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By certified U.S. mail

Administrator Gina McCarthy

U.S. Environmental Protection Agency

Washington, D.C. 20460

Re: Third Notice Pursuant to 40 C.F.R. Part 54 Prior to Filing of Civil  
Action under 42 U.S.C. § 7604(a)(2) for Failure to Take  
Nondiscretionary Action

Dear Administrator McCarthy:

I write on behalf of Plant Oil Powered Diesel Fuel Systems, Inc. ("POP Diesel"), a Delaware corporation with offices in California, Virginia and New Mexico. I write to give you notice pursuant to 40 C.F.R. Part 54, prior to the institution of a citizen's civil action under 42 U.S.C. § 7604(a)(2), of the failure of the U.S. Environmental Protection Agency ("EPA" or "the Agency") to fulfill nondiscretionary duties and take nondiscretionary actions. This notice is in addition to, and supplements, two previous notices POP Diesel has provided you, by my certified letters to you dated February 13, 2015 and its exhibits and my letter dated March 5, 2015 (together "POP Diesel's previous notices").

- A. Additional Statutory Sections Underlying Nondiscretionary Duty to Regulate the Phosphorous Content and Iodine Value of Diesel Engine Biofuels

I wish, first, to draw your attention to several additional statutory provisions that underlie the nondiscretionary statutory duties stated and attributed to EPA in

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POP Diesel's previous notices. Subsection (B) of 42 U.S.C. § 7545(c)(1) authorizes EPA to regulate, control or prohibit any fuel or fuel additive "if emissions products [] will impair to a significant degree the performance of any emission control device or system which is in general use." As argued in POP Diesel's previous notices, the presence of phosphorous in any diesel engine biofuel in excess of 15 parts per million ("PPM") and the allowance of diesel engine biofuels with an iodine value in excess of 95 will significantly impair emissions after-treatment equipment.

In addition to other sections of the Clean Air Act set forth in POP Diesel's previous notices that together establish a duty for EPA to monitor for diesel biofuel phosphorous level and iodine value, 42 U.S.C. § 7525(a)(1) requires EPA or, in its place, the manufacturer to test, and if they pass, EPA to certify new motor vehicles and engines according to the emissions standards promulgated pursuant to 42 U.S.C. § 7525(a)(1). 42 U.S.C. § 7525(a)(2) and (a)(3) require EPA or the manufacturer to test, and EPA to certify, any "emission control system" if it enables a motor vehicle or engine to conform to emissions standards, in accordance with 42 U.S.C. § 7521(a)(4). 42 U.S.C. § 7525(g) addresses the duty of EPA to certify heavy duty engines according to standards promulgated under 42 U.S.C. § 7525(a)(1) and requires EPA to establish penalties for their nonconformance with those emissions standards.

EPA shirks its nondiscretionary statutory duty, set forth in the above-cited statutory sections, as well as the sections cited in POP Diesel's previous notices, if EPA allows new motor vehicles and engines, and even vehicles and engines beyond their useful life, to be certified or approved to run on a biofuel, be it a biodiesel, so-called "renewable diesel," or plant oil fuel, that will, if not during the emissions test, before long, (a) significantly degrade the functioning of the catalytic converter by its phosphorous content in excess of 15 PPM or (b) produce higher nitrous oxides emissions ("NOx) than petroleum diesel would coming from the same engine, or higher than EPA's NOx emissions standards allow for that particular engine.

B. Failure to Require Nondiscretionary Health Effects Testing of So-Called “Renewable Diesel” Fuel

In short, EPA has failed to request and approve necessary Tier 1 and Tier 2 health effects testing of so-called “renewable diesel” fuel, refined from hydro-processed esters and fatty acids (“HEFA’s”), as this fuel is combusted in its neat form or before it is blended with other constituent fuel feedstocks, which would principally be petroleum diesel fuel, in fuel commercially sold as No. 1 or No. 2 diesel.

This issue arises for the same reason as the phosphorous and nitrous oxides issues set forth above and in POP Diesel’s previous notices. First, EPA requires fuel “commercially known or sold as” Grade 1-D or Grade 2-D motor diesel fuel to be registered with it. 40 C.F.R. § 79.33. Second, ASTM International’s Petroleum Products Committee has in recent years changed the language of its Standard Specification D-975 (“D-975”) to remove all reference to its origins in compression ignition petroleum diesel fuel, replacing those references with a new definition of “hydrocarbon oil” which allows fuel deriving from petroleum and non-petroleum sources, no matter the source, to qualify as No. 1 or No. 2 diesel fuel if they meet the chemical and physical characteristics stated in D-975’s Table 1. This Committee removed references to petroleum from and adopted the same or a similar definition of “hydrocarbon oil” into ASTM Standard Specifications D-396, governing fuel oil burners (“D-396”), and D-2880, governing non-aviation gas turbine engines (“D-2880”).

The Renewable Fuel Statute, codified at 42 U.S.C. § 7545(o), and EPA’s implementing regulations, recognize “renewable diesel” as a distinct fuel by making it eligible for tradable credits under the statutorily-mandated Renewable Fuel Standard. The definition of “biomass-based diesel” eligible for these credits stated in 40 C.F.R. § 1401 requires it to “(ii) [meet] the definition of either biodiesel or non-ester renewable diesel.” The same regulatory section defines “Non-ester renewable diesel” as a non-biodiesel substance that “can be used in an engine



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designed to operate on conventional diesel fuel, or be heating oil or jet fuel.” 42 U.S.C. § 7545(b)(2) states that with regards to fuels registered with it, such as No. 1 or No. 2 diesel fuel, EPA “shall, on a regular basis, require the manufacturer of any fuel or fuel additive (A) to conduct tests to determine potential health and environmental effects of the fuel or additive (including carcinogenic, teratogenic, or mutagenic effects).” Emphasis added. EPA regulations implementing this statutory mandate set forth two levels of mandatory health effects testing and data, Tiers 1 and 2. 40 C.F.R. §§ 79.52 and 79.53. Upon information and belief, EPA has not requested or required the manufacturers of so-called “renewable diesel” fuel to submit Tier 1 and Tier 2 test data to it.

D-975, D-396, and D-2880 allow manufacturers to sell so-called “renewable diesel” fuel to the nationwide fuel marketplace as a blend component of “hydrocarbon oil” in as much as 100 percent concentration, provided the final fuel meets the characteristics of each Standard's Table 1, by virtue of most states’ incorporating by reference these ASTM Standards into their state law, as set forth in Exhibit 1 to the first of POP Diesel’s previous notices. In addition, EPA’s approval of Optimus Technologies’s retrofitting select compression ignition engines to run on 100 percent “biofuel” includes the use of 100 percent “renewable diesel” fuel. The failure of EPA to require manufacturers to conduct and report health effects testing of so-called “renewable diesel” fuel constitutes an additional breach of the Agency’s non-discretionary, statutory duty.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,



Claude D. Convisser,  
President & General Counsel\*

\*Admitted in VA (active status and corporate law office), NM, DC, and NY;  
not admitted in CA