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DEMOCRATIC STAFF DIRECTOR

July 31, 2012

The Honorable Timothy Geithner
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Geithner:

I write to urge you to close a tax loophole that could result in hundreds of millions of dollars in lost revenues, revenues intended by Congress to be made available for dealing with the aftermath of oil spills.

Congress authorized the Oil Spill Liability Trust Fund (Fund) with the passage of the Oil Pollution Act (OPA) of 1990, shortly after the grounding of the Exxon Valdez and the disastrous oil spill in Prince William Sound. The Fund makes resources available to respond to and clean up oil spills and to pay claims to those who have incurred removal costs or suffered damages. The largest source of revenue to the Fund is a per-barrel excise tax, collected from the oil industry on crude oil received at U.S. refineries and petroleum products entered into the United States for consumption, use or warehousing. The excise tax is currently at 8 cents per-barrel and will increase to 9 cents in 2017.

On May 20, 2011, the Internal Revenue Service (IRS) issued a Technical Advice Memorandum (TAM-142671-10) concluding that “tar sands imported into the United States are not subject to the excise tax on petroleum imposed by §4611 of the Internal Revenue Code.” In the TAM, the IRS concludes that the terms “crude oil” and “petroleum products” “do not clearly include or exclude tar sands.” Instead of relying on the plain language in the statute or consulting with oil industry experts, the IRS drew exclusively from an outdated 1980 House Committee Report that says “the term crude oil does not include synthetic petroleum, e.g., shale oil, liquids from coal, *tar sands* [emphasis added], or biomass, or refined oil.”

While a TAM is the final determination of the IRS only with respect to the specific issue for a specific taxpayer, I am concerned that a tax loophole has been established for other refiners and importers of tar sands which may find the TAM instructive for purposes of avoiding the excise tax. This loophole could result in lost revenues of about \$48 million in 2012 at current levels of

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tar sands imports and perhaps hundreds of millions of dollars in lost revenue in future years as tar sands production increases. If those who transport or refine tar sands oil are allowed to avoid the excise tax, then the risk increases that the Fund will be depleted from a major spill or spills and that taxpayers will be asked to pay for the accidents of others.

It is unfortunate but important to note that just last weekend a major pipeline used to ship tar sands oil spilled more than a thousand barrels of oil in Wisconsin. The spill comes nearly two years to the day after a pipeline from the same system, operated by Enbridge, Inc., spilled more than 20,000 barrels of tar sands oil into the Kalamazoo River in Michigan, the largest and costliest pipeline spill in American history, with cleanup costs topping an estimated \$800 million. The risk of oil spills from tar sands and the associated costs will only increase as the United States imports more tar sands oil and if the proposed Keystone XL pipeline is approved.

As Ranking Member of the House Natural Resources Committee, I asked Democratic committee staff to examine IRS's TAM on tar sands and prepare the attached analysis. The analysis shows that IRS's position is not only technically flawed, but also contrary to sound public policy.

The IRS's conclusion appears to be the result of an inadequate understanding of the terminology employed by both industry and regulatory bodies. IRS lawyers who drafted the TAM informed Democratic staff that they did not consult with subject-matter experts or survey industry and government documents in deciding whether tar sands is crude oil or a petroleum product. Had the IRS officials performed more robust research and analysis, they would have found that petroleum companies, their trade associations, and government agencies that oversee the industry all consider tar sands to be crude oil.

For the reasons above and in the attached analysis, I ask that you, as Treasury Secretary, revisit this issue and initiate a process to develop guidance and/or regulations to ensure that the IRS's position comports with the law as it was written. I also respectfully request that you provide a written response to this letter informing me how you intend to proceed in addressing this important matter.

Thank you in advance for your assistance in responding to my request. I ask that you please respond by August 31, 2012. Should you have any questions, your staff may contact Reece Rushing of the House Natural Resources Committee Democratic Staff at 202-226-4627.

Sincerely,



Edward J. Markey
Ranking Member
Committee on Natural Resources