

July 30, 2012

VIA ELECTRONIC MAIL AND COURIER DELIVERY

Administrator Lisa P. Jackson
U.S. Environmental Protection Agency
Room 300, Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Petition for Waiver or Partial Waiver of Applicable Volume of Renewable Fuel

Dear Administrator Jackson:

On behalf of the National Pork Producers Council (“NPPC”) and the other undersigned national and regional livestock, poultry, and feed organizations, we hereby request that you utilize your authority under the federal Renewable Fuels Standard (RFS) to waive the applicable volume of renewable fuel, in whole or in substantial part, for the period of one year pursuant to section 211(o)(7) of the Clean Air Act (“CAA”) (42 U.S.C. § 7545(o)(7)).

As detailed below, the extraordinary and disastrous circumstances created for livestock and poultry producers by the ongoing drought in the heart of our grain growing regions requires that all relevant measures of relief be explored and taken where possible. One of these measures must be the amount of grain utilized for the production of renewable fuel. The ongoing drought is taking an enormous toll on the nation’s corn crop¹. As we detail below, the 15.2 billion gallon renewable fuel standard (“RFS”) in 2012² coupled with the prospect of a 16.55 billion gallon standard in 2013³ will require the renewable fuels industry to utilize a major portion of the drought-limited available corn supply. The drought-induced reductions in the corn supply means that the mandated utilization of corn for renewable fuels 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. In addition to this direct harm, these herd and flock reductions will ripple through the meat, milk and poultry sectors, causing severe harm in the form of more job and economic losses. This drought-induced harm exists now, will continue to exist into the latter part of 2012 and 2013, and could continue to be felt in 2014 depending on the policy choices made now.

¹ Effective July 12, 2012, USDA declared natural disaster areas in 26 states affected by the drought. This includes over 1000 counties and more than 78% of the corn grown in the United States. <http://blogs.usda.gov/2012/07/12/agricultural-weather-and-drought-update-%E2%80%9371212/>

² See Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 76 Fed. Reg. 38,844, 38,848 (July 1, 2011).

³ See Clean Air Act section 211(o)(2)(B)(i).

We believe that the drought – the most severe the nation has experienced in over half of a century - and the resulting harm under the RFS mandate is manifest and supported in this request for a waiver. In creating EPA’s waiver authority, Congress was acting to provide the tools to address exactly the current situation. Congress does not act to create a nullity. That is, EPA simply cannot avoid taking action in the current situation. To do so would fundamentally undermine the core principles of the RFS. Your immediate action in this matter is therefore required.

According to the Department of Agriculture, “[p]ersistent and extreme June dryness across the central and eastern Corn Belt and extreme late June and early July heat from the Central Plains to the Ohio River Valley have substantially lowered yield prospects across most of the major growing regions.”⁴ Recently, Secretary of Agriculture Tom Vilsack put the conditions caused by this massive drought a bit more bluntly when he said “I get on my knees every day and I'm saying an extra prayer now.”⁵ Secretary Vilsack confirmed that current corn yields are in substantial decline (at present, yields are projected to be 20 bushels/acre lower than forecast and appear poised to make additional substantial declines) while corn prices have increased by nearly 40% since June based on sharply reduced supply.⁶

According to the United States Drought Monitor, weather conditions that have caused the current drought are expected to continue through the month of August and could extend into September.⁷ As demonstrated by the graphic below, drought is expected to continue or worsen

⁴ *World Agricultural Supply and Demand Estimates*, United States Department of Agriculture, July 11, 2012. The undersigned organizations will, as further reports are made available, supplement and update the materials in this waiver petition. The next World Agricultural Supply and Demand Estimate is scheduled to be published on August 10, 2012. As discussed in more detail in footnotes 20 and 21, private agricultural forecasters have subsequently predicted a significant further drop below USDA’s July 11, 2012 crop forecast.

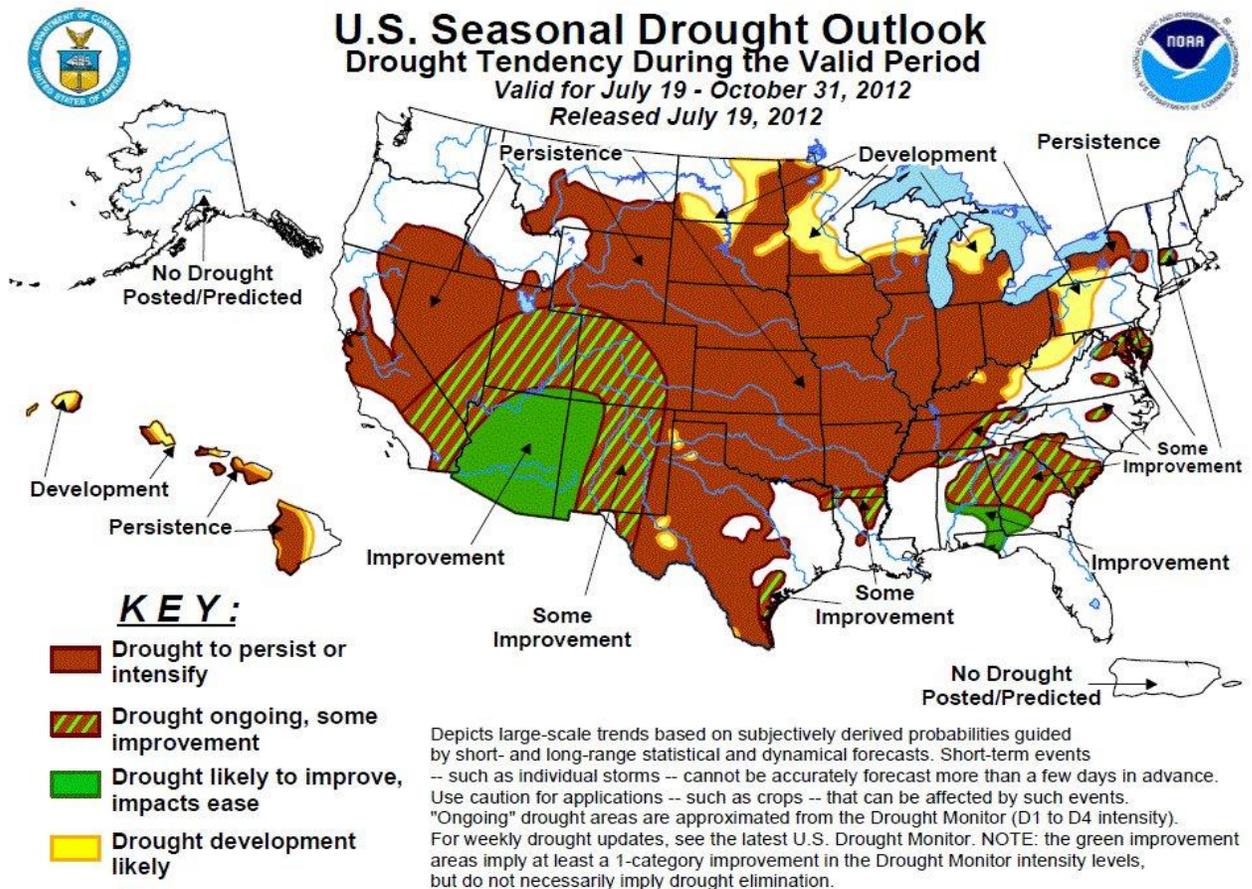
⁵ *Press Briefing by Press Secretary Jay Carney and Secretary of Agriculture Tom Vilsack*, James S. Brady Press Briefing Room, July 18, 2012.

⁶ “There’s no question that this drought is having an impact on our crops: 78 percent of the corn crop is now in an area designated as drought impacted; 77 percent of the soybeans that are being grown in this country also impacted. It also obviously involves other commodities as well -- 38 percent of our corn crop as of today is rated poor to very poor; 30 percent of our soybeans poor to very poor. And this obviously will have an impact on the yields. Right now we have indicated yields will be down about 20 bushels to the acre for corn and about 3 bushels to the acre for beans. That may be adjusted upward or downward as weather conditions dictate. This will result in significant increases in prices. For corn, we’ve seen a 38 percent increase since June 1st, and the price of a bushel of corn is now at \$7.88. A bushel of beans have risen 24 percent.” *Id.*

⁷ See <http://www.cpc.ncep.noaa.gov/products/predictions/30day/>. The Drought Monitor map of July 17, 2012 “showed increases in the area of the United States in all categories of drought, setting a record for the third consecutive week for the total area of the country in drought during

(continued...)

through much of the midsection of the country from Colorado and Wyoming to Ohio. In addition, new drought areas are expected to develop in the northern tier of the United States and extend further east from the Midwest into Pennsylvania, West Virginia and western New York.



This current and future harm is fully of an extent and character that meets the requirements of CAA section 211(o)(7). Thus, the undersigned organizations request that you exercise your authority as Administrator of EPA to promptly issue a waiver of the RFS.

(continued...)

the 12-year history of the map. As of July 17, 53.17 percent of the country was in moderate drought or worse, up from 50.92 percent a week earlier." According to Brian Fuchs, climatologist and U.S. Drought Monitor author at the National Drought Mitigation Center, "The dryness and heat wave pattern are still locked in . . . The latest forecast says this isn't changing. This could easily go on into September."

I. EPA Has Authority to Act On This Waiver Request.

The RFS was enacted seven years ago as part of the Energy Policy Act of 2005 (“EPCA 2005”).⁸ These provisions were amended in the Energy Independence and Security Act of 2007 (“EISA”).⁹ Both of these acts granted EPA the authority to waive the applicable volume for renewable fuel. EPA issued one waiver determination in 2008, denying a requested 50% partial waiver submitted by the State of Texas.¹⁰

The applicable authority is found in CAA section 211(o)(7)(A), which provides that the Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements [for applicable volumes of renewable fuel] ...in whole or in part on petition ... *or by the Administrator on his own motion ...*” (Emphasis added). We therefore ask that you exercise this authority and initiate a process that will result in a waiver of RFS applicable volumes in 2012 and 2013.

In addition, we ask that you act promptly in this matter to both address current harm and to prevent future harm to American livestock and poultry producers. Nothing in the CAA renewable fuels program requires that EPA wait until any harm is fully realized before acting. CAA section 211(o)(7)(A)(i) requires only a determination by the Administrator that implementation of applicable volumes of renewable fuel “*would* severely harm the economy or environment of a State, a region, or the United States.” (Emphasis added). This provides authority for EPA to act now and not wait until additional crop losses are fully realized in August and September and economic harm flows from these losses during the remainder of 2012 and 2013.

In sum, it is abundantly clear that EPA has the authority to grant this waiver if sufficient harm is occurring now and that economic conditions affecting grain supplies and feed prices will worsen in the months ahead. Both conditions provide an independent basis for a waiver of the RFS, and as we show below, these conditions do exist.

⁸ Pub. L. No. 109-58, 119 Stat. 594, 1069 (2005).

⁹ Pub. L. No. 110-140, 121 Stat. 1491, 1522 (2007).

¹⁰ 73 Fed. Reg. 26, 026 (August 13, 2008). EPA has also responded via letter to waive 2011 RFS cellulosic biofuel requirements. Letter from Administrator Lisa Jackson to Charles Drevna, President, American Fuel and Petrochemical Manufacturers, May 22, 2012.

II. A Waiver is Justified under the Clean Air Act in Light of Extreme and Persistent Drought, Rising Commodity Prices and Other Economic Conditions

A. Use of Corn to Meet the 2012 and 2013 RFS

The renewable fuel requirements of CAA section 211(o)(2)(B) lead directly to the purchase and use of corn by the renewable fuel companies. Under this provision the “applicable volume of renewable fuel” has risen from 4.0 billion gallons in 2006 to 15.2 billion gallons in 2012. EPA projected for 2011 that 12.80 billion gallons of the 13.95 billion gallon renewable fuel applicable requirement would be met by ethanol, with the overwhelming majority of this ethanol produced from corn starch.¹¹ For 2012, a reasonable estimate of ethanol derived from corn starch would be in the range of 13.4 billion gallons.¹² To produce these 13.4 billion gallons will require approximately 4.8 billion bushels of corn, as the vast majority of the mandated RFS is met through the production of ethanol from corn starch.¹³

As shown in the following table, the year over year, for the past four years, EPA has mandated a renewable fuel applicable volume satisfied by the use of corn starch that has increased by an average of 1.45 billion gallons per year.

¹¹ Although EPA imposed a 1.35 billion gallon “advanced biofuel” requirement in 2011 that would serve to exclude “conventional” corn ethanol, the final regulation allows this requirement to largely be satisfied by biomass-based diesel, which receives a volumetric credit relative to ethanol. As explained in the final RFS rule for 2011, “[s]ince biodiesel has an Equivalence Value of 1.5, 0.8 billion physical gallons of biodiesel would provide 1.20 billion ethanol-equivalent gallons that can be counted toward the advanced biofuel standard of 1.35 billion gallons. Of the remaining 0.15 billion gallons (150 million gallons), 6.0 million gallons will be met with cellulosic biofuel. Based on our analysis . . . we believe that there are sufficient sources of other advanced biofuel, such as additional biodiesel, renewable diesel, or imported sugarcane ethanol . . .” 75 Fed. Reg. at 76,792.

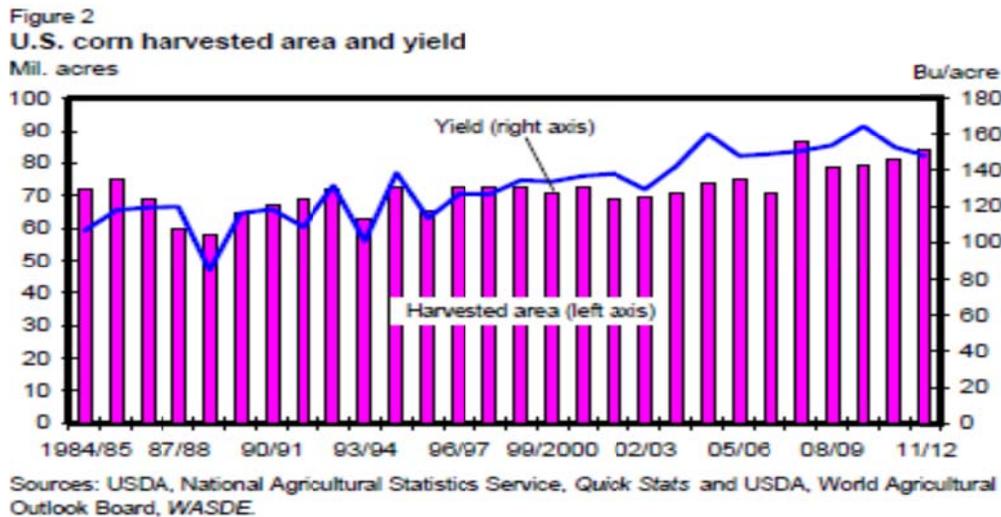
¹² EPA established a biomass-based diesel requirement of 1.0 billion gallons for 2012 and otherwise assumes that imports of sugarcane ethanol will fulfill some part (perhaps 300 million gallons) of both the requirement for total renewable fuel and advanced biofuel in 2012. *See* 77 Fed. Reg. at 1332, 1340.

¹³ Figure calculated utilizing a factor of 2.77 gallons of ethanol per bushel of corn. *See* <http://www.fapri.missouri.edu/outreach/publications/2006/biofuelconversions.pdf>.

Total Renewable Fuel Corn Starch Ethanol¹⁴
(in billion gallons “bgal”)

2008	9.0 bgal	8.52 bgal
2009	11.10 bgal	10.62 bgal
2010	12.95 bgal	11.98 bgal
2011	13.95 bgal	12.80 bgal
2012	15.20 bgal	13.40 bgal

Corn prices have trended strongly upward over this period, leading to more acres of corn planted and harvested. That, coupled with corn yields trending upward has allowed corn supply to almost keep up with total demand for corn production, which has varied between approximately 12 billion and 13 billion bushels over the last five years.¹⁵ As detailed below, though, demand growth has exceeded the supply of corn, leading to progressively lower ending stocks.



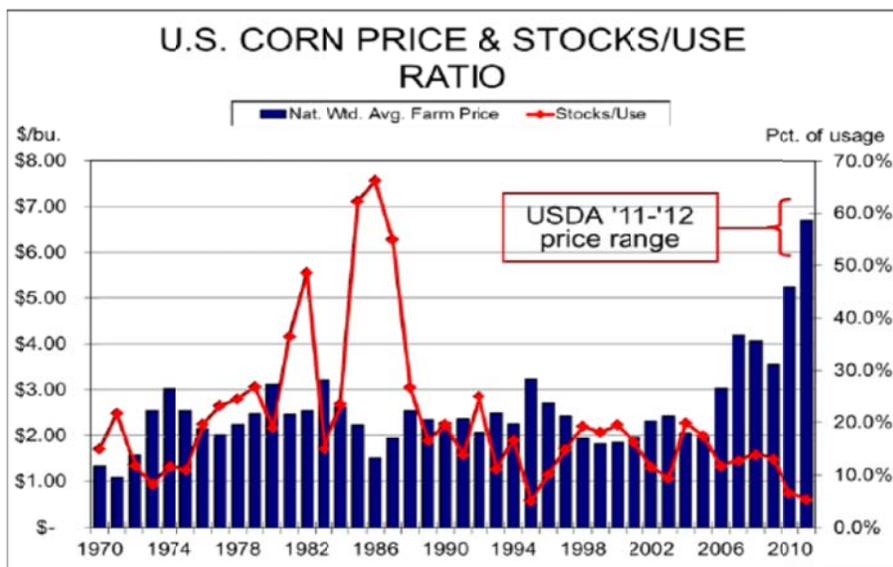
B. The 2012 RFS and Feed Prices

As noted above, corn prices over this period have strengthened considerably, nearly tripling from 2005 to the present and are currently reaching record highs in response to the drought. At the same time, corn ending stocks have tightened considerably, making the market

¹⁴ Corn starch ethanol amounts calculated by using domestic consumption of biodiesel in 2008 and 2009 (316 and 315 million gallons respectively) and the biomass-based diesel requirements for 2010-2012. Gallon amounts were multiplied by 1.5 to represent credit for energy content under RFS regulations. This figure was then subtracted from applicable volumes for renewable fuel in the corresponding year with adjustment for sugarcane ethanol imports in 2012.

¹⁵ Chart on this page appeared in Crop Production Report, Department of Agriculture, National Agricultural Statistics Board, October 12, 2011.

more volatile and susceptible to things such as drought-induced supply shocks. Last year, NPPC noted that “[t]he 2011-2012 corn numbers are coming after a 2010-2011 marketing year that, while the third largest harvest on record, saw year-end stocks of just 17 days. That’s a historic low. The last time the carryover was that small – fall 1996 – corn was so scarce in Iowa – the No. 1 corn-producing state – it had to be shipped in from Texas, and other areas suffered similar shortages.”¹⁶



Basic economics and the working of supply and demand make it clear that the greater the demand for a given supply of a product, the higher the price. As demand for corn has grown, in part due to many things, including the demand for feed corn to meet the RFS, prices have increased. Demand has exceeded the growth in supply, as evidenced by the shrinking of the ending stocks. The extensive drought conditions in 2012, however, will cut dramatically into the available corn supply. Corn yields will almost certainly be 20 bushels per acre below those projected at the start of the year, and additional decreases of 20-30 or more bushels per acre are unfortunately very possible as the drought continues and deepens. Prices have escalated sharply.

In this regard, during the time period when EPA last considered an RFS waiver petition, the Congressional Budget Office estimated that the use of ethanol for fuel accounted for about a 28 percent to 47 percent increase in the price of corn and 10 to 15 percent of the increase in food prices.¹⁷ CBO noted that these increases occurred during a time period when the United States

¹⁶ Written testimony of the National Pork Producers Council On the Availability of Feed, House Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry, at 4 (September 14, 2011).

¹⁷ Congressional Budget Office, *The Impact of Ethanol Use on Food Prices and Greenhouse Gas Emissions* 6-7 (April 2009). CBO also noted that a projected 700 million bushel increase in corn devoted to ethanol production in the 2008-2009 marketing year could increase the price of corn

(continued...)

harvested a record 13.1 billion bushels of corn.¹⁸ Other analyses have projected higher impacts on the price of food, especially food prices outside of the United States.¹⁹

As outlined above, the drought conditions are creating a dire condition for the corn crop and the users of corn like livestock and poultry producers. Some private forecasters predict a total crop of 11.8 billion bushels, the smallest crop since 2006-2007.²⁰ In some areas, private forecasters are predicting the smallest crop since at least 1993.²¹ The applicable volume of renewable fuel in 2012 will require approximately 4.8 billion bushels of corn to produce, or 2.0 billion bushels more than in 2008. These circumstances are causing and will continue to cause severe economic harm to livestock, poultry and other agricultural industries in various regions of the United States.

(continued...)

from 10 to 17% and that “[i]n the long run, upward pressure on prices caused by increased ethanol production may be alleviated by planting additional acres in corn and soybeans, increasing crop yields per acre in the United States and abroad, and improving the technologies used at refineries to allow more ethanol to be produced from each bushel of corn.” *Id.* at 8.

¹⁸ *Id.* at 7.

¹⁹ CBO cites analysis from International Food Policy Research Institute attributing 40% rise in corn prices from 2000 to 2007 as attributable to ethanol and International Monetary Fund estimates of a 70% rise in corn prices linked to ethanol. *Id.*

²⁰ “The U.S. harvest may drop to 11.8 billion bushels (299.7 million metric tons), said Dan Cekander, director of grain research, who correctly predicted in March that soybeans would trade at the most expensive level relative to corn since 2010. Cekander’s output forecast is 29.75 million tons less than the latest estimate from the U.S. Department of Agriculture, and would be the smallest crop since 2006-2007. Futures traded as high as \$7.89 yesterday, near the \$7.9925 record set in 2008.” *Corn Seen Rallying to Record \$8.50 As Drought Kills Crops*, Bloomberg Business Week, July 18, 2012. On Friday, July 27, 2012, the Des Moines Register reported that Informa Economics was lowering their estimate for the national corn crop to 134 bushels an acre. Also on Friday July 27, 2012, Reuters reported that MDA EarthSat was projecting a total U.S. corn yield of only 118 bushels an acre based on a survey of fields in Iowa, Illinois, Indiana and Ohio. <http://www.reuters.com/article/2012/07/27/usa-grains-tour-idUSL2E8IRBIM20120727?irpc=932>

²¹ “In summary, our estimate for the Iowa corn yield is 117 bpa, resulting in production of 1.58 billion bushels. The yield is down 32% from 172 bpa a year ago and would be the lowest yield since the flood year of 1993. If realized, production would be down 33% from 2.356 billion a year ago. Doane will survey Illinois, Indiana and Ohio early next week so stay alert for updates.” Doane’s Agricultural Service’s, July 27, 2012. <http://www.cattlenetwork.com/cattle-news/Doane-Crop-Tour-Day-4-Iowa-corn-yields-lowest-since-1993-163998296.html>.

III. The Supply and Price Benefits of a Waiver

A. Iowa State Analyses for 2010, 2011, 2015 and 2020

The Center for Agricultural and Rural Development at Iowa State University has published a report on the costs and benefits of current U.S. ethanol policies (“2010 ISU Analysis”).²² Modeling performed for this study measured the impact of implementing the RFS in 2011 and 2014.

ISU also conducted additional analysis in 2011 (“follow-on ISU Analysis”) that used the 2010 work and modeled the impact in 2011 on corn prices and the swine industry of the various federal renewable fuels policies.

As verified with researchers involved in this effort, their 2011 estimates can be utilized to estimate the effect of waiving the RFS for a year. Their work indicates that if all other federal policies affecting ethanol in 2011 had remained the same, a waiver of the RFS in that year would have reduced the price of a bushel of corn by \$1.48.

A follow-on ISU Analysis for 2015-2020,²³ indicates that the RFS could add \$2.13 and \$2.37 to the price of a bushel of corn in 2015 and 2020, respectively, and that in situations where the crop is short (as expected this year in light of the drought), waiving the RFS would result in an even more significant reduction in the price of corn than would otherwise take place.

B. Grain and Feed Prices Are Affected By Low Yields

The most recent reports from the United States Department of Agriculture Economic Research Service (“USDA ERS”)²⁴ indicate that U.S. feed grain production in 2012/13 could be 343.8 million metric tons, down an estimated 45.9 million tons in only one month. According to USDA ERS:

U.S. feed grain supplies for 2012/13 are projected sharply lower this month with lower production for corn on lower yields. Extremely hot weather and drought result in a 20-bushel-per-acre decline in the projected corn yield to 146 bushels per acre reducing projected production to 13.0 billion bushels, compared with 14.8 billion bushels last month. The June Acreage report increased planted acreage relative to March intentions but harvested acreage

²² Dr. Bruce A. Babcock, Kanlaya Barr and Miguel Carriquiry, *Costs and Benefits to Taxpayers, Consumers, and Producers from U.S. Ethanol Policies*, Staff Report 10-SR 106, Center for Agriculture and Rural Development, Iowa State University, (July 2010).

²³ *Analysis of Ethanol and Corn Market and the Impact on the Swine Industry (Result for the year 2015 & 2020)*.

²⁴ United States Department of Agriculture, Feed Outlook, FDS-12g, July 13, 2012.

was reduced 249,000 acres. Corn supplies for 2012/13 are projected 1.8 billion bushels lower. Forecast 2012/13 prices are increased for corn, sorghum, and barley and oats. With tighter supplies and higher price prospects, domestic corn use is projected down 755 million bushels as feed and residual and ethanol use prospects are lowered. The U.S. corn export projection is also reduced, down 300 million bushels. Reductions in U.S. corn supplies exceed those for use, leaving projected 2012/13 ending stocks down 698 million bushels.²⁵

In 2011, ending stocks of corn were at 6.7 percent of usage, the tightest level since 1995/1996.²⁶ Yields in 2011 were 147.2 bushels per acre,²⁷ representing the lowest average yield since 2005.²⁸ These low yields in 2011 directly contribute to the economic stress now being experienced in 2012 due to the widespread drought conditions.

Conditions of continuing drought tend to increase uncertainty regarding crop yields, affecting trading and increasing the economic impact on consumers of grain and feed. The granting of an RFS waiver would reduce this economic impact over the remainder of this year. Demand for corn to meet the RFS continues to grow as the RFS grows. It has risen by 5.0 billion gallons over the last five years and will rise 2.25 billion gallons from 2010 to 2012. Thus, lower corn yields and a drawdown of stocks is occurring at the same time mandatory levels of ethanol blending continue to increase.²⁹

Analysis indicates that the effects of the RFS on corn prices increases when crop yields decrease. As noted by Dr. Babcock, “the effects of the mandate are highest when feedstock supplies are low ... current U.S. ethanol policy³⁰ exacerbates tight market conditions by forcing all demand adjustment to tight supplies on non-ethanol users of maize, which disproportionately impacts the livestock sector ... mandates exacerbate the market impacts of tight supplies by forcing all demand adjustment into the livestock sector.”³¹ When corn yields are low, tight supply conditions accentuate the effect of the RFS mandate.

²⁵ *Id.*

²⁶ United States Department of Agriculture, Feed Outlook, FDS-12a, January 17, 2012.

²⁷ *Id.*

²⁸ Crop Production Report, Department of Agriculture, National Agricultural Statistics Board, October 12, 2011.

²⁹ Obligated parties under the RFS may also comply through the purchase of RINs. RINs, however, must be based on the production of qualified renewable fuel.

³⁰ “Current US policy” when used in this context includes both RFS mandate and the VEETC.

³¹ Dr. Bruce Babcock, *The Impact of US Biofuel Policies on Agricultural Price Levels and Volatility*, International Centre for Trade and Sustainable Development, Issue Paper No. 35 at 19-20, June 2011.

At a yield of 156 bushels per acre, the mandate increases the price of corn by approximately 80 cents, while at 135 bushels per acre, the effect of the mandate alone is over \$2.50 per bushel.³² Currently, corn yields of 146 per acre are being projected by USDA, but this projection is based on conditions through the end of June.³³ July has proved to be another month of very high temperatures and limited rain in wide areas of the grain producing regions of the United States. Thus, it is extremely likely that yields will be further depressed, perhaps well below the level projected to have a \$2.50 per bushel price impact.³⁴ EPA has the ability to mitigate the current impact and prevent future economic harm to the nation's livestock and poultry sectors and the regions of the country in which they operate. Section 211(o)(7) contains a "relief valve" in the form of an applicable volume waiver that can address these conditions and allow EPA to tailor the relief required to address the harm presented.

IV. The Requirements for a CAA section 211(o)(7) Waiver Exist

A. Harm Is Attributable to RFS Applicable Volume

As indicated above, recent modeling information demonstrates that the granting of a complete RFS waiver in 2011 might have resulted in a decrease of \$1.48 in the price of a bushel of corn. This modeling was performed using a stochastic model, the type of model that EPA has indicated is "critical" to use since it captures a range of potential outcomes and helps to account for different variables associated with ethanol production.³⁵ Referring back to Dr. Babcock's work cited above, there is every reason to expect that the effect of a waiver in this year's drought-induced short crop situation will be even more dramatic for the price of corn. It 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.

In its 2008 waiver decision, EPA referenced the fact that under the ISU model, the RFS applicable volume level was only binding in 24% of the random draws used in the model. In other words, there was a 76% probability that the RFS applicable volume level was not binding and therefore did not influence the price of corn in that year. The mean estimate in the ISU model showed an economic impact of 7 cents per bushel.³⁶ Conditions in 2011 were far different from those reviewed by EPA in 2008. The RFS volumes have escalated while corn production

³² *Id.* at 19.

³³ WASDE-508, July 11, 2012.

³⁴ Recent estimates of corn yield are discussed in more detail on page 8 and in footnotes 20 and 21.

³⁵ *See* 73 Fed. Reg. at 47,173.

³⁶ EPA also cited two other studies which showed much higher impacts of \$1.05/bushel and \$0.34 per bushel. The agency, however, consider the results of the ISO model to be more "robust" than two other models (Elam and the Texas A&M model). *See* 73 Fed. Reg. at 47,173-47,175.

has remained level. Modeling that is similar to that EPA reviewed in 2008 now shows a mean estimate of the impact of the RFS in the past year that is *21 times larger* than in 2008.

Conditions regarding mandated ethanol production and the corn market are also markedly different in 2012 than 2008. Requirements for ethanol derived from corn starch are now over 60% greater in 2012 than in 2008. Meanwhile, domestic corn production in 2012 will be less than in 2008, perhaps substantially so. In the past two years, more corn has been devoted to ethanol production than used for feed grain. This condition will only be exacerbated the longer and the more severe the 2012 drought becomes and will continue into 2013 as feed stocks are drawn down and the total volume of renewable fuels required under the RFS is subject to an increase of 1.25 billion gallons in 2012 over 2011 and a 1.35 billion gallon increase in 2013 over 2012.³⁷

B. Harm Meets CAA Requirements

1. Harm Affects Important Economic Interests

Those who must purchase corn and corn-based feed and soybean meal are adversely affected by the current drought and their levels of harm would be dramatically reduced if a waiver of the RFS applicable volume is granted. Both of these primary feed sources have been greatly affected by the continuing drought.³⁸

For those who produce pork, beef, milk, and poultry, this represents a dire outcome. Prices for feed have risen substantially and will likely rise further. In some regions, feed

³⁷ CAA section 211(o)(2)(B)(i)(I).

³⁸ Corn prices reached \$8.08 on the Chicago Board of Trade on July 19, 2012. Soybean prices may also reach record highs. In specific, “[t]he USDA made significant changes in the July WASDE report projection for “new crop” MY 2012/13 U.S. soybeans, dropping projected yields to 40.5 bu/ac (down 3.4 bu/ac from June), production to 3.050 billion bushels (bb) (down 155 million bushels or mb from last month), total use to 3.105 bb (down 150 mb), ending stocks to 130 mb (down 10 mb), and ending stocks-to-use to a record low 4.2% (down from 4.3% in June). Projected U.S. soybean prices for MY 2012/13 were raised to a range of \$13.00-\$15.00 /bu, up \$1.00 on each end of the range from the June report. “Old crop” MY 2011/12 U.S. soybean exports were projected to be 1.340 bb (up 5 mb), leading to ending stocks of 170 mb (5.5% S/U), down 5 mb from a month ago. If 2012 U.S. soybean yields were to fall further to 39 bu/ac with U.S. 2012 soybean production falling as well to the range of 2.925-2.950 bb, then U.S. soybean ending stocks projections for “new crop” MY 2012/13 would likely fall further to near the historic low of 112 mb (in MY 2003/04), with price rationing reducing forecast U.S. soybean usage and causing ending stocks-to-use to fall to what would be a new record low of 3.7%, with U.S. soybean farm prices climbing even further to record highs.” *Soybean Outlook and Market Report for July WASDE Report*, Kansas State Research and Extension, July 16, 2012.

availability will be substantially disrupted, forcing long distance shipping and challenges in financing its acquisition. Depending on final yields, available stocks from 2012 to 2013 will be greatly affected. As NPPC has recounted in congressional testimony:

Feed comprises 60-70 percent of the cost of raising a hog to market weight (about 260-280 pounds). Primarily, hogs are fed corn and soybean meal – each market pig consumes approximately 10.5 bushels of corn and 4 bushels of soybeans in the form of meal.

* * *

The pork industry has seen the effects of tight grain supplies before, most recently just a few days ago. Despite (at the time) a record harvest in 2007, increasing demand saw prices for corn begin a rapid ascent, increasing from about \$3.50 a bushel in mid-2007 to a peak of nearly \$7.90 a bushel in mid-2008. While corn prices moderated over the next year and a half, falling back to around \$3.50 a bushel, they began rising again as oil prices rose. The result was soaring costs of production. Total industry losses from October 2007 through January 2010 were more than \$6 billion, and the average farrow-to-finish operations lost nearly \$23 for each animal marketed. More than 6,300 pork operations went out of business. This financial disaster occurred despite near-record hog prices in 2008 and hog prices in 2009 high enough to have provided profits at the average production-cost levels that prevailed from 1999 to 2006.³⁹

The economic impact of the RFS applicable volume is thus directly experienced by the pork industry and parts of the economy that are interrelated to that industry as well as other agricultural industries that also utilize feed corn and soybean meal.⁴⁰ This level of harm meets the requirements for a waiver under CAA section 211(o)(7).

2. Harm Occurs in State or Region

In assessing whether the conditions for a waiver exist, the CAA requires EPA to look to the harm resulting from imposition of the RFS applicable volume for renewable fuel. EPA must also evaluate the areas where this harm exists: whether it occurs at the national level, at a State level or within various regions.

In the Agency's consideration of the 2008 Texas waiver request, EPA attempted to alter this focus and consider the harm produced by the RFS applicable volume relative to other

³⁹ Testimony of National Pork Producers Council at 3, 6.

⁴⁰ Impacts from changes to the price of corn can also be experienced with respect to soybeans to the extent that each product is capable of substitution.

impacts. EPA measured the impact related to the economy generally⁴¹ and assessed changes in the price of corn to the Texas economy as a whole and to the livestock industry within that state.⁴² EPA stated that “it would be unreasonable to base a waiver determination solely on consideration of impacts of the RFS program to one sector of an economy, without also considering the impacts of the RFS program on other sectors of the economy or on other kinds of impact. It is possible that one sector of the economy could be severely harmed, and another greatly benefited from the RFS program; or the sector that is harmed may make up a quite small part of the overall economy.”⁴³

CAA section 211(o)(7)(A) states, however, that a waiver determination is to be based on whether the requirements of CAA section 211(o)(2) “severely harm the economy or environment of a State, a region, or the United States” The CAA does not otherwise include language authorizing EPA to “balance” different harms or consider any corresponding benefits. While EPA did not provide any developed analysis of this point and, indeed, included discussion of the matter apart from its Decision in Section VII,⁴⁴ the Agency simply does not have authority to invoke such a process. Interpretation of this matter is clearly governed by *Chevron*⁴⁵ analysis. The words contained in CAA 211(o)(7) and the plain meaning of the statute do not include language authorizing the Agency to assess harm broadly within the economy as a whole (given that there are three specific areas described as “a State, a region, *or* the United States” within CAA section 211(o)(7)(A)(i) (emphasis added). Nor does this provision authorize EPA to engage in a process to determine if there are economic winners as well as economic losers. CAA 211(o)(7) speaks only to harm experienced, not financial benefits that may occur through the production and sale of ethanol or otherwise. In brief, the waiver is linearly drawn; it is sufficient for harm to be experienced within any of the itemized areas.

With respect to the scope of the harm, it should also be pointed out that a “region” is first defined as “an administrative area, division, or district”⁴⁶ A region therefore is not constrained to any geographic area, nor is it required to be of any particular geographic size. Instead, the statute is most naturally read to mean that a region be defined as to where the harm occurs. EPA is therefore not constrained in examining the harm presented to that experienced state-wide, or for that matter county-wide. Instead, the Agency is directed by Congress to determine regional impacts that exist either within a State, or regions of different sizes that may cross political jurisdictional borders or even be shared among states.

⁴¹ “EPA notes that the overall weight of the evidence indicates that implementation of the mandate itself would have no significant impact on the economy during this time period . . .” 73 Fed. Reg. at 47,182

⁴² 73 Fed. Reg. at 47,177-47,178.

⁴³ *Id.* at 47,172.

⁴⁴ *Id.* at 47,180

⁴⁵ *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)

⁴⁶ <http://www.merriam-webster.com/dictionary/region>

In the current instance, many different pork, beef, milk and poultry producing regions have been severely impacted by the implementation of the RFS applicable volume for renewable fuel. Harm to these economic sectors and the rural regions in which they operate is sufficient, if judged by EPA to meet the “severely harm” criteria, to support a determination by the EPA Administrator to waive the RFS applicable volume for renewable fuel. EPA may, as it has stated, “always want to examine the nationwide effects of the requested relief,”⁴⁷ but it cannot base or condition relief on this basis.

3. Level of Harm Required Cannot Be Unattainable

In the 2008 Texas waiver determination, EPA discussed the meaning of “severely harm” as that term is utilized within CAA section 211(o)(7). The Agency compared use of this term with use of other adjectives within the CAA (e.g., the existence of “severe” or “extreme” ozone nonattainment areas with CAA section 181). EPA did not, however, provide definitive guidance on this statutory term either in the discussion of the phrase⁴⁸ or within the Section VIII Guidance on Future Requests for Waivers.⁴⁹

The level of harm demonstrated within this waiver request certainly rises to the level of harm justifying a waiver under CAA section 211(o)(7). The harm exists now and will continue to exist into the latter part of 2012 and 2013. We believe that harm is manifest and supported in this request for a waiver. But in assessing the data supporting this waiver request as well as data that will be submitted during public notice and comment on this request, EPA should bear in mind that Congress does not act to create a nullity. That is, EPA may not impose a test of “severe harm” such that the waiver provisions contained in CAA section 211(o)(7) is inoperable or cannot reasonably be met. Indeed, the CAA distinguishes between waivers of otherwise applicable provisions and extraordinary relief.⁵⁰ Waivers under CAA section 211(o)(7) must therefore be reasonably achievable within the plain meaning of the statute and its legislative history. Congress had every opportunity to not provide a waiver for economic harms caused by the RFS, yet it chose to not only include this waiver within EPACT 2005 but to expand access to petition for a waiver in EISA. 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.

⁴⁷ 73 Fed. Reg. at 47,172.

⁴⁸ *Id.*

⁴⁹ *Id.* at 47,183-47,184.

⁵⁰ For example, Presidential exemptions for hazardous air pollutant standards are authorized pursuant to CAA section 112(i)(4) where the “national security interests of the United States” are involved.

To the contrary, waiver authority regarding the RFS applicable volume for renewable fuel exists in the context of other available waivers of the RFS or various parts of the RFS.⁵¹ Congress, therefore, considered that the applicable volumes of renewable fuel contained in CAA section 211(o)(2)(B) were not immutable requirements to be imposed regardless of the harm caused. The devastating conditions now occurring across the prime agriculture areas of this country combined with the economic effects of implementing increasing volumes of renewable fuel over the past six years are producing the severe economic harm necessary for a waiver. The impact of the applicable volume of renewable fuel in 2012 and 2013 on the pork, beef, milk, and poultry industries, operating in various regions of the country, fully justifies the use of the waiver authority provided to the Administrator.

V. EPA Has Ability to Grant Relief

A. EPA Should Grant a Waiver for 2011/2012

The waiver authority contained in CAA section 211(o)(7) states that EPA may waive the applicable volume of renewable fuel if implementation *would* result in severe harm. EPA is not constrained to issue a waiver based on the yearly compliance schedule of the RFS. Rather, EPA has authority to extend waivers over two different years as long as the waiver terminates not more than 1 year after the waiver is granted and effective.⁵² Given the effects of the historic drought that will continue to be felt in corn markets throughout 2013, the undersigned parties would request that the waiver of the RFS last a full year to allow the full effects of the 2012 short corn crop to work through the system. While EPA has recognized that it may be able to grant a waiver over a “marketing year” we believe that the Agency can either utilize this concept or otherwise tailor the requirements of CAA section 211(o)(7)(C) to address the real-world continuing impacts of high corn prices and short supply, granting a waiver to alleviate these conditions for as long as they are reasonably projected to last, subject only to the 1 year statutory limitation.⁵³

⁵¹ See CAA section 211(o)(7)(D) regarding waiver authority for cellulosic biofuel, CAA section 211(o)(7)(E) regarding waiver of biomass-based diesel volumes; CAA section 211(o)(7)(F) regarding waiver of the statutory schedule upon waiver of the RFS volume requirement by 50% in one year or 20% in two consecutive years; CAA section 211(o)(8) regarding study and waiver of the RFS for the initial year of the program; and small refiner exemptions contained in CAA section 211(o)(9)

⁵² See CAA section 211(o)(7)(C). Waivers granted “shall terminate after 1 year . . .”

⁵³ It is also important to note that EPA’s grant of a waiver in no way impacts the ability of the ethanol industry to continue to produce and market ethanol. It simply removes the mandate that customers must buy ethanol at any price.

B. EPA Should Expedite Consideration of This Waiver Request

NPPC and the undersigned national and regional livestock, poultry, and feed organizations appreciate that EPA guidance states that waiver applications should be submitted “generally at least six months before the requested start date . . .”⁵⁴ We, of course, understand that Federal Register publication and an adequate time for public comments to be received and analyzed could be necessary in some circumstances. But current drought conditions require that EPA depart from this process. We request that the Agency take steps to accelerate all requirements that EPA decides it may impose for Federal Register publication and subsequent Agency review. Timing is everything. The predicted devastating impact on corn yields and resulting high prices for feed pose a severe threat to livestock and poultry producers. Many will choose to leave livestock farming altogether, and that combined with overall herd reductions across these industries, will cause significant job losses across all regions where livestock and poultry are raised. By beginning the process immediately, EPA will be prepared to take final action once harvest is underway and the full extent of the drought, and the impact of the RFS, on grain supplies is clear.

VI. Conclusion

Based on the foregoing analysis and information that will become available during the time of EPA’s consideration of this request concerning evolving conditions of drought and price impacts on feed, NPPC and the other undersigned national and regional livestock, poultry, and feed organizations requests that EPA promptly act to grant a full or partial waiver of the applicable volume of renewable fuel required for 2012 and that part of 2013 which is within 1 year of the date of final action on this request.

Respectfully submitted

Michael C. Formica
Chief Environmental Counsel
National Pork Producers Council
122 C Street, N.W., Suite 875
Washington, D.C. 20001

National Chicken Council
1015 15th Street, N.W.
Suite 930
Washington, D.C. 20005

National Turkey Federation
1225 New York Ave, N.W.
Suite 400
Washington, D.C. 20005

National Cattlemen’s Beef Association
1301 Pennsylvania Ave, N.W.
Washington, D.C. 20004

American Sheep Industries Association
9785 Maroon Circle, Suite 360
Englewood, CO 80112

⁵⁴ 73 Fed. Reg. at 47,184.

California Dairy Campaign
P.O. Box 1957
Turlock, CA 95381

Dairy Producers of New Mexico
P.O. Box 6299
Roswell, NM 88201

Dairy Producers of Utah
P.O. Box 1082
Midway, UT 84049

Idaho Dairymen's Association
1182 Eastland Drive North, Suite A
Twin Falls, ID 83301

Milk Producers Council
13545 S. Euclid Avenue, Unit B
Ontario, CA 91762

Nevada State Dairy Commission
4600 Kietzke Lane, A-107
Reno, NV 89502

Northwest Dairy Association
P.O. Box 34377
Seattle, WA 98124

Oregon Dairy Farmers Association
10505 SW Barbur Blvd.
Portland, OR 97219

Southeast Milk, Inc.
1950 SE County Highway 484
Bellevue, FL 34420

Washington State Dairy Federation
P.O. Box 1768
Elma, WA 98541

North American Meat Association
1970 Broadway Suite 825
Oakland, CA 94612

United Dairymen of Arizona
2008 South Hardy Drive
Tempe, AZ 85282-1211

American Feed Industry Association
2101 Wilson Boulevard, Suite 916
Arlington, Virginia 22201

American Meat Institute
1150 Connecticut Avenue, NW
12th Floor
Washington, D.C. 20036

Cc: The Honorable Thomas Vilsack
Secretary, United States Department of Agriculture

The Honorable Steven Chu
Secretary, United States Department of Energy

The Honorable Cass R. Sunstein
Director, Office of Information and Regulatory Affairs
Office of Management and Budget