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Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations

Midwest AgEnergy Group, LLC (MAG) is the owner and operator of Blue Flint Ethanol and Dakota Spirit AgEnergy, which are producers of renewable fuels. We submit the following comments in response to the Federal Register notice FLR-9991-04-OAR requesting comments on extending the Reid Vapor Pressure (RVP) Waiver to gasoline blended with up to 15% ethanol and the proposed regulatory changes designed to prevent market manipulation in the Renewable Identification Number (RIN) market.

It has been with great frustration we have watched a technicality within an environmental regulation prevent adoption of a fuel blend that lowers emissions. Gasoline with ethanol blended at 10% makes up over 98% of current domestic supply. EPA's own analysis accepts the fact E15 has lower levels of evaporative emissions than E10. Thus it is more than a little ironic, for the past 9 years, evaporative emissions regulations have been grounds for prohibiting E15 from year round sales. We are delighted EPA has now identified two separate and compelling interpretations which enable E15 to be a fuel choice for consumers all year long.

We believe both of the arguments made by EPA to enable the 1 pound waiver to apply to E15 are legally solid, based on good science, and adhere to Congressional intent. The first argument appropriately identifies there was never a legal intent to set maximum limit on ethanol content. Any references to upper limits were solely related to the applicable RVP waiver conditions approved under the Clean Air Act *at the time the waiver was granted*. As additional RVP waivers for fuels such as E15 are granted, any corresponding references to maximum ethanol content should also be adjusted.

The second argument declaring E15 is substantially similar to a certification fuel is equally sound. It is important when setting vehicle emission standards that certification fuels reflect fuel commonly used in the marketplace. E10 was added as a Tier 3 certification fuel in 2014 because it had become the most common form of gasoline. The EPA analysis conducted nearly a decade ago has already confirmed vehicle emissions on E15 are substantially similar to E10. The service data collected on automobiles run on E10 indicates they have performed well over time. The 8 billion miles already travelled on E15 provide strong evidence E15 will perform similarly throughout a vehicle's service life.

EPA also offered four RFS RIN market changes for comment. The stated intent of proposed changes is to decrease the potential for market manipulative behaviors while not imposing undue regulatory burdens. All of the proposed RIN market changes apply only to conventional (D6) RINS. There are approximately 3 billion D6 RINs in the market beyond what are required for compliance. A large portion of the excess RINs are available because of retroactive Small Refinery Exemption (SRE) waivers granted in the last 15 months. Based on these EPA practices, there will likely be no tightening RIN supplies in the foreseeable future. In a market flush with low priced RINs there is no incentive and little opportunity for RIN market manipulation. We argue that until RIN demand has the potential to approach RIN supply, there is no reason for RIN market manipulation.

In the event RIN market participants wish to endeavor in unfair trading practices, we too seek transparency in the RIN market and support common sense changes which would prevent market manipulation. However, the proposed changes will effectively impose downward pressure on RIN prices and impose additional regulatory compliance obligations on all RIN holders. Furthermore, these changes are proposed to address a problem that EPA admits it cannot prove exists. We are certain some of the proposed changes will create new and unnecessary compliance challenges and negatively impact our organization as well as the intent of the RFS to blend more biofuels. Thus, we are in the unique position of entirely agreeing with the American Petroleum Institute testimony stating this proposal is "a solution in search of a problem".

We encourage EPA to finalize the RVP waiver provisions and hold back RIN market reforms until such time as specific and targeted market manipulation concerns lead to the need for precise and prescriptive reform actions.

Our subsequent comments respond to EPA request for comments on regulatory changes on RIN market operations and adjustments required to enable E15 to qualify for the 1 pound waiver.

RIN Market Operations

Per the October 11, 2018 Presidential directive, EPA has offered four proposed reforms intended to add transparency and avoid manipulation in the RIN market. The EPA indicates “We intend to finalize the reforms that we conclude are beneficial for the RFS program, the RIN market, and the RFS stakeholders, and do not impose unnecessary burden.” Of the four proposed reforms we believe two may have some small potential to prevent manipulation and two would have significant negative impacts on the RFS program and impose a large regulatory burden with no measurable benefit.

All of the suggested reforms are proposed to apply only to separated (K2) conventional RINs (D6). The EPA rationale for only reforming K2 D6 RINS is based on the fact that about 78% of RINs generated are conventional and the notion the “E10 blendwall” is limiting the availability of D6 RINs while the mandated level for this category continues to increase. We do not feel this reasoning is appropriate for multiple reasons.

First, because the majority of biofuel currently produced in the country is conventional ethanol gallons the fuel is readily available to those who wish to meet their obligation through blending instead of purchasing RINs. Obligated parties that are not positioned to blend and thus must purchase RINs for compliance currently have 15 months from the beginning of the compliance period to secure adequate RINs for compliance and may even carry over a deficit if they are unable to economically procure RINs during this time period. This enables much more flexibility than revised proposals offer. It would be hard for any party to manipulate the market values over this long of a time period and prevent obligated parties who must purchase RINs for compliance at fair value. Second smaller sized RIN markets such as cellulosic RINs would be much easier to influence and manipulate than the D6 market. Yet EPA, FTC, the media, and industry have collectively been unable to prove manipulation has occurred even in these smaller markets. Finally, the conventional mandate level has not expanded since 2016. (It should have been 2015 based on Congressional intent and subsequent court findings.) But because of numerous volume obligations being waived there is no current shortage of D6 RINs, nor does shortage seem possible in foreseeable future without reallocation of the waived requirements.

Thus, based on EPA rationale for proposed changes—until RVO waived compliance obligations are restored, there is no basis for RIN reform. In a market flush with low priced RINs-- there is no incentive and little opportunity for RIN market manipulation. Instances where market manipulations are alleged to have occurred have typically involved an obligated party, but the proposed changes do nothing to limit the opportunity for obligated parties to buy and sell with other obligated parties. All other entities are restricted on how many RINs they can own, how long they can hold RINs, or the ability to purchase RINs at all. Since all of these restrictions will be placed on entities trying to function in the same marketplace as obligated parties, it appears the proposed changes purposefully create more inequity instead of removing. Furthermore the proposed changes likely have minimal impact on those who have been alleged to be manipulators.

#1 The first suggested revision requiring disclosure of RIN holdings is perhaps the most palatable.

The EPA proposes that public disclosure be made if parties acquire certain quantities of detached RINs. EPA has suggested two different limits based on whether the party is obligated to source RINs for compliance or if the party owns RINs as part of normal supply chain or for other reasons. The proposed limits, essentially 450 million detached RINs for non-obligated parties, and 130% of implied individual RVO for obligated parties seem like reasonable levels to trigger reporting. The limits are also practical because this is simply a reporting requirement as opposed to a legally enforceable limit. The existing quarterly RFS report process is proposed as the mechanism by which reporting would occur. Again this seems like minimal additional compliance burden.

There remains some question as to if reporting the names of companies which surpass these thresholds will bring greater transparency or limit manipulation of RIN markets? Quarterly RFS reports are due sixty days after the last date of the quarter. Therefore the knowledge that another party had “excessive RINs” may be of little use to others because it is not timely. RIN markets are very much subject to the current day to day supply and demand and news cycles. Pointing out a party had exceeded the threshold at some point as far back as 5 months ago is likely not especially useful. Furthermore, the disclosure is so benign that it will not indicate by how much, how often, or for how long the threshold was exceeded. The cases EPA cites in the proposed rule where parties have amassed RINs in quantities that may provide them with power for manipulation seem to be tied to events such as SRE or other waivers to specific companies implied compliance RVO and not normal RIN market practices. This proposed change would be applicable to all parties, so in that sense, it is at least equitable.

#2 The second proposed revision increases the frequency of RIN retirement.

Having obligated parties retire approximately 80% of their quarterly obligation will likely have the desired impact of diminishing the amount of RINs available to the market for hoarding. It would seem that responsible obligated parties are already accumulating RINs at approximately the pace required to meet their annual RVO so periodic retirement on a similar pace would be reasonable. We believe a holding requirement of 80% instead of retirement on a quarterly basis will accomplish similar results. If parties chose to retire RINs early this amount should be excluded from the RIN limit reporting recommendation #1 above. Thus, a party would need to report if they held more than 130% of their outstanding RVO.

Challenges with the RIN retirement provision surround inequity in how it would work if conducted in combination with the final two proposed changes. The two month administrative period essentially gives the obligated party 5 months to acquire/retire 80 percent of their quarterly obligation. Proposed revision #4 would require blenders to sell 100% of RINs on a quarterly basis.

#3 Limiting who can purchase separated RINs is the third proposed reform.

Under the proposal only obligated parties and a limited set of non-obligated parties can purchase RINs. The exemptions are proposed for exporters, RIN generation errors, and entities that have contractual agreement to provide RINs to obligated parties. The reporting and recordkeeping associated with these

exceptions is completed through requiring additional information on existing quarterly reports and recordkeeping for attest engagement audits.

We are a small quantity blender of E85 and thus acquire very small amounts of detached RINs. We have enough experience in the RIN market to know that it is already thinly traded and finding a counterparty for small amounts of RINs can be problematic. Additionally, sales price for smaller lots of RINs tend to be lower than larger volumes due to amount of recordkeeping already required to maintain compliance. Shrinking the pool of potential RIN buyers will lower the price small blenders can get for RINs and further disincite the manner in which we blend fuel.

Limiting the number and type of companies who can purchase detached RINs has the potential to greatly reduce liquidity as well as the flexibility and ingenuity of the marketplace to comply with the RFS. There is virtually no way to evaluate all the ways companies may legitimately buy and sell RINs to minimize risk or meet other business objectives. As the RFS is currently configured, the RIN has a definite shelf life and therefore ultimately needs to find its way to an obligated party for its purpose to be fulfilled. Trying to carve out who can or cannot purchase RINs and the increasing reporting complexity does not seem like a reasonable approach to RIN reform. We believe the unintended consequences far outweigh any perceived benefit. If hoarding and market manipulation were to occur, placing enforceable volume limits on non-obligated parties similar to the first proposed change would be much more effective in controlling bad actors than coming up with arbitrary justifications limiting who can legally purchase the RINs for legitimate business purposes.

#4 The final and most problematic of the proposed RIN reform is limiting the duration of RIN holdings for non-obligated parties.

As indicated above, there is a finite time that a RIN will have value and the ultimate value can only be realized by obligated parties. Further limiting the amount of time a non-obligated party can hold RINs may add slight amounts of liquidity to the market **but at great cost to those who are doing the real work of the RFS and blending renewable fuels!** As proposed the non-obligated parties would be required to sell the same amount of RINs as they separated in any quarter. As proposed, the operational/mechanics of meeting this requirement would be extremely difficult to achieve. The proposal indicates equal (or greater) K2 RIN sales transactions must occur during the same quarter as fuel was blended (RINs were separated). We believe requiring the exact same volume of sales and separation within the same quarter will make it difficult if not impossible for our business and others like it that blend small amounts of ethanol into E85 to comply.

Ethanol producers that blend E85 for sale to local retailers usually separate the RINs from ethanol portion of the fuel sold. This allows the producer/blender to reduce the E85 sales price by the value of the D6 RIN and pass those savings along to retailer and ultimately the consumer. They can then sell the separated RINs to make up for the cost reduction in E85 sales. It is difficult to acquire large enough volumes of K2 RINs to get posted market values because of the small size of the transaction. Thus E85 blenders most often end up selling to entities that are aggregating small lots of RINs to sell to obligated parties.

It is important for EPA to understand some of the variables in this type of blending. When making E85, the ethanol is often blended with gasoline as it enters the truck. In this manner the exact number of temperature corrected ethanol gallons in the mixture are known and thus the corresponding number of RINs are separated. Prior to filling, the seller will have a contract describing the fuel and price but only an approximation of the volume and an estimate on the delivery schedule. Thus, E85 trucks may arrive to pick up product at most anytime during specified contract period including the last day of a quarterly compliance period. Additionally, until the truck is actually loaded the exact quantity of product (and thus separated RINS) is also uncertain.

It will be nearly impossible to predict the precise volume of ethanol added and therefore the number of RINs which will need to be separated. In a worst case compliance scenario, if a truck loads E85 on the last day of the quarter, the blender must somehow sell (or have sold) precisely the equal number of K2 RINs to avoid a violation. **In our case, this is especially ridiculous because the volume of RINs we could aggregate through E85 blending would not reach the number considered necessary for reporting under proposal #1-- unless we were able to accumulate RINs for 225 years!**

If the E85 blender proactively sold K2 RINs in the amount of ethanol believed would be blended during quarter, and even slightly missed the predicted volume, they would either be out of compliance (more RINs separated than sold) or need to buy RINs to cover sales obligations not obtained through E85 blending. **Due to proposed revision #3 limiting types of companies allowed to buy K2 RINs, blenders like us would likely be prohibited from purchasing RINs to cover sales!**

Perhaps as troublesome as the regulatory requirement of precisely matching RIN separation on quarterly basis, is the market's certainty there will be downward pressure on RIN pricing at the end of each quarter. Entities blending fuel may be forced to sell RINs at any price near the end of quarter to remain in compliance with the proposed RIN holding duration limits. Purchasers obviously will know the 100% sell requirement and bid accordingly to blenders who are forced to comply.

In summary- asking parties to sell precisely the same volume of RINs in the same quarter as they were separated is unworkable. Under the second proposed revision obligated parties are asked to retire 80% of their quarterly obligation to allow flexibility. Requiring sales equal to 100% of RINs separated in the same quarter allows no flexibility to those further up the supply chain. It will diminish blending incentive by exerting downward pressure on RIN prices at end of quarter. It will create compliance challenges to parties that have no possibility of ever manipulating the market. This is a clear instance of unintended consequences of proposed rule changes creating more harm than potential for improvement. If EPA is adamant about implementing this provision we recommend this rule apply only to entities with RIN holdings above a certain threshold such as described in reform #1.

Adjusting the 1 psi waiver to accommodate E15-

EPA has identified two separate and compelling interpretations which should enable the original 1 psi waiver granted to E10 to also apply to E15. We believe both of the arguments made by EPA to enable a 1 pound waiver to apply to E15 are legally solid, based on good science, and adhere to Congressional intent.

The first argument appropriately identifies that there was never a legal intent to set maximum limit on ethanol in gasoline based on RVP. Any reference to upper limits were solely related to the applicable waiver conditions approved under section 211(f)(4) of the Clean Air Act **at the time the waiver was granted**. As additional waivers for fuels such as E15 are granted, any corresponding references to maximum ethanol content should also be adjusted.

In the proposed rule EPA does an excellent job of examining the history of vapor pressure regulations and the waivers which have enabled E10 and E15 to be marketed. EPA points out that limits on the maximum concentration of ethanol which can be combined with certified gasoline originated from the CAA sec 211(f)(4) waivers granted at that point in time. Therefore, the CAA sec 211(f)(4) (the 1 lb waiver) first allotted to E10 should always have been interpreted to read “at least” 10 percent ethanol. And ultimately when E15 received its CAA 211(f)(4) waiver, for 2001 and newer light duty vehicles, the RVP limit should have been as codified at 10 psi in CAA sec 211(h)(4) instead of 9.0 psi.

EPA describes how volatility requirements were absent from the 1979 211(f)(4) waiver for blends up to 10% and how this needed to be addressed when CAA for motor vehicle fuel were contemplated in 1987. EPA proposed allowing a 1- psi waiver be allowed on fuels containing 10% ethanol and stipulated any party wishing to use the waiver would be subject to RVP sampling and testing on final gasoline blends. In 1989, Phase I RVP language prescribed no upper limit on of ethanol content other than that prescribed by 211(f)(4) waivers. Phase II volatility regulations enacted in 1990 reiterated language regarding ethanol’s 1-psi waiver as well as indicating EPA had limited concerns regarding the small increase in emissions associated with higher volatility of ethanol blended fuels.

In 1990 Congress provided the first statutory provisions addressing RVP. Like the Phase I and Phase II volatility regulations they allowed fuel blends with 10% ethanol to have RVP 1 psi higher than other wise established. Furthermore, Congress recognized the value to America of enabling ethanol blended fuel and determined the RVP sampling and testing provisions were problematic and enacted a conditional defense or a “deemed to comply” provision. Basically this provision indicated if the gasoline portion of the fuel met RVP requirements and the ethanol portion of the fuel did not exceed the waiver conditions of (f)(4), and there were no other additives, the blenders of the final fuel would be considered in compliance with volatility regulations. It wasn’t until EPA implemented the deemed to comply provision under 40 CFR 80.28(g)(8) that language associated with the 10% maximum content for ethanol was introduced. And again this language was utilized only because 10% was the current maximum ethanol content granted a (f)(4) waiver.

Therefore, it is perfectly acceptable for EPA to re-examine the “deemed to comply” language and adjust accordingly for ethanol blends that have been granted a waiver under CAA 211(f)(4). As reiterated above this is clearly what the intent has always been. In fact, we would suggest 40 CFR 80.27-28 should not be prescriptive to any percentage ethanol other than what has been approved under the (f)(4) waiver process.

After E15 was granted a partial waiver under (f)(4) in 2011, additional regulations designed to limit RVP for E15 were implemented. These misfueling mitigation provisions associated with requiring E15

achieve 9.0 psi volatility in summer months and preventing the co-mingling of E10 and E15 should also be removed. We believe there are more than enough labeling and warnings requirements in the marketplace to prevent inadvertent fuel with E15.

In its second argument to enable E15 year round, EPA discusses whether E15 may be very much the same as existing fuels in the marketplace.

As an alternative to the partial waiver granted under (f)(4) EPA has requested comments on whether it is appropriate to consider E15 Substantially Similar (sub sim) to a certification fuel as described in CAA sec. 211(f)(1).

In 2014 EPA updated the Tier 3 certification fuel from E0 to E10. This was very appropriate and done primarily to reflect the reality of the vast majority of all gasoline sold in US contains 10% ethanol. We strongly believe that emissions standards for vehicles should be determined based on fuels commonly available in the marketplace as opposed special formulations used only for testing. EPA proposing E15 at 9.0 or 10.0 RVP is sub sim to the E10 certification fuel at 9.0 psi. We believe this approach is appropriate as the end result in either case would enable sales of E15 year round with RVP of less than 10 psi just like 98% of gasoline currently sold domestically.

EPA has typically considered three things when determining if a fuel or fuel additive is sub sim to a certification fuel. They consider the effects of a fuel or fuel additive on emissions, on material compatibility, and on driveability as criterion. Conveniently all of these areas have already been considered as part of the E15 (f)(4) waiver process finalized in 2011. EPA examined the emissions from E15 and found no statistical difference from E10. Since the time of E15 partial waiver approval, numerous additional studies have been performed to quantify the emissions associated with E15 in light duty vehicles. None of the credible studies have provided information indicating emission profiles have anything other than "slight differences" when comparing E15 to E10 certified fuel. **In fact, even an API study conducted in 2010 revealed that when E15 displaces E10 (made from the same gasoline blendstock) the volatility will decrease by as much as 0.1 psi.**

Examination of the compatibility of vehicle and engines with E15 has also already been completed, reviewed and offered for public comment when EPA was considering the E15 partial waiver. By utilizing DOE information, EPA was able to determine E15 would have substantially similar or identical materials compatibility with Tier 3 E10 certification fuel. When considering driveability, as part of the partial waiver process, EPA concluded that so long as the gasoline specification for ASTM D 4814 was achieved by fuel manufacturers and gasoline refiners the impact of ethanol blends of 10 and 15% ethanol, the fuel will have similar driveability characteristics.

While they are both appropriate, considering E15 sub sim is likely to be a considered more simple approach of the two proposed. It also allows greater flexibility on parties who could utilize the 1 psi waiver. We believe enabling fuel manufacturers and refiners access to the waiver (instead of limiting to oxygenate blenders as in the revised (f)(4) interpretation) is good for the widespread adoption of E15 in marketplace so long as the CBOB portion to gasoline does not change to alter the emissions profile. It is

critical for EPA to consider if displacing an additional 5% of gasoline CBOB with ethanol will somehow allow the level of pollutants such as sulfur and benzene in to increase in those blendstocks.

Conclusion

We support EPA conclusion that E15 should no longer be precluded from the RVP 1 pound waiver. We only lament that it has taken nearly a decade since E15 was approved for use to get to this most appropriate conclusion.

The proposed RIN reform proposals are problematic and if implemented as proposed will likely cause all types of undesirable implications without adequately addressing the potential for anti-competitive market behaviors. We believe some of the methodology used in the proposed RIN revisions will create inequity between various market participants and force RIN prices lower. We urge EPA to reconsider implementing any RFS RIN trading reforms and return to simply administering the RFS as intended by Congress.

We encourage EPA to finalize the RVP waiver provisions and hold back RIN market reforms until such time as specific and targeted market manipulation concerns lead to the need for precise and prescriptive reform actions.

Sincerely,

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