

Regarding the Written Notice by the Commissioners of Agriculture, Commerce and Pollution Control Specified in Minnesota Statutes, section 239.77, subdivision 2(b) that Conditions of Statute Have Been Met, and that the State is Prepared to Move to the 20% Biodiesel Content Level (B20)

FINDINGS OF FACT,  
CONCLUSIONS, AND  
DETERMINATION

## FINDINGS OF FACT

### Legal Background

1. Minnesota Statutes section 239.77 requires, as of May 1, 2018, that diesel fuel offered for sale from April through September contain a minimum 20% biodiesel (“B20”)(“B20 Mandate”). However, the B20 Mandate can go into effect only after the Commissioners of the Minnesota Department of Agriculture (MDA), Minnesota Pollution Control Agency (MPCA) and Minnesota Department of Commerce (Commerce)(“Commissioners”) have consulted with the Biodiesel Task Force and determined that four conditions, contained in Minnesota Statutes, section 239.77, subdivision 2(b)(1) to (4), are met, notice is published in the State Register and notice is provided to certain specified legislative chairs.
2. The conditions that the Commissioners must find have been met are as follows:
  - (1) an American Society for Testing and Materials specification or equivalent federal standard exists for the next minimum diesel-biodiesel blend;
  - (2) a sufficient supply of biodiesel is available and the amount of biodiesel produced in this state from feedstock with at least 75 percent that is produced in the United States and Canada is equal to at least 50 percent of anticipated demand at the next minimum content level;
  - (3) adequate blending infrastructure and regulatory protocol are in place in order to promote biodiesel quality and avoid any potential economic disruption; and
  - (4) at least five percent of the amount of biodiesel necessary for that minimum content level will be produced from a biological resource other than an agricultural resource traditionally grown or raised in the state, including, but not limited to, algae cultivated for biofuels production, waste oils, and tallow.

Minnesota Statutes section 239.77, subdivision 2(b)(1) to (4).

3. Minnesota Statutes section 239.77, subdivision 2(b) provides that “[the] condition in clause (2) may be waived if the commissioner [of Commerce] finds that, due to weather-related conditions, the necessary feed stock is unavailable.”
4. Minnesota Statutes section 239.77, subdivision 2(b) provides that “[the] condition in clause (4) may be waived if the commissioners [of MDA, MPCA, and Commerce] find that the use of these nontraditional feedstocks would be uneconomic under market conditions existing at the time notice is given under this paragraph.”
5. Minnesota Statutes section 239.75, subdivision 1(11) provides that the Weights and Measures Director may “after consulting with the commissioner [of Commerce], grant a temporary exemption from the diesel-biodiesel blending requirements in section 239.77, if the supply of biodiesel is insufficient to produce diesel-biodiesel blends.”
6. Minnesota Statutes section 239.77, subdivision 2(d) provides that “[d]uring a period of biodiesel fuel shortage or a problem with biodiesel quality that negatively affects the availability of biodiesel fuel, the commissioner of Commerce may temporarily suspend the minimum content requirement in subdivision 2 until there is sufficient biodiesel fuel, as defined in subdivision 1, available to fulfill the minimum content requirement.”
7. Minnesota Statutes section 239.77, subdivision 2(e) provides that “[b]y February 1, 2012, and periodically thereafter, the commissioner of Commerce shall determine the wholesale diesel price at various pipeline and refinery terminals in the region, and the biodiesel price determined after credits and incentives are subtracted at biodiesel plants in the region. The commissioner shall report wholesale price differences to the governor who, after consultation with the commissioners of commerce and agriculture, may by executive order adjust the biodiesel mandate if a price disparity reported by the commissioner will cause economic hardship to retailers of diesel fuel in this state. Any adjustment must be for a specified period of time, after which the percentage of biodiesel fuel to be blended into diesel fuel returns to the amount required in subdivision 2. The biodiesel mandate must not be adjusted to less than five percent.”
8. Minnesota Statutes section 239.80, subdivision 1(b) provides that “[t]he director or any delegated employee may waive a penalty for a violation under section 239.77 or 239.791 on a retailer when ethanol or biodiesel are not available at a pipeline or refinery to meet the blending requirements of this chapter, and the terminal has had ethanol or biodiesel blended products available to the licensed distributor for 20 of the previous 30 days. The director or delegated employee shall use the reports required in section 239.754 or other available information in making a determination under this paragraph.”

### Procedural History

9. In November 2011, the Commissioners notified the state legislature that the transition to B10 would be delayed past its scheduled implementation date of May 1, 2012 because they could not yet find that all four required conditions had been met. In September of 2013, the Commissioners found that all four conditions had been met and the B10 mandate became effective as of July 1, 2014.

10. On April 17, 2015, a number of parties challenged the B10 mandate decision alleging that the mandate conflicted with the Renewable Fuel Standard (Energy Policy Act of 2005) and was preempted by the Supremacy Clause, Article VI of the U.S. Constitution. They also challenged the mandate alleging that the Commissioners violated the Minnesota Administrative Procedures Act by making findings without adhering to administrative rulemaking requirements.
11. On September 29, 2016, the U.S. District Court ruled in favor of the State of Minnesota and dismissed the challenges on various grounds. This decision was not appealed.
12. On April 24, 2017, the MDA provided notice via e-mail to Biodiesel Task Force members and an e-mail list of interested parties that a Biodiesel Task Force meeting would be held on June 9, 2017. Notice of the June 9, 2017 meeting was also published in the State Register on May 1, 2017 (Volume 41, Number 44, page 1255).
13. On May 9, 2017 the MDA sent an e-mail to Biodiesel Task Force members that included a statement of the purpose of the meeting, "to discuss whether the statutory conditions are met in order to move to the B20 level on May 1, 2018, as provided in M.S. 239.77", and that the Commissioners of MDA, Commerce, and the MPCA would be in attendance. An agenda was attached.
14. Notice and an agenda for the Biodiesel Task Force Meeting was published on the MDA website on or about May 18, 2017.
15. The Biodiesel Task Force and the Commissioners met together on Friday, June 9, 2017, at the MDA offices.
16. At the June 9, 2017 meeting, members of the Biodiesel Task Force present and on the phone provided statements regarding the four conditions required for implementation of the B20 Mandate pursuant to Minnesota Statutes section 239.77, subdivision 2(b). After each member was given the opportunity to speak to the four conditions, there was a period of question and answer and further discussion.
17. On June 14, 2017, an e-mail was sent to the Biodiesel Task Force members notifying them that the Commissioners would continue to take comments through Saturday, July 15, 2017.
18. Comments were subsequently received from Scott Hedderich of REG, Michael Petefish of the Minnesota Soybean Growers Association, Joseph Sullivan of the Center for Energy and Environment, Brett Webb of Flint Hills Resources, Mike Youngerberg of the Minnesota Biodiesel Council, and representatives of Magellan Midstream Partners, Alliance of Automobile Manufacturers, BP Products North America, Flint Hills Resources, Minnesota Petroleum Council, Minnesota Trucking Association, and Tesoro Corporation.
19. On July 19, 2017 the Commissioners met to consider whether the conditions necessary to proceed with the B20 Mandate were present.

Condition 1: an American Society for Testing and Materials ("ASTM") specification or equivalent federal standard exists for the next minimum diesel-biodiesel blend

20. The Commissioners find that the American Society for Testing and Materials ("ASTM") has promulgated a "Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)." This Standard Specification was approved by ASTM in 2008 as D7467. The standard establishes specifications for biodiesel blends including B10 and B20. The current version is D7467-17. Therefore, the Commissioners find that the first condition contained in Minnesota Statutes section 239.77, subdivision 2 (b)(1) that is necessary for the B20 minimum content level to become effective, has been met.

Condition 2: a sufficient supply of biodiesel is available and the amount of biodiesel produced in this state from feedstock with at least 75 percent that is produced in the United States and Canada is equal to at least 50 percent of anticipated demand at the next minimum content level

21. The Commissioners have been presented evidence that, using Minnesota Department of Revenue's diesel sales data for 2016 B20 mandate months, along with current MN biodiesel monthly production maximums, approximately 53% of the biodiesel needed from April through September can be met by Minnesota production if the mandate goes into effect in 2018. The data for 2016 B20 mandate months are listed in the table below:

Month	Diesel Demand	Biodiesel gallons needed	Current Production maximums	Production vs Need
APR-16	66,030,138	13,206,028	7,467,869	56.5%
MAY-16	69,702,065	13,940,413	7,716,798	55.4%
JUNE-16	74,534,388	14,906,878	7,467,869	50.1%
JULY-16	71,951,164	14,390,233	7,716,798	53.6%
AUG-16	66,708,664	13,341,733	7,716,798	57.8%
SEPT-16	81,724,976	16,344,995	7,467,869	45.7%
Total	430,651,395	86,130,280	45,554,001	52.9%

22. Based on the information summarized above, the Commissioners find that the second condition for the B20 minimum content level to become effective, contained in Minnesota Statutes section 239.77, subdivision 2(b)(2), has been met.

Condition 3: adequate blending infrastructure and regulatory protocol are in place in order to promote biodiesel quality and avoid any potential economic disruption

23. A representative of Magellan Pipeline provided the following information at the June 9, 2017 Biodiesel Task Force meeting regarding the Roseville terminal, which was stated to be representative of Magellan's other terminals in Minnesota:

<b>Number of terminal loading bays in use simultaneously</b>	<b>Diesel/biodiesel pumping capacity (in gallons per minute)</b>
One	650
Two	400
Three	200
Four	100

Based on this data, the Magellan representative asserted that there would be delays in fueling if the B20 mandate was implemented, due to lack of blending infrastructure.

24. Following the Biodiesel Task Force Meeting, MDA staff sought additional information on the blending capacity issue from Magellan Pipeline. In response to this request, on July 7, 2017, the MDA received a response that stated, in part, that approximately 50% of the total trucks loaded at Magellan's Roseville terminal include diesel and biodiesel blends.
25. Following the Biodiesel Task Force Meeting, MDA staff sought additional information on the blending capacity issue from MEG Corp. a company that provides diesel fuel consulting services and operates the Minnesota Diesel Helpline, and whose staff has experience in the petroleum industry. In response to this request, on July 7, 2017, the MDA received a summary of Minnesota biodiesel blending capacity and a map showing diesel terminals, facilities where blending is done outside the rack, and biodiesel plants.
26. Based on the information collected and knowledge of the Commerce Weights and Measures staff, the agency staff concluded that other fuels, including gasoline, jet fuel, and diesel without biodiesel, are also loaded at the Magellan terminals, and therefore instances where all four bays would be loading B20 are likely to be unusual.
27. MDA and Commerce staff also concluded that instances of simultaneous use of all bays for B20 will likely occur only at limited times of the year, such as spring planting and fall harvest, and in hours immediately preceding announced B20 price increases.
28. MDA and Commerce staff also concluded that there are options for fuel distributors to obtain diesel/biodiesel outside of Magellan's terminals, including terminals other than Magellan's, and fuel distributor locations where blending can be done outside of terminals ("outside the rack"). The agency staff found these options included:
- Greater Twin Cities Metro Area

- Additional terminals: NuStar, St. Paul Park and Flint Hills
- Blending outside the rack: at least 6 options
- Southeastern MN
  - Additional terminals: KinderMorgan – Spring Valley
  - Blending outside the rack: Kwik Trip + 3 options
- Central MN
  - Additional terminals: NuStar Sauk Centre
  - Blending outside the rack: at least 11 options
- Fargo/Moorhead
  - Additional terminals: NuStar Moorhead
  - Blending outside the rack: at least 3 options
- Southwestern MN
  - Blending outside the rack: at least 7 options
- Duluth MN
  - Additional terminals: Calumet (2)
  - Blending outside the rack: Kwik Trip
- Northern MN
  - Blending outside the rack: at least 4 options

29. Additionally, the MDA and Commerce staff concluded that Minnesota's largest retail chains can obtain B20 outside of the Magellan terminals as follows:

- Holiday – Flint Hills, Rosemount
- Kwik Trip – added blending infrastructure in Eyota and Superior
- SuperAmerica - majority is provided by St. Paul Park terminal and likely NuStar in the future, both of which have infrastructure to provide B20.
- CHS - uses Magellan terminals, however many Cenex locations utilize distributors that blend outside the rack

30. Further information in support of the existence of adequate infrastructure and regulatory protocol to ensure fuel quality at B20 blend levels was provided by the Commerce Weights & Measures Division staff. This information included:

- Based on the Weights and Measures Division's experience with B10 blending, "splash blending" in the truck is an adequate way to blend biodiesel during warm weather months.
- The only time splash blending is of concern is during winter months when the B20 Mandate would not be in effect.
- The two methods which the Weights and Measures Division currently uses to enforce the B10 Mandate (auditing delivery records and testing samples by infrared spectroscopy) will work at the B20 level.
- The only change needed would be for the Weights and Measures Division's fuel lab to build B20 models for the lab's spectrometers. The Commerce staff expects this to be completed by the end of the year.
- All current sources of biodiesel should remain available. Terminals which currently blend B10 should be able to blend B20, albeit at a slower rate.

31. The Commerce staff indicated that the staffing and equipment needed to enforce a B20 mandate are the same as those needed to enforce the B10 mandate and can be met with current Commerce resources.
32. Based on the information above, the Commissioners find that blending infrastructure and regulatory protocol are in place to promote biodiesel quality and avoid any economic disruption, and thus that the third condition contained in Minnesota Statutes section 239.77, subdivision 2(b)(3) for the B20 minimum content level to become effective has been met.

Condition 4: at least five percent of the amount of biodiesel necessary for that minimum content level will be produced from a biological resource other than an agricultural resource traditionally grown or raised in the state, including, but not limited to, algae cultivated for biofuels production, waste oils, and tallow.

33. Staff obtained information via e-mail from REG and Ever Cat Fuels, which produce fuel from “a biological resource other than an agricultural resource traditionally grown or raised in the state.”
34. Based on the information above, staff determined that, taken together, REG and Ever Cat Fuels produced 4.6 million gallons of biodiesel in 2016, and 4.2 million gallons of biodiesel in 2017; all from feedstocks other than those traditionally grown or raised in the state.
35. The REG and Ever Cat Fuels production represents 6.2% of total biodiesel production in 2016, and 5.7% of total biodiesel production in 2017.
36. Based on this information, the Commissioners find that production of biodiesel from non-traditional feedstock exceeds the 5% threshold, and this requirement of Minnesota Statutes section 239.77, subdivision 2(b)(4) has been met.

## CONCLUSIONS OF LAW

Based on the above findings, the Commissioners make the following conclusions of law:

1. The Commissioners have jurisdiction to determine whether the state should move to the next biodiesel content level based on the statutory conditions established in Minnesota Statutes section 239.77, subdivision 2(b).
2. The Commissioners provided adequate public notice of the Biodiesel Task Force Meeting and consulted with the Biodiesel Task Force as required by statute.

3. The conditions in Minnesota Statutes section 239.77, subdivision 2(b) have been met for that statutory requirement that diesel fuel sold or offered for sale in Minnesota for use in internal combustion engines contain at least 20 percent biodiesel fuel by volume by May 1, 2018.
4. Notice shall be published in the State Register, and written notice to the chairs of the house of representatives and senate committees with jurisdiction over agriculture, commerce, and transportation policy and finance shall be given as required by Minnesota Statutes section 239.77, subdivision 2(b) at least 270 days prior to the date of the scheduled B20 increase.
5. Any findings that might properly be termed conclusions and any conclusions that might properly be termed findings are hereby adopted as such.

## **DETERMINATION**

The Commissioners find that the conditions in Minnesota Statutes, section 239.77, subdivision 2(b)(1) to (4) have been met, the state is prepared to move to the next scheduled minimum biodiesel content of 20% (B20), and the staff of MDA is directed to publish notice in the State Register and provide notice to the legislative committee chairs as directed by Minnesota Statutes section 239.77, subdivision 2(b).

*Signed copy on file*

David J. Frederickson, Commissioner  
Minnesota Department of Agriculture

*Signed copy on file*

Mike Rothman, Commissioner  
Minnesota Department of Commerce

*Signed copy on file*

John L. Stine, Commissioner  
Minnesota Pollution Control Agency

July 25, 2017