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One Massachusetts Avenue NW, Suite 820
Washington, DC 20001
202.289.3835
www.ethanolRFA.org

Standard for Waiver of RFS: A Waiver is Unnecessary and Unwarranted for 2008

The 2008 Renewable Fuel Standard (RFS) requires that 9.0 billion gallons be sold in the United States. Concerns have been raised regarding the impacts of the increased 2008 RFS requirement on consumer prices, calling for a reduction. While there are provisions that allow a state to request a partial or complete waiver of the required volumes, Congress limited those waivers to extreme circumstances that do not exist at this time.

Congress provided for limited waivers of the RFS, placing a high burden on petitioners.

- Clean Air Act § 211(o)(7) states that the U.S. Environmental Protection Agency (EPA) may only grant a state waiver petition if the petition allows EPA to determine that:
(1) implementation of the RFS requirement would *severely harm* the economy or environment of a State, a region, or the United States; or (2) there is an inadequate domestic supply.
- EPA can only make this determination after consultation with the Departments of Agriculture and Energy and receiving and responding to comments from the public. A waiver can only issue for one year although it may be renewed.¹
- Importantly, even if a state petition satisfies the waiver requirements, any relief must be of the “total national volume required” and does not provide targeted relief to a particular area or group of companies.²

“Severe” harm means extreme situations affecting an area’s economy. Normal price fluctuations that can be addressed through mechanisms already provided in the Act do not meet this test.

- The Act allows States to seek waivers from the use of ethanol “in the event that there is disproportionate economic hardship.”³ There has been no showing of disproportionate hardship. Moreover, the Act is designed to minimize adverse local economic impacts through the credit provisions, which ensure that ethanol is used “where it is most efficient and economical.”⁴

¹ The 2007 amendments to Section 211(o) revise the waiver provisions, but are not effective until January 1, 2009.

² EPA, Renewable Fuel Standard Program: Summary and Analysis of Comments, EPA420-R-07-006, April 2007 at 11-7 (“Response to Comments”).

³ 151 Cong. Rec. S6601-03, S6613 (Statement of Sen. Jeffords).

⁴ *Id.* (Statement of Sen. Durbin).

Petitioners must show that the asserted harms result from implementation of the RFS standard. However, implementation of the RFS is not driving food prices.

- The statistical evidence available does not support a conclusion that the growth in the ethanol industry is driving consumer food prices higher.⁵ “Rising energy prices had a more significant impact on food prices than did corn.”⁶
- Numerous factors affect food prices. While the farm commodity share of food prices has diminished, there has been a sharp rise in marketing costs. Marketing costs (e.g., labor, energy, transportation, advertising, profits) account for approximately 80% of food prices today from 67% in the 1970s.⁷ Labor costs are the biggest component of the retail food dollar.
- The marketing bill has a higher correlation with the consumer price index (CPI) for food than does corn, largely due to rising energy and transportation costs. Only a “weak correlation” exists between corn prices and overall food prices. In fact, just four percent of the fluctuation in consumer food prices can be attributed to food prices.⁸
- Population growth and rising incomes are altering global food consumption patterns and increasing the demand for food and supporting higher prices.⁹
- Industrial livestock operations have benefited from U.S. agricultural policies that have lowered feed prices and increased production. Data suggests that they have collectively saved almost \$4 billion per year since 1997.¹⁰ With the increased production of ethanol in the U.S., farmers are finally being paid prices that cover their costs of production resulting in industrial livestock firms paying full costs for feed for the first time in more than a decade.¹¹
- Much like crude oil markets, “speculators are driving commodity prices higher and higher, feeding on hype provided by the large commission houses that have turned to commodities to fuel their own recoveries from the mortgage disaster they engineered.”¹²

In determining “severity” of economic harm, EPA’s determination must take into account all economic effects.

- A petition needs to evaluate both benefits and alleged harms to determine the overall economic effect of the RFS before it can satisfy the criterion of severe economic harm. For example, any

⁵ Informa Economics, *Analysis of Potential Causes of Consumer Food Price Inflation*, Nov. 2007, at 4.

⁶ John M. Urbanchuk, LECG LLC, *The Relative Impact of Corn and Energy Prices in the Grocery Aisle*, June 14, 2007, at 2, available at http://www.sdcorn.org/kernelsoftruth/pdfs/research/food_price_analysis_-_urbanchuk.pdf.

⁷ Federal Reserve Bank of Kansas City, *What is Driving Food Price Inflation?* The Main Street Economist: Regional and Rural Analysis, 2008, Vol. III, Issue I, at 2.

⁸ Informa Economics, *Analysis of Potential Causes of Consumer Food Price Inflation*, Nov. 2007, at 5.

⁹ Federal Reserve Bank of Kansas City, *What is Driving Food Price Inflation?* The Main Street Economist: Regional and Rural Analysis, 2008, Vol. III, Issue I, at 4.

¹⁰ Elanor Starmer and Timothy A. Wise, *Feeding at the Trough: Industrial Livestock Firms Saved \$35 billion From Low Feed Prices*, Global Development and Environment Institute, Tufts University, Policy Brief No. 07-03, Dec. 2007, at 3.

¹¹ Elanor Starmer and Timothy A. Wise, *Feeding at the Trough: Industrial Livestock Firms Saved \$35 billion From Low Feed Prices*, Global Development and Environment Institute, Tufts University, Policy Brief No. 07-03, Dec. 2007, at 4.

¹² Tom Waterman, *The Ethanol Monitor*, Why a Slumping U.S. Economy Will Eventually Slow Commodities, March 10, 2008, at 1.

alleged increase in prices related to corn would be counterbalanced by economic benefits in the state. The growing ethanol industry significantly contributes to the American economy, creating new high-paying jobs, increasing market opportunities for farmers, generating additional household income and tax revenues, and stimulating capital investment.

- Ethanol plants are seen as a major boost to local communities in terms of employment and the tax base.¹³ In today's challenging rural economy, "[e]thanol and biodiesel production offers rural communities the greatest opportunity for economic growth...."¹⁴
 - In 2007, an average 100 million gallon per year ethanol biorefinery provided the following economic benefits to the local economy¹⁵:
 - ❖ The goods and services bought and sold as a result of the operation of the ethanol biorefinery added \$367 million to the local Gross Domestic Product (GDP).
 - ❖ The economic activity resulting from the ethanol biorefinery helped create more than 2,400 new jobs across all sectors of the economy. Those include 50 at the biorefinery itself and more than 1,300 in the agricultural sector.
 - ❖ The increase in good paying jobs as a result of the ethanol biorefinery boosted local household incomes by more than \$100 million.
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- **The only other basis for a waiver – inadequate domestic supply – does not exist since an additional 4 billion gallons of ethanol production capacity will come online in 2008.**
 - **It is a complex set of factors that determine consumer food prices that cannot be easily explained by singling out one specific factor, like corn prices.**
 - **Responsibly increasing the domestic production of ethanol, which is what the Energy Independence and Security Act of 2007 does, will not impact consumer food prices.**
 - **Failing to address our energy crisis and the consequences of rising oil prices will force consumer food prices higher, along with everything else that requires petroleum.**

¹³ State Energy Conservation Office, *Texas Ethanol Plants*, http://www.seco.cpa.state.tx.us/re_ethanol_plants.htm.

¹⁴ State Energy Conservation Office, *Energy Crops for Fuel*, http://www.seco.cpa.state.tx.us/re_biomass-crops.htm.

¹⁵ John M. Urbanchuk, LECG LLC, *Contribution of the Ethanol Industry to the Economy of the United States*, Feb. 20, 2008.