 2012, <http://www.nationalchickencouncil.org/wp-content/uploads/2012/08/Letter-to-EPA-Administrator-RFS-DE-MD-8.9.12-final.pdf>); Gov. Nathan Deal, Georgia (Aug. 20, 2012, <http://www.nationalchickencouncil.org/wp-content/uploads/2012/08/Letter-to-Lisa-P-Jackson-Petition-for-Waiver.pdf>); Gov. Susana Martínez, New Mexico (Aug. 20, 2012, <http://www.meatami.com/ht/a/GetDocumentAction/i/80562>); Gov. Beverly Eaves Perdue, North Carolina (Aug. 14, 2012, <http://www.epa.gov/oms/fuels/renewablefuels/documents/north-carolina-rfs-waiver-request.pdf>); Gov. Rick Perry, Texas (Aug. 24, 2012, <http://governor.state.tx.us/files/press-office/O-JacksonLisa201208240000.pdf>).

⁶ *Food Industry Petition*, p. 1.

⁷ Timothy A. Wise, *Fueling the Food Crisis: The Cost to Developing Countries of US Corn Ethanol Expansion*, ActionAid, October 2012, p. 3, http://www.eenews.net/assets/2012/10/10/document_pm_02.pdf.

⁸ Timothy A. Wise, *The Cost to Mexico of U.S. Corn Ethanol Expansion*, *GDAE Working Paper No. 12-01* (Medford, Mass, Global Development and Environment Institute, Tufts University, 2012).

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- ⁹ National Research Council, *Renewable Fuel Standard: Potential Economic and Environmental Effects of U.S. Biofuel Policy* (Washington, DC: National Academies Press, 2011), pp. 131-132.
- ¹⁰ Congressional Budget Office, *The Impact of Ethanol Use on Food Prices and Greenhouse-Gas Emissions, April 2009*, p. 7, <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/100xx/doc10057/04-08-ethanol.pdf>.
- ¹¹ David Pitt, "US corn estimate lowered to reflect harvest yields," *BloombergBusinessWeek*, Oct. 11, 2012, <http://www.businessweek.com/ap/2012-10-11/us-corn-estimate-lowered-to-reflect-harvest-yields>.
- ¹² *Food Industry Petition*, p. 6.
- ¹³ University of Illinois researchers estimate the stock of RINs currently available at 2.6 billion gallons. That is equivalent to about 942 million bushels of corn. My calculation is based on Wallace E. Tyner, Farzad Taheripour, Chris Hurt, *Potential Impacts of a Partial Waiver on the Ethanol Blending Rules*, Purdue University/Farm Foundation, NFP, August 2012, <http://www.farmfoundation.org/webcontent/Potential-Impacts-of-Waiving-Ethanol-Blending-Rules-1841.aspx>.
- ¹⁴ National Chicken Council, Oct. 11, 2012, <http://www.nationalchickencouncil.org/wp-content/uploads/2012/10/NCC-Comments-on-Docket-No.-EPA-HQ-OAR-2012-0632-RFS-Waiver-Oct.-11-2012.pdf>.
- ¹⁵ Tyner, Taheripour, and Hurt, *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, pp. 4-5.
- ¹⁶ Bruce A. Babcock, *The Impact of US Biofuel Policies on Agricultural Price Levels and Volatility*, Center for Agricultural and Rural Development, Iowa State University, Issue Paper No. 35, 2011, p. 12, <http://www.iadb.org/intal/intalcdi/PE/2011/08442.pdf>.
- ¹⁷ Wise, *Fueling the Food Crisis*, p. 17, citing LiHong Lu McPhail and Bruce A. Babcock, Impact of US biofuel policy on corn and gasoline price volatility, *Energy*, Volume 37, Issue 1, 2012, <http://www.sciencedirect.com/science/article/pii/S0360544211007225>.
- ¹⁸ 42 USC § 7545, <http://www.law.cornell.edu/uscode/text/42/7545>.
- ¹⁹ Gov. Rick Perry, Letter to EPA Administrator Stephen Johnson, April 25, 2008, <http://www.epa.gov/oms/renewablefuels/rfs-texas-letter.pdf>.
- ²⁰ EPA Decision on Texas Request for Waiver of Portion of Renewable Fuel Standard (RFS), EPA420F-08-029, August 2008, <http://www.epa.gov/oms/renewablefuels/420f08029.htm>.
- ²¹ See, for example, "Record Corn Imports by China to Drive Rally, Rabobank Says," *BloombergBusinessweek*, Sep. 07, 2012, <http://www.businessweek.com/news/2012-09-07/china-rising-corn-import-demand-to-sustain-rally-rabobank-says>.
- ²² For example, in the Purdue study, Tyner, Taheripour, and Hurt estimate that if the "technical and economic hurdles" to replacing ethanol with another octane booster could be overcome, a waiver decreasing the RFS blending requirement to 7.75 billion gallons would decrease corn prices by \$2.00 a bushel, even under drought conditions. See Table 2 of *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, p. 8. Overcoming those hurdles would likely require more than one year.
- ²³ Environmental Protection Agency and Department of Transportation, *Greenhouse Gas Emission Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles*, Proposed Rule, 75 FR 74289, Nov. 30, 2010.
- ²⁴ Environmental Protection Agency, *National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, Proposed Rule, 76 FR 24978, May 3, 2011.
- ²⁵ Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, Proposed rule, 77 FR 22340, April 13, 2012.
- ²⁶ House Members Letter to EPA Administrator Lisa Jackson, Aug. 1, 2012, <http://www.nationalchickencouncil.org/wp-content/uploads/2012/08/house-letter-final.pdf>
- ²⁷ Senators Letter to EPA Administrator Lisa Jackson, Aug. 8, 2012, <http://www.nationalchickencouncil.org/wp-content/uploads/2012/08/8.7.12-Letter-to-EPA.pdf>
- ²⁸ Catherine Hornby, "U.S. should change biofuel policy to avoid food crisis: U.N.," *Reuters*, Aug. 13, 2012, http://articles.chicagotribune.com/2012-08-13/news/sns-rt-us-food-biofuels-faobre8790k4-20120810_1_food-crisis-biofuel-food-price-index