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GrowthEnergy.org

December 1, 2020

VIA CERTIFIED MAIL

Hon. Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Re: Notice of Intent to Sue for Failure to Issue the 2021 Renewable Fuel Obligations

Dear Administrator Wheeler:

Growth Energy hereby provides notice of its intent to sue the Environmental Protection Agency (“EPA”) under section 304(a)(2) of the Clean Air Act to enforce EPA’s non-discretionary duty under section 211(o)(3) of the Act to issue by November 30, 2020, the renewable fuel obligations that ensure that the Renewable Fuel Standard (“RFS”) volume requirements for 2021 are met.

Growth Energy is the country’s leading association of ethanol producers. With its members, Growth Energy works to bring consumers better choices at the fuel pump, grow America’s economy, and improve the environment. Growth Energy’s members’ operations depend directly on the annual RFS obligations issued by EPA.

Under the Clean Air Act, “EPA must by November 30 of each year calculate and promulgate ‘renewable fuel obligations that’ will ‘ensure that the Program’s requirements ... are met’ in the upcoming year.”¹ Accordingly, EPA was required to issue the renewable fuel obligations for 2021 by November 30, 2020.

¹ *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 570 (D.C. Cir. 2019) (quoting 42 U.S.C. § 7545(o)(3)(B)(i)); *accord id.* at 571 (“EPA must promulgate annual percentage standards by November 30 each year”); *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 637 (D.C. Cir. 2019) (“The statute calls on EPA to publish the percentage standards not later than November 30 ...”); *Americans for Clean Energy v. EPA*, 864 F.3d 691, 699 (D.C. Cir. 2017) (“By statute, EPA is required to promulgate the percentage standards for a given year no later than November 30 of the preceding calendar year.”).

EPA has failed to perform this mandatory, non-discretionary duty. As of today, EPA has not issued the renewable fuel obligations for 2021. In fact, EPA has not even issued a notice of the proposed obligations for 2021. Consequently, EPA appears likely to issue the obligations many months after the November 30, 2020, deadline. Such extreme delay not only violates EPA's statutory duty, but also undermines the RFS program's purpose of "for[cing] the market to create ways to produce and use greater and greater volumes of renewable fuel each year"² and deprives market participants of the "market certainty" that is "so critical to the long term success of the Renewable Fuel Program."³

Therefore, Growth Energy urges EPA to promptly issue the renewable fuel obligations for 2021 as statutorily required. Should EPA fail to do so within 60 days of this notice, we reserve our right to sue for relief,⁴ including an order compelling EPA to issue the obligations promptly.⁵

If you have any questions concerning this notice, please contact me at 202-545-4025.

Respectfully submitted,



Joseph Kakesh
General Counsel
Growth Energy

cc: David Fotouhi
Anne (Idsal) Austin

² *Americans for Clean Energy*, 864 F.3d at 710; accord *American Fuel & Petrochemical Manufacturers*, 937 F.3d at 568.

³ *Americans for Clean Energy*, 864 F.3d at 715 (quotation marks omitted).

⁴ See 42 U.S.C. § 7604(b)(2) ("No action may be commenced ... under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator ...").

⁵ See 42 U.S.C. § 7604(a)(2) ("any person may commence a civil action ... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator"); 5 U.S. Code § 706(1) ("The reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed ...").