May 7, 2013

The Honorable Gina McCarthy
Assistant Administrator
U.S. Environmental Protection Agency
Office of Transportation and Air Quality
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Tier 3 Rulemaking: API Request for an Extension of the Public Comment Period, and Publication of Sulfur Credit Data

Dear Ms. McCarthy:

API recently testified at public hearings in Philadelphia and Chicago expressing our substantive and procedural concerns with the Tier 3 rulemaking. As you know, our members are the regulated parties and are significantly impacted by the proposal, and would like to be fully engaged in the rulemaking process to provide meaningful input. I am writing to you to detail the procedural obligations of EPA in proceeding with the rule and to object to the manner in which the agency is proceeding. We also formally request a public hearing 30 days after the rule is published in the Federal Register, and that we be provided a reasonable public comment period extension to review the entire docket and to prepare meaningful comments.

EPA must follow the Clean Air Act’s procedural requirements in proposing and adopting any fuels regulations. Specifically, Section 307 sets forth the requirements for the rulemaking process, which EPA has seemingly violated. Clean Air Act section 307(d)(3) states: “A notice of proposed rulemaking [must] be published in the Federal Register.” That basic, but fundamental, action has not occurred to date.1 Only the Proposed Rule that is published in the Federal Register “shall specify the period available for public comment.”2 To wit, EPA cannot set a deadline for public comments on a proposal that has not yet been published in the Federal Register. The publication of a two page notice in the Federal Register

1 Section 307(d)(3).
2 Id.
that merely identifies EPA’s hearing dates and locations and sets a date deadline for receipt of comments is contrary to the procedural requirement that a properly published proposal in the Federal Register must establish the public comment period.

Publishing proposed rules in the Federal Register provides the public with the requisite notice. To achieve this objective, EPA is required to “state the docket number, the location or locations of the docket, and the times will be open to public inspection.” Without a published proposed rule, obviously this objective has not been achieved. EPA must include the following information when it publishes a proposed rule:

(A) The factual data on which the proposed rule is based;

(B) The methodology used in obtaining the data and in analyzing the data; and

(C) The major legal interpretations and policy considerations underlying the proposed rule.

This requirement means that, at the time of the proposed rule’s publications, EPA must include everything on which it relies. All of this information must be available for public review. Without a published proposal and a complete docket, EPA once again is violating the clear procedural requirements of the Clean Air Act.

Another public hearing must be scheduled, and it must be held long enough after publication of the proposed rule to allow for public review of all of EPA’s data and analyses. EPA must also “keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.”

EPA should have a 90-day public comment period for the Tier 3 proposed rulemaking, beginning on the date when the proposed rule is published in the Federal Register. The Clean Air Act states: “It is the intent of Congress that . . . the Administrator . . . shall ensure a reasonable period for public participation of at least 30 days” [emphasis added.] Given the complexity of this proposed regulation and its underlying data and analyses, and especially in light of the two years it took EPA to develop this proposal, a 90-day comment period would be reasonable. A 37-day comment period, assuming the proposal was published today, would not be enough, and would subvert our statutory procedural rights.

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3 Id.
4 Id.
5 Section 307(d)(5)
6 Section 307(h)
The availability of a prepublication rule cannot be used as a reason to truncate the public comment period, especially when all of the supporting information (which is substantial), is not yet available.

The Proposed Rule concludes that the Averaging Banking and Trading provisions will result in a significant reduction to marginal costs. While there may be some benefits, it is difficult to ascertain the extent of these benefits with data currently available to the public. Tier 2 credits remain in circulation, and some companies continue to trade and use these credits. EPA could publish aggregate, (non-company or region specific) data on remaining Tier 2 credit balances. This information would be useful to our industry in providing meaningful comments to the proposed rule.

We appreciate your attention to these issues. It is critical that EPA follow the procedural requirements of the Clean Air Act and EPA's procedural regulations in this important rulemaking or any rule finalized with these procedural deficiencies would be unlawful. We urge EPA to be aligned with the Obama Administration's directive to "work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government." 7

Regards,

Robert L. Greco, III
API Group Director
Downstream & Industry Operations

Cc: Chris Grundler

7 http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment