

COMMENTS OF THE NATIONAL BIODIESEL BOARD ON
THE RFS RENEWABLE IDENTIFICATION NUMBER (RIN)
QUALITY ASSURANCE PROGRAM; PROPOSED RULE,
78 Fed. Reg. 12,158 (Feb. 21, 2013)

Docket ID No. EPA-HQ-OAR-2012-0621

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INTRODUCTION

The National Biodiesel Board (NBB) commends EPA on its efforts in addressing concerns regarding RIN liquidity that has recently hampered the biodiesel market. EPA has undergone extensive stakeholder outreach in developing its Proposed Rule for the RFS Renewable Identification Number (RIN) Quality Assurance Program, 78 Fed. Reg. 12,158 (Feb. 21, 2013) (referred to as “Q-A-P Proposal”). While NBB continues to believe that a strong enforcement program is the solution to address concerns regarding fraudulent RINs, it has taken numerous actions to promote RIN integrity. NBB does not oppose the creation of an affirmative defense from civil penalties for parties obtaining invalid RINs in good faith, and also generally supports EPA providing guidance to the industry as to the level of due diligence that is required to constitute “good faith.” NBB also generally supports the additional proposed revisions that will better address potential violations of the regulations downstream of RIN generation.

Nonetheless, NBB is concerned with the overall additional burdens the proposal is likely to place on producers, particularly small producers. The entire purpose of the Q-A-P Proposal is undermined if the small producers are saddled with significant additional costs and still unable to move their fuel or RINs. This problem becomes particularly acute as EPA continues to chip away at the volumes by allowing obligated parties to potentially rely on RINs that may not represent any actual gallon of fuel. In finalizing the rule, EPA must keep in mind that the purpose of the Q-A-P Proposal is to weed out *bad actors* and to ensure small producers can participate in the program on a level playing field. EPA must also keep in mind its obligation to ensure that *at least* the mandated volumes are met.

In short, NBB believes any such “quality assurance program” should be substantially simplified, and that the three-tiered system proposed by EPA is fatally flawed. There should be one type of verification system (not two as EPA proposes or even three as some have suggested). The auditor should be truly independent from the parties it audits, but also from the RIN program in general. More important, as NBB has consistently indicated to EPA, any “affirmative defense” should relate solely to civil penalties, and should not affect RIN replacement, which is properly the ultimate responsibility of the obligated party. Seeking to impose any RIN replacement on the auditor will create additional costs ultimately borne by the renewable fuel producer, undermining the purposes of the quality assurance program to level the playing field and, in fact, may engender more opportunities for fraud, rather than less. EPA should take the time to ensure a proper program, not merely rush through the rulemaking process in an attempt to appease the complaints of the petroleum sector, particularly where the ability to commit fraud stems from the “liquid” RIN market the obligated parties supported and received in the 2007 and 2010 RFS rules.

PART 1: EPA SHOULD SEEK TO LEVEL THE PLAYING FIELD FOR SMALL PRODUCERS TO IMPROVE RIN LIQUIDITY THROUGH A MORE SIMPLIFIED VERIFICATION PROCESS WHERE ULTIMATE RESPONSIBILITY FOR RIN REPLACEMENT, AND THEREBY MEETING THE VOLUME MANDATES, REMAINS ON THE STATUTORILY-DEFINED OBLIGATED PARTIES

I. HISTORY OF THE RFS AND THE RIN PROGRAM

A. Since its Inception, the RFS Program Has Been One of “Buyer Beware.”

The Energy Policy Act of 2005 first established the Renewable Fuel Standard (RFS), recognizing the numerous economic, environmental, energy and national security benefits of moving away from fossil fuels and toward renewable fuels. Pub. L. No. 109-58, § 1501(a) (codified at 42 U.S.C. § 7545(o)). Under the RFS, Congress required EPA to promulgate regulations to implement the volume mandates. 42 U.S.C. § 7545(o)(2)(A). Rather than require actual use of renewable fuel by obligated parties, EPA determined that proof of production would be taken as proof of consumption, and established the Renewable Identification Number (RIN), which is generated at the point of production, as the means of establishing compliance with the statutory requirements. 72 Fed. Reg. 23,900, 23,909 (May 1, 2007). This RIN program was established as a collaborative effort with obligated parties, as well as producers. *Id.* at 23,902. The RIN program was also intended to serve as the credit trading program required by Congress in Section 211(o)(5) of the Clean Air Act (CAA), 42 U.S.C. § 7545(o)(5). 72 Fed. Reg. at 23,900. In the RFS rule, EPA provided for an open RIN market. *Id.* at 23,944. Obligated parties agreed that the goal was to “retain sufficient flexibility” in the credit trading program for obligated parties to establish compliance, and requested a program “without government interference.” EPA-HQ-OAR-2005-0161-0205 at 29-30, 51, 54 (Tr. of Oct. 13, 2006 Public Hearing for RFS Proposal); EPA-HQ-OAR-2005-0161-0170 at 2 (NPR Comments).

Throughout the rulemaking process, however, EPA made clear that the statute requires a certain *minimum* amount of biofuels and that it would enforce the program to ensure that these volumes are met. *See* 71 Fed. Reg. 55,552, 55,580, 55,597 (Sept. 22, 2006); EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard, Summary and Analysis of Comments (RFS1 RTC) at 11-18 to 11-19 (Apr. 2007). Toward those ends, the RIN credit program established by EPA was one of “buyer beware”: “These invalid RIN provisions apply regardless of the good faith belief of a party that the RINs are valid. These enforcement provisions are necessary to ensure the RFS program goals are not compromised by illegal conduct in the creation and transfer of RINs.” 72 Fed. Reg. at 23,950. Under such a program, it was incumbent on RIN buyers to ensure the RINs were valid. Specifically, EPA made clear that, while it normally will look first to the generator of the invalid RIN, “if EPA is unable to obtain relief from that party, attention will turn to the obligated party who may then be required to obtain sufficient valid RINs to offset the invalid RINs.” *Id.* at 23,950-23,951. On this aspect of the program, the obligated parties merely requested an opportunity to correct any shortfall caused by invalid RINs without penalty. EPA-HQ-OAR-2005-0161-0170 at 14 (NPR Comments); *see also* EPA-OAR-2005-0161-0185 at 5 (API Comments).

When Congress expanded the RFS program in 2007, it retained the provisions requiring EPA to issue regulations that ensure compliance with the volume mandates. EPA proposed to

retain the RIN program under the RFS1 program and to retain similar liability and RIN replacement provisions. 74 Fed. Reg. 24,904, 24,909, 24,970-24,971 (May 26, 2009). The final RFS2 program retained the “buyer beware” aspect of the program. 75 Fed. Reg. 14,670, 14,733 (Mar. 26, 2010); EPA, RFS2 Summary and Analysis of Comments at 4-43 (Feb. 2010) (“EPA RFS2 RTC”). EPA reiterated its support for a buyer beware program in the Q-A-P Proposal: “We continue to believe that the buyer beware approach gives industry the greatest flexibility in determining how best to manage credit trading practices while providing society the assurance that the benefits of a program will materialize.” 78 Fed. Reg. at 12,162. NBB agrees.

B. Although Over 500 Producers are Registered in the RFS2 Program, Obligated Parties Have Declined to Purchase RINs as a Result of Acts by Three Bad Actors.

In late 2011 and 2012, EPA announced three enforcement actions related to invalid RINs. *See generally*, EPA, *Enforcement of the Renewable Fuel Standard Program*, <http://www.epa.gov/enforcement/air/renewable-fuels/fuel-novs.html> (last updated Apr. 17, 2013). These RINs were found to be fraudulently generated; that is, RINs were generated, but no biofuel was actually produced. These RINs were generated mostly in 2009 and 2010, with some in 2011, and involved clear acts of fraud that could have been uncovered by a few phone calls. However, as EPA determined, there was a “widespread failure of obligated parties to conduct adequate oversight.” 78 Fed. Reg. at 12,163. Such failures occurred notwithstanding the many warnings EPA provided that the buyer must beware and the regulations in place regarding replacement of invalid RINs. These failures occurred as obligated parties sought to merely purchase “paper” credits, rather than actual gallons of fuel. While EPA did issue notices of violation to obligated parties who used these fraudulent RINs for compliance purposes, in March of 2012, EPA also issued an Interim Enforcement Response Policy to address these violations, reminding parties again that they must “undertake due diligence to ascertain the validity of RINs.”¹ Under this enforcement policy, EPA imposed penalties of mere pennies, but did require obligated parties to provide a plan to replace the invalid RINs.

EPA also pursued severe penalties against the three bad actors. On December 14, 2012, Jeffrey David Gunselman, owner of Absolute Fuels, LLC, pleaded guilty to an Indictment charging 51 counts of wire fraud, 24 counts of money laundering and four counts of making false statements in violation of the CAA. On March 29, 2013, he was sentenced to more than 15 years, and was ordered to pay more than \$54.9 million in restitution, and fined \$175,000. On June 25, 2012, Rodney R. Hailey, the owner of Clean Green Fuels, LLC, was found guilty of wire fraud, money laundering, and violating the CAA in generating and selling fraudulent RINs. On February 22, 2013, he was sentenced to more than 12 years in prison and ordered to pay restitution of about \$42 million to over 20 companies and to forfeit \$9.1 million in proceeds from the sale of fraudulent RINs. EPA also issued a notice of violation to Green Diesel, LLC on April 30, 2012. It is important to note, that although unfortunate and despicable, these fraudulent acts are no different than what we have seen in other financial markets where criminals have come in and found a way to take advantage of the system.² The vast majority of producers, however, are

¹ Available at <http://www.epa.gov/compliance/resources/policies/civil/erp/erp-invalidrins.pdf>.

² There has also been fraud in other credit systems including the European GHG cap-and-trade program and California’s South Coast Air Quality Management District’s Regional Clean Air Incentives Market program. This is not an inherent problem with the RFS, but the focus on RIN liquidity rather than sales of wet gallons has provided

taking every effort to comply with the program. Biodiesel producers are the true victims of these bad acts.

Based on the acts of these three individuals, *obligated parties have since substantially curtailed their purchases of RINs from smaller producers based on concerns that those producers may not have financial backing to make obligated parties whole in the event EPA subsequently determined the RIN is invalid.* These concerns are a direct result of the reluctance of many obligated parties to actually purchase *physical gallons of renewable fuel*. Another cause is the reluctance of many parties to limit the ability to trade RINs, which has created a separate market for RIN traders and allowed speculation on RINs to run rampant. The trading program in the statute, however, was merely intended to allow parties to determine the most economical and efficient means of meeting the volume mandates under the RFS, recognizing the potential differences among the various geographic regions of the United States. Rather than address these issues and perform the appropriate due diligence before they submit RINs for compliance purposes, obligated parties requested an affirmative defense to essentially let them off the hook for replacing any RIN potentially found invalid, and placing the burden on producers, particularly small producers, of making the program whole. Thus, NBB strongly disputes the claims that obligated parties are the victims and has vigorously argued that producers should not be the ones that should bear the entire burden of the actions of these criminals.

C. The Biodiesel Industry Promptly Responded to EPA's Enforcement Actions to Promote RIN Integrity.

Notwithstanding that NBB believes the cases of fraud were isolated incidents and the vast majority of producers are producing renewable fuel eligible under the program, the changes in the market as a result of the cases of RIN fraud had a disparate impact on small producers, which are of vital importance to the biodiesel industry. As such, in 2012, NBB established a RIN Integrity Task Force, which included representatives of obligated parties, to create a private sector solution to eliminate RIN fraud. The task force was the first to outline what the industry agreed were appropriate elements of a RIN audit. Thus, the industry acted promptly to provide additional assurances to obligated parties and promote RIN integrity.

Biodiesel facilities are also responding to numerous requests from obligated parties and third parties and are being subject to audits to defend their RINs that were sold by other parties, even when there is no indication whatsoever that there is any problem with their product. NBB believes that biodiesel producers -- together with the obligated parties -- have already installed many of the safeguards necessary to have an industry free of fraudulent RINs. Along with EPA's strong enforcement actions against bad actors, we believe these actions are sufficient to eliminate any potential for the types of fraudulent RIN cases that came to light in 2011 and 2012.

Despite these efforts, small producers have faced a difficult market. While small producers are of vital importance to the renewable fuels industry, they have been unable to sell their RINs in this market without substantially discounting them to address the purported "risk" that the RINs are invalid. *See* 78 Fed. Reg. at 12,162. As such, NBB agreed to enter into

opportunities for fraudulent activity. Hence, EPA warned obligated parties from the beginning that they must take care in purchasing separated RINs.

discussions with EPA and obligated parties as to how to address these concerns. As indicated in our testimony at the public hearing, NBB has not disputed that an affirmative defense for obligated parties to avoid penalties in the event they purchased RINs in good faith that turned out to be invalid may be warranted. NBB also agrees that EPA should provide more guidance as to what constitutes an appropriate due diligence, so that the industry can understand what may be required rather than face many and varied requests for information and audits. NBB made clear, however, that the goals of its participation were to ensure that the volume mandates remain whole, the burdens on producers are minimized, and the program creates a level playing field for small producers. These are the key goals that EPA must keep in mind with the final rule. While NBB appreciates the work EPA has done in developing this proposal relatively quickly, it believes the proposal is too complicated and actually undermines these key goals. It appears that EPA is attempting to respond solely to claims by obligated parties that the only way they will purchase RINs from small producers is if EPA gives them a “get out of jail free” card. But, this is contrary to the statute and beyond EPA’s authority. The Q-A-P Proposal, while having many positive aspects, is fundamentally flawed.

The complaints raised by the obligated parties are just another way they are trying to undermine the clear policy choice of Congress in establishing the RFS program. EPA cannot undermine the program merely because obligated parties refuse to take the appropriate actions to incorporate renewable fuels into the transportation system. *Indeed, EPA’s duty under the statute is to implement the program, and to ensure the volumes are met.*

Moreover, nothing requires EPA to provide for an affirmative defense even for civil penalties. EPA implements numerous credit programs with no such affirmative defense, and retains enforcement discretion not to impose high penalties on parties acting in “good faith.” To our knowledge, EPA has only required pennies per invalid RIN from obligated parties, notwithstanding their failures to conduct any oversight. Strong penalties are the incentives to ensure the program requirements are being met. Nonetheless, for those obligated parties that have taken all reasonable actions and a RIN is still found to be fraudulent, NBB does not oppose providing some relief with respect to civil penalties, particularly where it can provide the industry with some guidance as to what due diligence may be required. However, as further outlined in the next section, NBB believes any such program must be substantially simplified to reduce the burdens on the producers and, to be consistent with the statute, the ultimate responsibility for RIN replacement must remain on the obligated parties.

II. ANY “Q-A-P” PROGRAM MUST BE SIMPLIFIED AND KEEP THE ULTIMATE RESPONSIBILITY FOR RIN REPLACEMENT ON THE STATUTORILY DEFINED OBLIGATED PARTIES.

A. To Level the Playing Field for Small Producers, the Q-A-P Proposal Must be Substantially Simplified.

The Q-A-P Proposal includes a three-tiered system, but provides no support or explanation as to how this system will help small producers. The final rule must *ensure* participation of small producers in the RFS program, not impose new undue burdens that will continue to place them at a disadvantage in the market. Unfortunately, the Q-A-P Proposal does

just that, it imposes a new obligation on small producers at a high price that is likely to drive them out of business, rather than reopen the RIN market.

It should go without saying that the purpose of the RFS2 program was to promote production of renewable fuels in the United States. *See* Pub. L. No. 110–140, 121 Stat. 1492 (2007). Among the many benefits of such a program is to “promote new technologies and more efficient use of energy, tap the potential for home-grown biofuels, and nurture America’s talent for innovation.” S. Rep. No. 110-65 at 2 (2007); *see also* 151 Cong. Rec. S11824-01, S11826-27 (Oct. 25, 2005) (Senator Obama indicated that Congress needed to provide “a far stronger signal,” proposing a renewable diesel standard, which he referred to as a “small but bold step to create jobs in rural America, strengthen our economic security, and improve air quality.”). These advancements are often developed by smaller producers who seek newer and better feedstocks based on their local circumstances and costs of transportation. Small producers often serve as research facilities to ensure a particular technology or a particular feedstock is viable at a larger scale. In addition, for the biodiesel industry, small producers serve local and regional needs. For example, in many rural areas, farmers utilize different road and non-road diesel engines, and biodiesel provides a more readily available, safer and cheaper alternative to diesel fuel.

1. NBB supports “voluntary” participation in a Q-A-P, but the three tier system as proposed by EPA will likely result in Q-A-P A being mandatory for small producers.

EPA proposes to establish two types of “quality assurance plans”: (1) Q-A-P A, which would require “ongoing” monitoring to verify “A” RINs and would remove any requirement that RIN purchasers (e.g., obligated parties) replace any “A” RIN subsequently deemed invalid; and (2) Q-A-P B, which requires “quarterly” monitoring to verify “B” RINs and RIN purchasers retain the ultimate responsibility to replace invalid RINs. This creates a three-tiered system of RINs, as parties can continue to conduct transactions under the current system. EPA explains in the Q-A-P Proposal that participation in Q-A-P A or Q-A-P B will be “voluntary.” NBB generally supports a voluntary program, as it believes a mandatory program will impose greater costs on producers, and it also allows the parties to determine what level of due diligence they need.³ NBB is concerned, however, that EPA has not fully examined the potential impacts on small producers of this three-tiered “voluntary” program.

EPA recognizes that obligated parties are likely to require producers to utilize a Q-A-P in order to sell their RINs: “[W]e expect that most RINs purchased and used for compliance purposes will be QAP-verified even though the program is voluntary because most obligated parties in most situations will prefer not to take on the risk of using an unverified RIN.” 78 Fed. Reg. at 12,167. NBB believes that, for small producers, this requirement will be mandatory in order for them to sell their RINs, and, moreover, that Q-A-P A will be mandatory. Q-A-P A, however, is likely to impose significant costs on small producers. These costs and their relative impact on small producers are not adequately examined by EPA, if at all.

³ For example, as most gasoline is blended with ethanol for various reasons, obligated parties generally purchase wet gallons of ethanol, rather than rely on the purchase of separated RINs. There is no risk that the RINs were generated fraudulently as the purchaser has the fuel in hand.

EPA asserts that the proposal is intended to “provide additional confidence in the validity of RINs without restricting access to the market by small producers.” 78 Fed. Reg. at 12,163; *see also id.* at 12,164. EPA simply assumes that the increased costs “will be offset by leveling the playing field between larger producers and small producers, allowing small producers to effectively compete in the market.” *Id.* at 12,205. However, there is no evidence that the additional costs these parties will likely have to incur in participating in Q-A-P A will be any better than the discount by which they must currently sell their RINs. EPA appears to assume that small producers would be able to add a premium to their RINs to make up the cost difference. There is no support for such a presumption. Nor is there any evidence that, even if small producers incur the expense, obligated parties will suddenly start purchasing their RINs, particularly when they may have a less expensive Q-A-P B RIN from a larger company that has provided financial assurances to replace any RIN subsequently found invalid. Testimony before EPA at the public hearing indicated that small producers have been engaged in numerous audits, yet continue to have to sell their RINs at a discounted price, even though their RINs are clearly as valid as any others in the system.

Thus, NBB urges EPA to more fully consider the disparate economic impacts its proposal will have on small producers, particularly with respect to Q-A-P A. While NBB supports a rigorous monitoring program, even one along the lines of EPA’s Q-A-P A, it cannot be overly burdensome, nor can it be so costly as to put small producers out of business. This would have the complete opposite effect as EPA has intended in establishing a Q-A-P. In fact, the most significant cost associated with the Q-A-P A program is the RIN replacement mechanism,⁴ which, as further described below, will substantially increase the costs for small producers. Thus, NBB opposes the three-tier system and believes, to the extent EPA does provide for a verification system, that there should be only one verification process that could be used by obligated parties to support an affirmative defense *from civil penalties only*.

2. A two-tiered system (with RIN replacement ultimately remaining with the obligated party) will better level the playing field and substantially simplify the Q-A-P Proposal.

Under a two-tiered system, obligated parties will have two choices: (1) purchase RINs under the status quo (i.e., buyer beware); or (2) purchase RINs that have been verified through an EPA-approved verification process. To the extent a verified RIN is subsequently deemed invalid, obligated parties could obtain an affirmative defense to avoid civil penalties for violations associated with transferring verified RINs and using invalid RINs for compliance purposes. Under a rigorous verification process, NBB believes that the risk for RINs subsequently deemed to be invalid will be minimal, but to ensure proper oversight, a RIN found to be invalid should be retired, regardless of who owns the RIN, and, if already used for compliance, the ultimate responsibility for replacing the invalid RIN should remain on the obligated party.⁵

⁴ The flaws identified with EPA’s proposed RIN replacement process for QAP A are described further below.

⁵ A simplified verification process could also identify invalid RINs earlier, rather than the long, drawn out administrative process proposed by EPA.

Under this simpler program, the goal is properly focused on rooting out fraud and creating a consistent system to validate RINs. Previously, the due diligence completed by obligated parties was to merely check to see if the producer was registered with EPA, but now obligated parties could either (a) conduct their own due diligence (as they should have done from the start of the program) or (b) rely on the third party, EPA-approved auditor to verify the RINs it purchases. If they choose the latter, they should not be issued a notice of violation, and can seek to take advantage of the affirmative defense provided by EPA. This addresses the concerns raised by obligated parties when they first received notices of violation as a result of the isolated fraud cases. EPA's proposal unfortunately goes well beyond addressing these concerns, without addressing the RIN liquidity issue for small producers and potentially creating a whole new set of problems.

The two-tier approach, as opposed to a three-tier approach, also levels the playing field in that it would create one consistent, high quality process for verification of RINs. Obligated parties could look at the verification by the EPA-approved auditor and have confidence that the RIN was valid. Thus, the obligated party's purported concerns that the small producer would not have the financial wherewithal to replace any RINs subsequently found invalid are nullified. Every RIN that has gone through the Q-A-P system would be approved by the same level of high quality EPA-approved audit program. But, for those facilities from which it directly purchases fuel or that have a larger balance sheet, obligated parties can choose to stay under the status quo program and negotiate with those parties to provide the added level of comfort needed, if any. In that way, producers can determine the most cost-effective method for addressing any lingering concerns as to the validity of their RINs.

Under EPA's proposed three-tiered system, an obligated party will either (a) require all parties to provide Q-A-P A RINs regardless of risk because they are completely left off the hook or (b) force small producers into the more expensive program while larger companies (with the financial backing) could continue to use a less expensive approach. In either case, there are no incentives for obligated parties to purchase more expensive "A-RINs" from small producers, and small producers are those least able to afford the additional costs for a Q-A-P A system.

3. NBB supports a strong verification process, but EPA need not include superfluous or overly burdensome requirements.

Throughout the stakeholder process, NBB repeated what it believed to be a main goal of the Q-A-P -- to provide a consistent set of guidelines for parties to conduct oversight over RIN generation. EPA's proposal provides general guidance as to what a Q-A-P should include, but allows third-party auditors⁶ to develop their own systems of meeting those elements. NBB applauds EPA's efforts, and appreciates its reaching out to stakeholders to ensure a reasonable, but effective monitoring program. While NBB does not agree with a three-tiered system, it does believe that EPA has generally identified key components of what a RIN verification process should include, though we are concerned that a quarterly process as under Q-A-P B may not be rigorous enough. Thus, NBB again proposes the elements of a verification process consistent

⁶ For ease of reference, NBB refers to those providing verification services as "auditor" or Q-A-P Provider throughout its comments.

with the terms developed by its RIN Integrity Task Force. This process should be rigorous, but with enough flexibility to allow auditors to work to reduce the costs of the verification process.

One aspect of the program that appears to be completely ignored by EPA is that the audit process should be a confidential process. The audited party will need the trust and confidence in the auditor completing the audit. NBB agrees that the auditor should provide the necessary information from the audit to obligated parties and marketers, and such information could be provided through the EMTS, as proposed by EPA for “A-RINs” and “B-RINs.” Rather than noting A- and B-RINs, however, the auditor would indicate that (a) the RIN has been verified, (b) when the review of the RIN was completed, and (c) if any corrective action was required and completed by the producer with respect to the RIN, if such RIN has already been sold by the producer.⁷

Like the Q-A-Ps proposed by EPA, the verification process would include elements related to feedstock, the facility’s production process, RIN generation, and RIN separation. But, the monitoring would be “ongoing” only to the extent appropriate for the particular component, without unduly interfering with the facility’s operations. In a perfect world all parties should work towards a true ongoing monitoring system, but we realize it is impossible to monitor every biofuel facility 24 hours a day, seven days a week. In its proposal EPA creates a false dichotomy between “ongoing” monitoring under Q-A-P A and “quarterly” monitoring under Q-A-P B. We believe “real-time” monitoring is a more appropriate terminology. The “ongoing” aspect of the program should be used where possible but with flexibility and outlined in the proposals submitted to EPA for its approval, not in EPA’s regulations. These elements include those described as follows.

- a. A verification process should include a mass balance analysis.

The verification process should include a mass balance analysis to ensure feedstock and other inputs are consistent with reported biofuel and co-product outputs. This would require a review of the facility’s documentation of feedstock supplies, energy usage, and biofuel production. This would be compared against the facility’s production process technology, storage and blending equipment, and nameplate capacity.

For biodiesel, this can include review of the facility’s oil collection operations, such as a review of purchase orders and oil collection logs. For certain feedstocks, such as waste oils, it is necessary to determine when the feedstock becomes measurable. For example, when the waste oil is dewatered and clean oil is available to the plant. The waste stream from the “clean up” process should also be measurable. Incoming feedstock reports may not equal gallons produced due to the “clean up” process, which should be accounted for by the verifier. Chemical usage, such as methanol, also would be reviewed, as well as energy usage, adjusted to account for other energy needs of the facility not directly related to biofuel production.

⁷ If the RIN remains with the producer, the producer should have the opportunity to either confirm whether the RIN was actually valid or retire the RIN without penalty.

It would also require a review of glycerin and other co-product production. This could be determined based on a review of glycerin sales and biofuel sales through a review of bills of lading and product transfer documents.

Biofuel producers not producing biodiesel will have different co-products, feedstocks, and other inputs, which will lead to parallel lists being created. For example, rather than tracking glycerin production and methanol usage other inputs will be used when producing ethanol, renewable diesel or bio-jet fuels. However, qualifying feedstocks and energy usage will be consistent attributes for the production of all renewable fuels.

To provide flexibility, the verification process should allow for reliance on existing audits and a review of reports already prepared and submitted to other government agencies. Such review should not be specifically required, but could be available to the entity conducting the verification process to ensure the volumes being reported are consistent, rather than engage in yet another separate review of a facility's operations. In this way, the facility need not undergo multiple reviews or prepare new reports, if it is already preparing reports for another government agency. If there are discrepancies between volumes reported and process rate, which cannot be attributed to differences in coverage or statutory definitions, then the auditor would investigate further to determine the cause.

The requirements for conducting a mass-balance analysis for a particular fuel and/or facility should be addressed in the verification process approved by EPA

- b. The verification process should confirm actual production records against RIN generation reported to EPA.

The verification process, similar to the attest engagement review, should include a comparison of actual biofuel production and sales data at the facility against the information submitted to EMTS. This would include a review of the RIN generation/activity reports. The verifier would confirm RINs generated matched wet gallons sold, including checking the temperature correction formula used, verifying the equivalence values and any non-renewable fuel content. The verification process should include a review of the attestation reports or incorporate them into the process. Indeed, to the extent a party is undergoing a Q-A-P, NBB does not believe a separate annual attestation report is necessary, nor does it believe a facility should be required to periodically update its engineering reviews. The auditor can identify if a particular facility has made any changes that would require updates to its registration, and is continuously monitoring the facility's production and RIN generation. The Q-A-P provides the assurances that the attest engagements were intended to provide, and more so.

- c. If a producer also owns and sells separated RINs, the verification process should include a review of whether the RIN was properly separated.

For those facilities that have reported separated RINs, the verification process should include a review of appropriate documentation. This includes documentation showing upward delegation by small blenders, blending records for <B80 blends, exports, or sales records for biofuels used directly as transportation fuel, heating oil, or jet fuel without further blending.

- d. Any verification process should include an annual site visit.

The verification process should include an annual site visit. A visit to the facility is necessary to: (a) evaluate the nameplate capacity of the plant (volume); (b) compare/contrast infrastructure with the Third Party Engineering Review on file with EPA; (c) evaluate size of storage tanks and observe point measurement of volumes in tanks; (d) evaluate the size of blending tanks, if any; and (e) determine whether any changes have been made in operations that have not already been reported to the auditor or to EPA.

Because the verification process includes ongoing review of purchases and sales, there should be sufficient contact between the producer and the auditor throughout the year to ensure that the producer has not gone out of business. The auditor would not be prohibited from visiting the facility more often in the event it finds a discrepancy and requires additional information. The producer should also be required to notify the auditor of any changes to its operations and updates to its registration. Thus, as noted above, periodic updates to its engineering review and separate annual attest engagements should not be required for parties undergoing a Q-A-P. At a minimum and as a matter of efficiency, convenience and in an attempt to decrease the cost to producers, the auditor should be allowed to incorporate the RIN attestation into the site visit under the Q-A-P.

- e. The verification process should include a means for the producer to take corrective action before reporting a RIN as invalid and requiring replacement.

An invalid RIN is any one of the following: (a) a duplicate of a valid RIN; (b) a RIN based on incorrect volumes or volumes that have not been standardized to 60 degrees Fahrenheit; (c) an expired RIN⁸; (d) a RIN based on an incorrect equivalence value; (e) a RIN deemed invalid under 40 C.F.R. § 80.1467(g)⁹; (f) a RIN that does not represent renewable fuel as defined in § 80.1401; (g) a RIN assigned an incorrect D code; or (h) a RIN that “was otherwise improperly generated.”¹⁰ 40 C.F.R. § 80.1431(a). Section 80.1431(c) provides for various

⁸ This illustrates the overreaching of EPA’s Q-A-P Proposal. Because a RIN identifies the year of generation, an obligated party could easily determine whether the RIN has expired or not. Under EPA’s proposal, however, a verified “A-RIN” could be used for compliance purposes regardless of its invalidity.

⁹ 40 C.F.R. § 80.1467(g) provides as follows:

(g) Prohibitions. —(1) A foreign RIN owner is prohibited from obtaining, selling, transferring, or holding any RIN that is in excess of the number for which the bond requirements of this section have been satisfied.

(2) Any RIN that is obtained, sold, transferred, or held that is in excess of the number for which the bond requirements of this section have been satisfied is an invalid RIN under § 80.1431.

(3) Any RIN that is obtained from a person located outside the United States that is not an approved foreign RIN owner under this section is an invalid RIN under § 80.1431.

(4) No foreign RIN owner or other person may cause another person to commit an action prohibited in this paragraph (g), or that otherwise violates the requirements of this section.

¹⁰ Currently the regulations also provide that a RIN is invalid if it was improperly separated under 40 C.F.R. § 80.1429

remedial actions that can be taken that allow improperly generated RINs to be used for compliance, including for RINs generated as a result of improper temperature correction.

Rather than create a long, drawn out administrative process as proposed by EPA, the verification process should allow for correction of RINs that are technically invalid under Section 80.1431(a). For example, a RIN may have been assigned an incorrect D code by sheer typographical error. This should not render the RIN forever invalid for compliance purposes, but the verifier and producer should ensure the correction is made in the EMTS so that the RIN is used toward the proper fuel category.

Where too many RINs were generated, those excess RINs (or equivalent RINs) should be retired, regardless of who currently owns the RINs. Under the verification process, the facility should be continuously updating its equipment and such errors should be identified prior to transfer. When a facility is being more closely monitored, the opportunity for fraud is minimized or eliminated. A fraudulent actor also should be identified early and those RINs blocked as soon as possible. The point of the verification process is to keep those RINs out of the system before they are transferred or used for compliance, reducing the potential burdens on third parties to replace those RINs. If there is a dispute between the auditor and the producer, EPA should be contacted to weigh in on the appropriate action, and the auditor can block the RIN in the EMTS until the issue is resolved.

EPA, however, must improve the EMTS and timeliness of its responses to assist auditors and producers in correcting errors. Many errors in reporting could be corrected, but for the restrictions in making changes in the EMTS. Parties attempt to contact EPA to ensure proper remediation, but often do not receive responses until months after the RIN generation, as long as six months. Producers cannot hold the RINs given the strict deadlines in the regulations, and the needs of its customers. Indeed, the inflexibilities of the EMTS have created additional burdens on producers, rather than eased the reporting system.

4. The entity providing the verification services must be truly independent, and there should be transparency as to the parties providing verification services and the parties participating in the verification process.

The verification process should be undertaken by a qualified and independent auditor whose program has been reviewed and approved by EPA. The auditor conducting the verification process must be independent of *any* day-to-day RIN activity and must be held to a high professional standard. Generally accepted auditing standards include three key general standards: (1) the auditor must have adequate technical training and proficiency to perform the audit; (2) the auditor must maintain independence in mental attitude in all matters relating to the audit; and (3) the auditor must exercise due professional care in the performance of the audit and the preparation of the report.¹¹ These same standards should apply to any entity providing verification services.

In particular, conflicts of interest can bias the auditor's verification process. A conflict of interest exists when professional actions or decisions are or have been influenced by

¹¹ See, e.g., AU Section 150, *Generally Accepted Auditing Standards*, § .02.

considerations of personal or financial gain. This conflict of interest can arise from having a financial interest or relationship with the parties being audited as well as the parties on both sides of the transaction, but also from having an interest in the commodity being traded itself (i.e., the RIN). Any potential conflict of interest on the part of the auditor must be reviewed prior to approval through financial disclosures and as part of its registration renewal. The auditor's objectivity must be paramount to ensure an effective verification process. For more information on what NBB believes should be required of any auditor under the Q-A-P, see Section IX.

NBB also supports requiring those providing verification services be registered with EPA and submit their proposals to EPA for approval. NBB recommends that EPA maintain a webpage with the list of all parties that have submitted a proposal to provide verification services and the status of such applications. EPA should also provide the public with information as to what parties have engaged the services of these providers, and the number of RINs that have been verified generally. Additional comments on EPA's proposed registration, recordkeeping and reporting requirements for Q-A-P providers are provided below.

NBB believes EPA should have some liability associated with Q-A-P provider in order to reduce the temptation for fraud, and the qualifications of who can perform the audits should be stringent enough to eliminate unqualified individuals from becoming auditors. In this sense, we think auditors should demonstrate at a minimum that you have at least a 5-person dedicated team with the requisite technical and financial skills to properly administer the Q-A-P. Each member must have at least a 4-year degree and 3 of the 5 must be a chemical engineer, a certified accountant or fraud investigator, and a process engineer. A Q-A-P provider, its members and any affiliated company must not engage in the purchase, sale or trading of RINs in any manner.

B. Ultimate Responsibility for RIN Replacement Must Remain with the Obligated Parties, as EPA is Obligated to Ensure the Statutorily Required Volumes are Met, And Its Regulations Must Ensure Compliance by *Obligated Parties*.

1. The statute places the obligation to meet the volumes on a specified list of parties -- blenders, refineries and importers of gasoline and diesel fuel.

The Energy Independence and Security Act of 2007 (EISA) substantially expanded the RFS program, setting "forth the *minimum* annual volumes for each year." *NPRA v. EPA*, 630 F.3d 145, 160 (D.C. Cir. 2010), *reh'g denied*, 643 F.3d 958 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 571 (2011). Congress "directed" EPA "to *ensure* that transportation fuel sold or introduced into commerce in the United States . . . , on an average annual basis, contains *at least* the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, biomass-based diesel" under the statute. *Id.* at 152-53 (emphasis in original) (citation omitted); *see also* 42 U.S.C. § 7545(o)(2)(A)(i), (o)(3)(B). Based on the plain meaning of the word "ensure," the statute requires EPA to "make certain" that the statutory volumes of each type of renewable fuel is sold or introduced into commerce. *Id.* at 153. The requirement that "at least" the applicable volumes be sold signals Congress' "intent that volumes not be reduced, at least not in the first decade of the renewable fuel program." *Id.* at 156. Thus, EPA's obligation is to enforce the *statutory* volumes. These are the goals set by Congress, and continued policy disagreements with those goals are insufficient to override this obligation.

The statute expressly requires that EPA's regulations "contain compliance provisions *applicable to refineries, blenders, distributors, and importers*, as appropriate, to *ensure* that the requirements of this paragraph are met." 42 U.S.C. § 7545(o)(2)(A)(iii) (emphasis added); *see also id.* § 7545(o)(3)(B)(ii) ("The renewable volume obligation determined for a calendar year ... shall ... be applicable to refineries, blenders, and importers, as appropriate."). Thus, Congress imposed compliance obligations with respect to the volume mandates on a defined set of parties. To avoid duplicative obligations, EPA's regulations define obligated parties as "any refiner that produces gasoline or diesel fuel ... or any importer that imports gasoline or diesel fuel..." 40 C.F.R. § 80.1406. Thus, it is these parties that are required to ensure compliance with the volume mandates, and, as described above, EPA established the program as one of "buyer beware" to best effectuate the volume mandates. As EPA recognizes, this is a similar approach that it has taken in numerous other fuels programs. *See, e.g.*, 40 C.F.R. §§ 80.67(h)(3), 80.315(b)(2).

Further, it is more than reasonable for parties actually involved in the RIN transaction, and obtaining the benefit of that transaction, to be ultimately responsible to make the program whole. Indeed, this is not unusual. A person using counterfeit money loses the value of that money, even if he or she was entirely unaware that it was counterfeit. That is simply the nature of the commoditized system that has been created in the RIN trading program.

Thus, while NBB does not oppose an affirmative defense with respect to civil penalties, it believes the replacement of invalid RINs cannot be forgiven. Moreover, there is no authority under the statute to shift the burden of compliance with the volume mandates on not-at-fault producers. As noted, the statute clearly requires EPA to impose the volume mandate requirements on obligated parties. Obligated parties alone, therefore, have the individual duty to fulfill their share of the overall volume mandate. The statute provides clear avenues on how obligated parties can meet those requirements (e.g., credit program, deficit carryover), but does not allow EPA to shift that duty to other non-obligated parties in any circumstance. As further described below, some of the RIN replacement provisions in the proposed rule would allow the volume to be reduced and may simply shift the burden of RIN replacement to other producers. But, the program was intended to promote production, and it is unclear how a party with absolutely no involvement or receiving no benefit from the transaction should be left holding the bag.

2. The constitution does not bar EPA from holding obligated parties responsible for their obligations under the statute.

Although obligated parties made a passing reference to potential constitutional infirmities in requiring "not-at-fault" obligated parties to replace invalid RINs at the public hearing on the Q-A-P Proposal,¹² EPA's regulations have always provided for strict liability -- it is the status quo. Obligated parties did not previously dispute this, nor did they raise this issue when facing enforcement actions, choosing instead to settle the potential violations and pay minimal penalties. Furthermore, if there were constitutional problems with requiring not-at-fault entities to replace invalid RINs, those problems would be even more serious if, as obligated parties would like, innocent renewable fuel producers were held responsible for replacing invalid RINs. Unlike

¹² *See* EPA-HQ-OAR-2012-0621-0030 at 90.

obligated parties who might purchase invalid RINs in a transaction, innocent renewable fuel producers obtain no direct benefit from the transaction.

In any event, there are no constitutional infirmities with the status quo. Strict liability schemes have consistently been upheld against constitutional attacks. *See, e.g., General Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) (upholding CERCLA Unilateral Administrative Order scheme and EPA's implementation thereof); *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327 (Fed. Cir. 2001) (affirming dismissal of claims that Energy Policy Act special assessment for remediation costs was unconstitutional); *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (upholding strict liability scheme of CERCLA against "innocent" landowners); *U.S. v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127-28 (5th Cir. 1981) (upholding civil penalty imposed on not at fault party under CWA). In these programs, fault is more appropriately considered in these schemes in assessing penalties, not in alleviating the regulated entity from their regulatory obligation. That is precisely what EPA considered in setting low penalties under its interim enforcement policies, and how EPA should approach its affirmative defense.

As EPA has recognized, however, "buyer beware" and the RIN replacement provisions are a mechanism for meeting the volume requirements in the statute. The statute imposes the obligation on the obligated parties to meet the volume mandates. *See, e.g., Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008) (upholding, against constitutional claims, statutory scheme requiring tobacco manufacturers to contribute to buyout for tobacco farmers and tobacco quota holders). Their obligation is based on their participation in the transportation fuel market, and the goal of the statute is to reduce the fossil fuels used by participants in that market. In so doing, Congress required EPA to "ensure" the volumes are met, which includes authority to enforce the obligated parties' duties under the statute. The volume mandates are prospective obligations, notwithstanding EPA's enforcement may lag behind. Enforcement of federal statutes is replete with examples of requiring parties to meet past due obligations and, in fact, such enforcement has included penalties above the past due amount. For example, the Internal Revenue Service may audit past tax returns occurring many years earlier and seek payment of unpaid taxes *plus penalties*. Thus, assertions that EPA's requirement to seek RIN replacement is unconstitutional are simply baseless.

3. As EPA has found, the potential impacts of RIN Replacement on Renewable Fuel demand will be minimal.

In the Q-A-P Proposal, EPA notes that, because of the timing of reviewing and replacing invalid RINs, some portion of a given year's applicable volume requirement may be fulfilled in a subsequent year. EPA nonetheless finds that it would be appropriate to permit an invalid verified RIN to be replaced outside of the year in which it was generated. 78 Fed. Reg. at 12,179, 12,184. *NBB agrees*.

Although obligated parties have attempted to argue that RIN replacement is inappropriate because one cannot go back in time.¹³ As always, the obligated parties mischaracterize EPA's

¹³ NBB notes that there have been excess RINs produced each year under the RFS2 program. Obligated parties, therefore, cannot contend that valid RINs were not available that year. If they are able to continue to use prior year RINs toward their volume obligations, they must also be required to make up any deficit as a result of the use of invalid RINs.

obligations and authority under the statute. As the D.C. Circuit has found, EPA is tasked with the obligation to ensure “at least” the statutory volumes are met. *NPRA*, 630 F.3d at 153. These volumes are minimum volumes. *Id.* at 160. The D.C. Circuit also found that EPA appropriately allowed the 2009 volume requirement to be fulfilled in 2010, recognizing its obligations under the statute. *Id.* at 158. The D.C. Circuit further recognized that it is refiners and importers that bear the burden of demonstrating that they met the requirements each year. *Id.* at 148, 149. The deficit carryover provision provides additional authority to fill the prior year’s requirements in subsequent years. 42 U.S.C. § 7545(o)(5)(D). Thus, EPA properly requires that RINs be replaced even if the compliance year has passed.

C. Any Affirmative Defense Provided by EPA Should be Limited to Civil Penalties Only.

Although NBB believes that strong enforcement is necessary to eliminate fraudulent activity and civil penalties are an important incentive to ensure compliance with the statutory requirements, NBB understands that civil penalties may not be necessary when a party has taken all reasonable steps to comply or has undertaken its due diligence but a RIN is still determined to be invalid. The following elements are necessary components of an affirmative defense:

- The party did not cause the invalidity of the RIN;
- The RIN underwent a verification process conducted by an independent third-party auditor and deemed valid;
- For parties that are not the generator of the RIN, the party did not know and did not have any reason to know that the RIN was invalid at the time the RIN was acquired and at the time the RIN was subsequently transferred or used for compliance purposes;
- For parties that are not the generator of the RIN, product transfer documents were provided and met the requirements of 40 C.F.R. § 80.1453; and
- Timely notice was provided to EPA and any necessary corrective action was taken.

NBB agrees that the burden should be on the party seeking the affirmative defense, and that each element must be established through a preponderance of the evidence. Again, however, the affirmative defense should apply only to civil penalties and, based on the availability of an affirmative defense, parties should be given the opportunity to seek coverage before EPA’s issues any notice of violation.

III. EPA MUST REJECT ANY ATTEMPTS TO FURTHER RESTRICT A PRODUCER'S ABILITY TO GENERATE AND SELL RINS, AND SHOULD CONSIDER ADDITIONAL FLEXIBILITIES TO ELIMINATE EXISTING CONSTRAINTS ON THE BIOFUEL INDUSTRY.

A. EPA Should Not Prohibit Producers From Separating RINs.

The current RFS2 regulations include a specific list of events when a RIN can be separated from a gallon of renewable fuel. 40 C.F.R. § 80.1429(b). Renewable fuel producers are limited in when they can separate RINs, including in those circumstances when the fuel is sold for use as transportation fuel, heating oil or jet fuel without further blending. Although EPA does not propose to eliminate this provision, it requests comment on a regulatory change in which renewable fuel producers would be completely prohibited from separating RINs. 78 Fed. Reg. at 12,168-12,169. This has been rejected by EPA twice, in the RFS1 rule and the RFS2 rule, and NBB does not believe that EPA should reopen this issue. NBB understands that the fraudulent RINs issued by Green Diesel, Clean Green and Absolute Fuels purported to be “separated” RINs and, in fact, agrees that when obligated parties purchase actual gallons of fuel there should be no question as to the validity of the RIN. But, the potential for fraud is not adequate grounds for reversing EPA’s position on this matter. As an initial matter, NBB does not agree with the statement that “some registered biodiesel producers exploited this provision.” *Id.* The provision was not exploited. Three actors committed fraud, and RIN brokers, obligated parties, and the like were more than willing to purchase such RINs without confirming that these RINs even came from a viable facility. Moreover, the correct solution is to eliminate the secondary RIN market and reduce the ability to transfer separated RINs, not to limit the ability of producers to separate RINs. Such is the case in other credit programs. *See, e.g.*, 40 C.F.R. §§ 80.67, 80.315(b)(2).¹⁴

The ability of producers to separate RINs was first promulgated under the RFS1 Rule and initially received no adverse comments. 72 Fed. Reg. at 23,943. It was retained (and expanded) in the RFS2 Rule. 75 Fed. Reg. at 14,724-14,726. As EPA has again indicated here, a main purpose of this provision was to “avoid situations in which RINs were never separated from renewable fuel due to its use in neat form or some atypical blend.” 78 Fed. Reg. at 12,168. NBB agrees that producers should be able to obtain full value of the fuel and RINs, which would not occur in these cases unless the producers can separate the RINs. The inclusion of neat biofuels and other blends also improves liquidity in the market, and is fully consistent with the statute that allows generation of RINs for “additional renewable fuel” and the appropriate generation of credits for biodiesel. 42 U.S.C. § 7545(o)(1)(A),¹⁵ (5)(A)(ii). Thus, Congress contemplated that not all renewable fuel would be sold to blenders or refineries subject to the volume mandates, and EPA must provide a mechanism to allow for the creation and use of these credits. EPA provides no explanation how these RINs can enter the marketplace for compliance purposes if producers could no longer separate RINs. Moreover, there is no evidence that removal of this provision would eliminate or even alleviate the ability of an industrious criminal to commit fraud.

¹⁴ EPA’s recent proposed rule for Tier 3 standards similarly places limits on the number of trades allowed for credits. Prepublication Version at 303-304, *available at* <http://www.epa.gov/otaq/documents/tier3/tier3-nprm-20130329.pdf>. No “affirmative defense” is provided in the proposal.

¹⁵ Users and blenders of heating oil and jet fuel are not obligated parties.

Obligated parties will still be purchasing “paper” credits, and oversight is needed to ensure the RIN is valid regardless of who is authorized to separate a RIN.

Producers are in the business of selling fuel, not RINs. The RFS program was intended to continue to promote production and use of renewable fuel. The biodiesel marketplace is not as mature as other biofuel markets and many of the gallons sold are to discretionary blenders who are not obligated to use renewable fuels under the RFS. *See* EPA RFS2 RTC at 3-232 to 3-236 and comments cited therein.¹⁶ These parties, particularly in local and regional markets, often use biodiesel directly and are not obligated parties, nor do they want to be in the business of owning or selling RINs. Many biodiesel producers have never sold a gallon directly to an obligated party. And, often the value of the RIN provides biodiesel producers with its only opportunity to create a margin.

Producers, particularly small producers, must be given the flexibility to continue to service this market while obtaining full value of their RINs.¹⁷ Moreover, ensuring continuation of these markets allows for the easier compliance with the RFS2 volume requirements, as the fuel can be used locally rather than shipped to obligated parties. Again, it is the decision by EPA, with full support of obligated parties, to focus RIN generation on production, rather than consumption, that requires renewable fuel producers to retain the ability to service these other markets. Unless obligated parties are required to actually purchase *the fuel* required under the statute, EPA should not eliminate the ability of producers to separate RINs.

B. EPA Should Provide Producers More Flexibility to Move RINs to Improve Liquidity and Allow for Full Value of RINs.

Rather than impose additional limits on a producer’s ability to transfer RINs by prohibiting separation of RINs, EPA should, in fact, eliminate some of those limitations and provide them with more flexibility to address the needs of the market. The refusal of certain obligated parties to purchase actual gallons of fuel requires producers to seek other customers for their fuel. As described above, these other customers, while wanting the renewable fuel, are often reluctant to become RIN owners and become subject to numerous requirements under EPA’s regulations. In recognition of this, EPA allows producers to transfer renewable fuel with 0-2.5 assigned RINs, so long as their inventory at the end of each quarter (times the appropriate equivalence value) is greater than the total number of assigned RINs it owns at the end of the quarter (referred to herein as the “quarterly true-up”). 40 C.F.R. § 80.1428(a)(5); 72 Fed. Reg. at 23,939-23,940. EPA also allows blenders who handle and blend less than 125,000 gallons of renewable fuel per year to delegate their RIN separation obligations to the upstream supplier of renewable fuel. 40 C.F.R. § 80.1440. EPA should reassess these provisions, as they provide

¹⁶ Indeed, producers argued that their ability to separate RINs should not be limited. EPA’s only rationale for limiting the ability of producers to separate RINs was that it was concerned with RIN hoarding. EPA has never provided evidence that such hoarding was likely to occur, nor is there evidence that such hoarding has occurred. Rather it is other parties (obligated parties and RIN brokers), not producers, that have distorted the RIN market place.

¹⁷ EPA has also indicated that it did not believe RIN separation was necessary for producers to service these markets, because EPA allows producers to transfer fuel with 0 to 2.5 assigned RINs. EPA RFS2 RTC at 3-237. But, these provisions also come with significant administrative burdens and costs and its own set of difficulties to ensure compliance. Moreover, this provision may not fit every transaction.

undue limits on a producer's ability to serve certain markets, which will become even more acute if EPA contemplates removing the producer's ability to separate RINs.

First, the quarterly true-up provisions impose an arbitrary deadline on producers to move their biofuel and RINs. Many biodiesel facilities are "batch" plants.¹⁸ Batch plants produce fuel based on the customer's request, and are not continually producing fuel that is simply placed in storage. RINs are generated for each batch, and batch plants do not necessarily have inventory in storage at their facilities at any given time. However, under Section 80.1428(a)(5), at the end of the quarter, the number of assigned RINs it has in its possession must be equal to or less than 2.5 times its inventory. As such, when a customer requests fuel, without assigned RINs, close to the end of the quarter, these plants often have to scramble to transfer the proper number of assigned RINs with other gallons of fuel so as not to run afoul of the quarterly true-up requirement. This often requires the producer to substantially reduce the price of the fuel with RINs in order to move the RINs. This is made more difficult by the fact that biodiesel has an equivalence value of 1.5, and EPA, to date, has declined to allow up to 3 RINs to be transferred, using instead 2.5 that is not easily divisible by any existing equivalence value. NBB urges EPA to change the number of assigned RINs it has in its possession to be equal to or less than 3.0 times its inventory.

The only support provided for the quarterly true-up requirement is to ensure that producers do not hoard RINs. 72 Fed. Reg. at 23,939-23,941. EPA, to date, has never provided any support for why producers would hoard such RINs or any evidence that any "short-term" hoarding has occurred even under this provision. For biodiesel producers, the RIN value attached to each gallon of biodiesel allows a producer to sell its biodiesel at a competitive price with diesel fuel. A producer has no incentive to accumulate assigned RINs, and only needs to sell biodiesel with no assigned RINs when it is servicing smaller blenders, jobbers, and other entities that do not want to be caught up in the administrative requirements of the RFS2 program.

Thus, NBB asks EPA to reconsider this requirement, and eliminate the barriers it may place on a producer's ability to sell fuel to these local and regional markets. First, NBB believes the quarterly true-up requirements are not necessary as producers have every incentive to sell the RINs as quickly as possible as the RIN value goes toward operating costs, and should be eliminated altogether. Indeed, the RINs have a limited life, and it makes little sense for producers to hold onto assigned or separated RINs. Alternatively, EPA can instead impose a requirement to transfer any assigned RINs 90 days from generation. Requiring this true-up at the end of each quarter is an arbitrary deadline established by EPA. If hoarding is a valid concern, putting the producers on a clock to transfer the RINs from generation serves the same purpose, but would not create the problems that arise at the end of each quarter for batch plants. Second, NBB requests again that the 2.5 RIN limit be adjusted to, at a minimum, reflect the applicable equivalence factor of the relevant fuel (e.g., 3 RINs for biodiesel). This would reduce calculation errors. There is nothing magical about the 2.5 number, which is merely a relic of a prior statutory provision removed by EISA and the RFS1 regulations. EPA provided no explanation why it believed the 2.5 number provided producers with sufficient flexibility, and, as described above, it has affected the ability of producers to service smaller customers and local markets.

¹⁸ These batches may not be the same "batch" of fuel as defined by EPA.

Finally, EPA should also allow upstream delegation of RIN separation obligations for more parties. While NBB supports the existing delegation provision for small blenders, the 125,000 gallon cap is again arbitrary, and EPA has never provided any support for that number. Comments indicated that 125,000 gallons was too small to cover many of the local jobbers. EPA RFS2 RTC at 5-11 to 5-14 (See, e.g., comments of NBB and Minnesota Soybean Processors). EPA simply asserted it believed the 125,000 gallons was a “correct balance,” so that non-obligated parties cannot influence the RIN market. *Id.* at 5-15. But, there are numerous parties that hold RINs that are not obligated parties, and there is no limit on how many separated RINs a party can have. Again, producers want to sell their fuel and have no incentive to “hoard” assigned RINs. Moreover, as the volumes continue to increase, EPA should encourage parties to enter the market and, thus, provide alternatives to the substantial administrative requirements of participating in the RFS2 program.

C. NBB Agrees That EPA Should Provide More Flexibility as to When a Producer Must Report the Transfer of Fuel And RINs, But Also Requires More Flexibility as to When It Must Transfer an Assigned RIN.

In the Q-A-P Proposal, EPA indicates that “[s]ome buyers and sellers of assigned RINs have expressed concerns with these requirements [to enter RIN sales into the EMTS within 5 and 10 business dates from date of transfer] stating they have difficulty determining the date of transfer since title of the renewable fuel is not transferred until the fuel physically reaches the buyer.” 78 Fed. Reg. at 12,201. Thus, EPA proposes an alternative to the five and ten business days by when a seller and buyer must report a RIN transaction into the EMTS. This alternative method would provide as follows:

We propose that sellers of assigned RINs under the alternative method be required to do the following:

- Within five (5) business days of shipping renewable fuel with assigned RINs, report a sell transaction, using the alternative method, via EMTS;
- Include in the EMTS sell transaction report other required information per section 80.1452; and
- Provide a PTD to the assigned RIN buyer with a unique identifier, also reported via EMTS, in addition to the information in section 80.1453. The date of transfer is not required for the alternative method.

We propose that buyers of assigned RINs under the alternative method be required to do the following:

- Within five (5) business days of receiving a shipment of renewable fuel with assigned RINs, report a buy transaction, indicating use of the alternative method, via EMTS;
- Include in the EMTS buy transaction report other required information per section 80.1452;

- Include in the EMTS buy transaction report the unique identifier provided by the seller; and
- Include in the EMTS buy transaction report the date the renewable fuel was received, i.e. the date of transfer.

Id. NBB supports providing additional flexibility as the five days and ten days to enter RIN transactions into the EMTS often create more errors and the need to resubmit transactions merely because the information is not accepted on time.

But, NBB believes that additional conforming changes may be needed with respect to the provisions requiring transfer of RINs *with the* transfer of the fuel. The concerns regarding the timing of reporting transactions into the EMTS is due to the reference to the date of transfer, which EPA has interpreted as being transfer of title. Existing 40 C.F.R. § 80.1428(a)(3) requires that an assigned RIN be transferred “simultaneously” with the transfer of renewable fuel. Similarly, if on separate product transfer documents, the RIN must be recorded on a product transfer document “on the same day” as the product transfer document used to transfer ownership of the fuel. 40 C.F.R. § 80.1428(a)(6)(ii); *see also* 40 C.F.R. § 80.1460(b)(4) (prohibiting transfer of assigned RINs without also transferring an appropriate volume of renewable fuel “on the same day”). As EPA has recognized, title to fuel is often transferred on receipt of the fuel, not shipment, and the timing of transfers may depend on the form of shipment. Buyers and sellers of fuel should be able to determine the appropriate terms of sale, including transfer of title to the fuel and RIN. *See* Appendix A, Part 1, for proposed additional regulatory language to address this issue.

IV. IF IMPORTS OF RENEWABLE FUEL ARE ALLOWED TO CONTINUE TO QUALIFY FOR THE RFS PROGRAM, THEN IT IS IN THE PUBLIC INTEREST FOR EPA TO REQUIRE EVERY GALLON OF IMPORTED FUEL TO HAVE BEEN VALIDATED BY AN ENHANCED AND THE MOST ROBUST QUALITY ASSURANCE PLAN AND TO MEET SPECIFIC BOND REQUIREMENTS THAT AMOUNT TO NO LESS THAN 10% OF THE VALUE OF RENEWABLE FUELS IMPORTED EACH YEAR PER COMPANY.

EPA addresses the imports of biofuels and whether the RINs from foreign producers are valid as a bit of an afterthought. At the core of the RFS program is the requirement that feedstocks sufficiently qualify for the program. The EPA provides specific regulations for the treatment and qualifications of foreign producers at 40 C.F.R. §§ 80.1465, 80.1466 and 80.1467, but once paperwork documents are initially approved by the EPA, it does not require any validation or certification that the renewable biofuel product that arrives in the United States was produced in accordance with the RFS regulation. In order for the RFS to continue to function as intended, then each RIN used for compliance must be valid. Under the program today, it is impossible to determine whether any gallon of imported renewable fuel actually meet any requirements of the program.

NBB proposes that each gallon of imported renewable fuel must be validated through the highest level quality assurance plan, where each gallon produced and each RIN validated must first be approved through a real time monitoring system. In the cases where foreign product is

being used to meet the strict requirements of the RFS program, then it is necessary for each foreign biofuel producing company to be continually monitored.

In its proposal EPA did not propose to limit whether purchasers of RINs from imported renewable fuel can also be eligible for the affirmative defense under the Q-A-P and importers can participate under the Q-A-P. EPA requested “comment on the likelihood of such producers participating in the quality assurance program, any difficulties to participating they might encounter, and any issues that could affect the integrity of the proposed program.” 78 Fed. Reg. at 12,165. To the extent imports of renewable fuel continue to qualify for the program, NBB is concerned that EPA is unable to adequately oversee foreign entities.

With respect to the verification process, NBB is most concerned with the ability of EPA to accurately verify feedstock used outside of the United States, such as palm oil or palm oil derivatives and soybean oil from Argentina and Brazil used to produce biodiesel. Certain such feedstocks are yet to be approved, and foreign crops (except Canada) are subject to numerous recordkeeping and reporting requirements. High level Q-A-P’s should be required to ensure that the renewable fuel generating RINs (i.e., fuel designated as “RFS-FRRF”) has been properly segregated as required under 40 C.F.R. § 80.1466(j)(1). The Q-A-P should be required, and the third-party auditor also should ensure that the bond is updated annually and meets the requirements of 40 C.F.R. §§ 80.1466 and 80.1467. EPA should consider additional requirements for such fuels to ensure adequate oversight including increasing the bond required for each company to be no less than 10 percent of the total value of imports each year.

The elements of the proposed Q-A-Ps also do not appear to account for the additional recordkeeping requirements required for foreign renewable fuel producers and foreign RIN owners under 40 C.F.R. §§ 80.1466 and 80.1467. This additional documentation includes, for example, certification each time the renewable fuel is transferred for transport and load port and port of entry testing. These documentation should be required for all imported renewable fuel, regardless of who generates the RIN. EPA should ensure that any approved Q-A-P covers both the foreign renewable fuel producer and the domestic purchaser. The Q-A-P elements as proposed appear to focus on the production process. Thus, EPA should consider imposing additional requirements to review documentation from the foreign producer, the exporter in the foreign country (if different), and the importer itself once the fuel reaches the United States.

In addition, EPA should strengthen the ability to ensure invalid RINs associated with imported fuel are replaced. For example, EPA should consider having the domestic purchaser of the imported fuel be first in line to replace any invalid RIN, regardless of whether the RIN was subsequently transferred. EPA should also consider increasing the bond required for foreign renewable fuel producers and foreign RIN owners. At a minimum, EPA should provide additional information on how it assesses bonds and ensures that the bond is updated annually.

While NBB believes additional regulations may be required for imports of fuel from overseas to ensure compliance with the RFS2 requirements, it also recognizes the ongoing and significant trade that occurs directly across the border, largely as a result of NAFTA. In addition, EPA has approved an aggregate approach for crops from Canada, and EPA has

provided for alternative methods for truck imports. *See, e.g.*, 40 C.F.R. § 80.1466(l).¹⁹ NBB agrees that truck and rail imports crossing one land border do not present the same types of difficulties in tracking and enforcement as imports brought in through multiple countries or on vessels from overseas. Thus, the additional requirements proposed by NBB focus on imports from vessels and not on imports brought in on trucks or by rail across the border, and EPA should continue to consider additional flexibilities for imports by truck or rail, which we expect would largely be from Canada.²⁰

V. NBB GENERALLY SUPPORTS AN INTERIM APPROACH UNTIL EPA CAN FINALIZE THE Q-A-P RULE, BUT BELIEVES EPA SHOULD SIMPLY RELY ON ITS CURRENT ENFORCEMENT POLICY.

When called before Congress, EPA indicated that it would strive to have the Q-A-P proposal completed to cover RINs generated from January 1, 2013. Although NBB believes that EPA acted quickly to respond to concerns raised by the three cases of fraudulent RINs, EPA must not rush into finalizing the rule and must not create confusing “interim” rules, simply to ensure a program start in 2013. First, as EPA has recognized, the industry has undertaken numerous steps to ensure the types of fraudulent actions that occurred in 2009-2011 do not occur again. Second, EPA is entering uncharted territory, and it is clear that the potential implications of the options being considered have not been fully examined. Third, even the interim rules proposed by EPA are complicated and lack clarity as to how they will operate in practice. Finally, EPA already has in place its “Second Interim Enforcement Response Policy – Violations Arising from the Use of Invalid 2012 and 2013 Renewable Identification Numbers”²¹ for RINs used for compliance in both 2012 and 2013 that essentially serves the purposes of its interim proposal, and EPA can continue to rely on that policy to alleviate the concerns of obligated parties and continue to encourage third parties to develop Q-A-Ps. As EPA recognized, several companies have already developed Q-A-Ps, and have begun to offer their services to producers. Thus, the interim approach as outlined in the proposal is not needed to encourage parties to develop Q-A-Ps.

EPA proposes that verifying a RIN in EMTS “be prospective, meaning that a RIN could only be verified after an auditor has audited a facility in accordance with an approved Q-A-P and met other conditions discussed below.” 78 Fed. Reg. at 12,190 (emphasis added). NBB agrees, and believes that EPA should apply the program prospectively from the beginning, with January 1, 2014 as the most likely start date. This would give EPA time to carefully consider all the public comments, conduct any additional analysis that may be required, and make the appropriate revisions to its proposal. It would also ensure all the parties are fully aware of the final requirements and give all the parties time to ensure that the appropriate Q-A-P elements are in place. While NBB supports efforts to encourage auditors to prepare and submit Q-A-P proposals to EPA early, this is a brand new world EPA is creating, and renewable fuel producers

¹⁹ The statute itself distinguishes fuel use in the contiguous United States, 42 U.S.C. § 7545(o)(2)(A)(i), and the United States shares a land border with Canada.

²⁰ In addition, Canada has its own renewable fuel requirements and, thus, the potential for ineligible fuel crossing the border is minimized.

²¹ <http://www.epa.gov/enforcement/documents/policies/erp/secondierp013113.pdf>.

continue to be in the dark as to the potential cost of the programs, largely due to EPA's RIN replacement *proposal*. Thus, EPA should finalize the rule and apply it prospectively so all parties understand the new world from day one.

The interim rules proposed by EPA lack clarity, and would only create further confusion. While NBB has no issue with a "pre-registration" process, EPA makes clear that it confers "no legal rights or privileges to the auditors, or to the production facilities and RINs they review" and RINs become verified only after rule is finalized and EPA formally approves the Q-A-P. 78 Fed. Reg. at 12,168. Even EPA's proposed interim approach will only be resolved "in the final rule after reviewing the comments." *Id.* Thus, it is unclear how EPA's proposed interim rules provide any comfort to renewable fuel producers.

Also, EPA's proposal would allow one retroactive audit of RINs generated prior to the final rule's effective date and before the Q-A-P was pre-approved. 78 Fed. Reg. at 12,168. Again, such audits would be done prior to the final requirements being determined, and, moreover, NBB does not understand how this is any different than relying on existing audits and application of EPA's interim enforcement policy. Thus, EPA should simply continue to utilize its enforcement discretion to the extent parties did engage in audit reviews of RINs, and should only apply the Q-A-P program prospectively, once it is finalized. NBB anticipates that a final rule could be completed prior to the end of the year, which would allow time for parties to register and choose to participate in a Q-A-P by January 1, 2014.

PART 2: EPA'S PROPOSED Q-A-P PROCESS EXCEEDS EPA'S AUTHORITY AND FAILS TO ENSURE THE VOLUME MANDATES ARE MET.

NBB is concerned that the Q-A-P Proposal is merely a huge accommodation to the petroleum industry, rather than a reasonable approach to addressing the concerns initially raised by obligated parties; that is, removing the threat of notices of violation in the case of fraudulent RINs. EPA's proposal essentially gives obligated parties an absolute defense under Q-A-P A, which we believe exceeds its authority. Finalizing the proposal will not create a level playing field for small producers, and overly complicates the program. At the end of the day, obligated parties will continue to refuse to purchase fuel and continue to complain that the program is too expensive. If EPA determines an affirmative defense continues to be necessary to restore RIN liquidity and help small producers, it must substantially revise the proposal.

VI. NBB GENERALLY SUPPORTS AN AFFIRMATIVE DEFENSE AGAINST CIVIL PENALTIES ONLY FOR GOOD FAITH RIN PURCHASERS WHERE THE RIN IS SUBSEQUENTLY DEEMED TO BE FRAUDULENTLY GENERATED.

As described above, NBB does not oppose the establishment of an affirmative defense with respect to potential civil penalties for transfer and use of invalid RINs that were purchased in good faith. Good faith, here, means that the party engaged in a reasonable amount of due diligence. But, under EPA's proposal, this merely means that the RIN has been verified through a Q-A-P. EPA, however, cannot relieve obligated parties from their statutory obligation to comply with the volume mandates. In addition, a producer engaged in a Q-A-P program should also be available to take advantage of an affirmative defense.

A. EPA Must Clearly Define What is an Invalid RIN for Purposes of the Affirmative Defense.

The three cases of RIN fraud involved the generation of RINs where *there was no corresponding renewable fuel produced*. NBB agrees that the program should ensure against generation of RINs without production of renewable fuel. NBB also agrees that a RIN is invalid if it does not represent a renewable fuel that has an approved pathway or that was produced from feedstock that meets the definition of renewable biomass under the statute. Under EPA's regulations, including its proposed revision to 40 C.F.R. § 80.1426(a), any error or misstep could render a RIN invalid notwithstanding the fact that the fuel was produced properly and meets the eligibility requirements under the Act. EPA must clarify that mere paperwork violations or data entry errors do not render a RIN invalid. Along those lines, NBB supports EPA's proposal to not treat improper separation of RINs as an event that could render a RIN invalid.

1. NBB strongly opposes EPA's proposed revision to Section 80.1426(a), and requests that EPA make clear that producers may fix correctable errors without rendering a RIN invalid or requiring its replacement.

In the Q-A-P Proposal, EPA is proposing to amend Section 80.1426 to state that RINs may only be generated for fuel that is demonstrated, pursuant to the reporting requirements of Section 80.1451, the recordkeeping requirements of Section 80.1454, or in other records maintained by the producer, to be produced in accordance with the applicable pathway listed in Table 1 to Section 80.1426(f) or a petition approved by EPA pursuant to Section 80.1416. 78 Fed. Reg. at 12,192. But, Section 80.1431(a)(ix) renders a RIN invalid to the extent it was otherwise improperly generated. 40 C.F.R. § 80.1431(a)(ix). In the Q-A-P Proposal, EPA appears to be requiring the replacement of any RIN deemed invalid, regardless of whether the cause of the invalidity could be corrected such that the original RIN can remain in the system and be valid for compliance purposes. As such, EPA must reject this change and, moreover, revise the current regulation to remove references to registration, recordkeeping and reporting violations as potentially rendering a RIN invalid.

While the current regulatory language also appears to potentially render a RIN invalid for largely paperwork violations, under the current enforcement scheme, EPA is able to work with the producers and provide for corrective actions (and potential civil penalties for the underlying violations), while allowing the RINs to remain valid for compliance purposes. This makes sense, as the fuel was properly produced and otherwise would qualify as renewable fuel under the statute. Moreover, the registration, recordkeeping and reporting requirements under the RFS2 are significant and complex, and present many opportunities for errors. This is particularly true with respect to the requirements to enter information on RIN generation and RIN transactions into the EMTS. While the intent of the EMTS was to reduce errors, there are many opportunities for mistakes, and the system is unforgiving to make any corrections. Moreover, it can take 6 months or longer for EPA to provide any response to queries as to how to make a correction in the EMTS, but parties have mere days to enter the appropriate information into the system. Thus, potential violations of these requirements should not affect the validity of a RIN.

EPA indicates that it has proposed this change "in order to ensure that renewable fuel producers will maintain their records in a manner that will allow third party auditors and the EPA to efficiently evaluate whether RINs were properly generated." 78 Fed. Reg. at 12,191-12,192.

But, the potential for civil penalties should be sufficient incentives for these parties to comply with EPA's regulations and, moreover, the auditors will likely not be able to verify the RINs without the necessary information. Thus, it makes little sense for a producer to agree to participate in a Q-A-P, and then fail to provide the auditor with the information required to obtain the verification.

NBB, therefore, strongly opposes the proposed change to 40 C.F.R. § 80.1426(a), and, in fact, recommends revision to the existing regulation to better conform with the new enforcement scheme being proposed by EPA. Proposed regulatory language is provided in Appendix A, Part 2.

2. Because a producer cannot track or regulate what happens to its fuel or RINs once they leave the producer's facility, NBB supports EPA's proposal to exclude improper separation of RINs from rendering a RIN invalid.

A common area of confusion among producers is whether a RIN is rendered invalid as a result of actions occurring downstream from the renewable fuel production facility. The Q-A-P proposal includes various proposed changes to clarify that the validity of a RIN is not affected by downstream actions. In particular, EPA proposes to remove Section 80.1431(a)(1)(viii) of the regulations. NBB supports this proposed change.

Section 80.1431(a)(1)(viii) currently provides that a RIN that was improperly separated pursuant to Section 80.1429 is invalid. Under the Q-A-P Proposal, EPA proposes to remove Section 80.1431(a)(1)(viii) of the regulations and to add Section 80.1460(h), which would identify the improper separation of RINs as a prohibited act. As EPA explained, the "net effect of these changes would be to allow obligated parties to use RINs that were improperly separated for compliance purposes, since the RINs would no longer be considered invalid. However, improper RIN separation would continue to be a prohibited act under the regulations." 78 Fed. Reg. at 12,196. NBB supports this proposed change, as a producer should not be responsible for the actions of parties downstream. If the RIN was properly generated, that RIN should be available for compliance purposes. If a downstream act resulted in the RIN being improperly separated, the party improperly separating the RIN should be held responsible for their violative actions. At the end of the day, the RIN still represents fuel eligible under the program.

EPA seeks comment "on whether the RFS regulations should instead maintain section 80.1431(a)(1)(viii), but also require a more comprehensive and robust mechanism to allow parties that acquire separated RINs and EPA to evaluate whether the RINs were properly separated and used in or for a qualifying fuel." 78 Fed. Reg. at 12,196. EPA indicates that such mechanism could require "a designate and track approach, with corresponding recordkeeping and reporting requirements, similar to the program set forth in the diesel sulfur regulations at 40 C.F.R. Part 80, Subpart I." *Id.* Under such a program, "each time custody of fuel is transferred from one facility to another, the transferor must designate the fuel and record its volume. The party who receives custody of the fuel must record the same information, to ensure that each party relies on the same designation and volume for its own compliance purposes. Maintaining proper PTDs, with proper designations, is also part of the diesel sulfur program's recordkeeping requirements." *Id.* But, here we are talking about separation of RINs from the fuel and, thus,

there are already PTD requirements under the existing regulations to track transfer of fuel and RINs.

Moreover, renewable fuel producers often sell their product to marketers, who then sell the fuel to other parties, and the fuel may exchange hands several times after that before it is finally used. The producer generally is not aware of who the marketers' customers are, and the marketers may pool or even split up particular batches. The validity of the RIN, which the generator must stand behind, should not be dependent on compliance by actors wholly unrelated to the original producer. While NBB generally supports improving the product transfer document requirements for fuel and RIN transfers (as described further below), NBB does not believe EPA needs to retain Section 80.1431(a)(1)(viii), particularly if other parties besides the separator of the RIN may be liable for replacing a RIN deemed invalid under that section.

EPA also requests comment on whether RIN separators should include additional records with their quarterly reports related to qualifying separation events. While NBB does not necessarily oppose this requirement, so long as the records are, in fact, already required, EPA does not identify what records will be required to be submitted and it is unclear how EPA anticipates such records will actually be submitted given that the quarterly reports must now be submitted electronically. In addition, separation of RINs by producers will already be under strict scrutiny under the Q-A-Ps. Thus, it is not clear what added benefit this requirement would provide and if such benefit outweighs the additional costs in submitting such records to EPA.

B. Invalid RINs Should Be Removed from the Market Upon Discovery.

EPA proposed to establish an affirmative defense for RINs that are verified through either the Q-A-P A or Q-A-P B program. The elements for meeting the affirmative defense are generally the same under both options, except that under Q-A-P A, once a RIN was verified, it remain verified for purpose of asserting an affirmative defense.

Under Option A, the RIN owner need only establish that it did not know or have reason to know that the RINs were invalidly generated prior to being verified by the third-party auditor. Under Option B, on the other hand, the RIN owner could not have known or had reason to know that the RINs were invalidly generated at the time of transfer or use for compliance, unless a remedial action had been implemented by the RIN generator. For Option B, EPA explained that knowledge of invalidity prior to transfer or use of a RIN for compliance “would subvert the purpose of the quality assurance program.” 78 Fed. Reg. at 12,183. If the purpose of the Q-A-P is to identify invalid RINs in the system, the goal should be to remove those RINs from the market as soon as possible, not to allow parties to continue to use an invalid RIN and shift the burden on others to make up the difference. Rather the Q-A-P should require the holder of the RIN to retire the invalid RIN or take other corrective action and avoid civil penalties. If the party was not made aware of the invalidity of the RIN until after it transferred the RIN or used it for compliance purposes, then the party should not be found in violation of the regulations, but should provide evidence that the RIN has been replaced or will be replaced within a specified number of months. Thus, NBB believes that, even under Option A,²² the party seeking the affirmative defense should be required to show that it did not know or have reason to know of

²² Again, NBB disagrees with having both an Option A and Option B.

the invalidity prior to transfer of the RIN or its use for compliance. In addition, the administrative process for replacing the RIN should allow for corrective actions if available. The Q-A-P program and affirmative defense should encourage prompt correction of errors and replacement of RINs, as necessary.

C. Notice to EPA Should Be Required to Take Advantage of the Affirmative Defense.

The Q-A-P proposal includes two key elements to establish an affirmative defense. First, the party seeking the affirmative defense must inform EPA within the next business day of discovering that the RINs in question were invalidly generated. Second, EPA is proposing to require a person seeking to establish the affirmative defense to submit a written report to EPA within 30 days of the person discovering the invalidity of the RIN, along with any necessary supporting documentation, that would demonstrate how the elements were met. While NBB believes that the affirmative defense and Q-A-P should be substantially revised as described above, under EPA's proposal, NBB supports these requirements. Neither of these requirements is overly burdensome, and each allows EPA to monitor and confirm the applicability of the affirmative defense as quickly as possible to ensure the party's obligations are being met.

D. NBB Agrees that Any RIN Owner Seeking the Affirmative Defense Should Not Have a Financial Interest in the Company that Generated the Invalid RIN.

For the affirmative defense under both Option A and Option B, the Q-A-P Proposal would require the party seeking to establish an affirmative defense to demonstrate that it did not have any financial interest in the company that generated the invalid RIN. The proposal explains, "[r]equiring that the RIN owner did not have any financial interest in the RIN generator's company ensures that the RIN owner did not receive and had no intention of receiving a financial benefit from the generation of invalid RINs." 78 Fed. Reg. at 12,166. NBB agrees that a RIN owner with a financial interest in the generation of the invalid RIN should not be able to take advantage of the affirmative defense.

E. EPA Provides No Explanation Why Producers, Who Undergo Audits through the Q-A-P Program, Should Not Also be Eligible for an Affirmative Defense Regarding Civil Penalties.

EPA proposes to limit the applicability of the affirmative defenses to any RIN owner, except the generator of the invalid RIN. 78 Fed. Reg. at 12,176. But, the complexity of the regulations create many opportunities for inadvertent actions and simple mistakes to render a RIN invalid. EPA so recognized in promulgating 40 C.F.R. § 80.1431(c). *See* 77 Fed. Reg. 1320, 1344-1345 (Jan. 9, 2012). In addition, a RIN may be generated improperly through no fault of the producer. For example, a feedstock supplier may not have properly segregated feedstock, but represented to the producer that the feedstock complied with the renewable biomass requirements. The producer conducted its due diligence, and engaged in a self-audit through the Q-A-P. The producer is no different than the purported "faultless" obligated party in this instance and should also be able to avoid civil penalties for improper generation of RINs. Moreover, if the producer takes the appropriate action to correct the error, the producer similarly should not face civil penalties.

The Q-A-P is arguably more stringent than the self-audits that EPA allows parties to use to reduce civil penalties under the self-audit policy. Under the self-audit policy, EPA can waive the gravity-based component of the penalty, which is that portion above the entity's economic gain, if the conditions under the policy are met. 70 Fed. Reg. 19,618 (Apr. 11, 2000). Since the producer would be required to correct the error or retire the invalid RIN, there should be no economic gain. Participation in the Q-A-P evidences the producer's intent to ensure compliance with the program, to correct any potential violations, and to avoid those same errors in the future. Prompt correction of the error or replacement of the RIN should be an element of any such affirmative defense for a producer. While EPA can rely on its enforcement discretion in these cases, providing producers with some protections against civil penalties will encourage them to participate in a Q-A-P, and give them some additional benefit to offset the additional compliance costs of the Q-A-P.

NBB reiterates that it believes a strong enforcement policy is needed to address intentional violations that undermine the integrity of the program, and that a generator of an invalid RIN should be held accountable for replacing that RIN. But, the vast majority of producers are seeking to comply with this ever increasingly complex program, and, as proposed, a RIN can be invalid for many reasons that do not render the volume of fuel produced ineligible under the program, merely a paperwork issue that should be easily corrected without substantial penalty, if any penalty at all.

VII. EPA'S RIN REPLACEMENT PROVISIONS IN THE Q-A-P PROPOSAL WILL IMPROPERLY IMPOSE VOLUME OBLIGATIONS ON NOT-AT-FAULT PRODUCERS AND MAY IMPERMISSIBLY ALLOW A WAIVER OF THE VOLUME MANDATES.

The Q-A-P Proposal would establish an affirmative defense for RINs that participate in a Quality Assurance Plan (or Q-A-P). The proposal purports to give parties the option to utilize a Q-A-P A or a Q-A-P B, where the requirements of Q-A-P A are more rigorous than Q-A-P B. The other key difference is who is required to replace a RIN subsequently found to be invalid -- the third-party auditor conducting the Q-A-P or the obligated party/RIN holder. This replacement only becomes an issue if the original generator of the invalid RIN is not able to replace the RIN; in other words, if the RIN generator is no longer in existence or has gone bankrupt, someone must replace the invalid RIN to ensure that the volume mandates are made whole. For Option A, EPA proposes that the third-party RIN auditor be responsible for replacing those RINs, up to a certain cap. For Option B, EPA proposes that the obligated party retain the ultimate responsibility to replace the RIN. As described above, NBB believes that the obligated party, in both cases, should retain the ultimate responsibility to replace the RIN. Again, NBB believes that the proposal must be substantially revised. In particular, EPA's RIN replacement provisions are improper because they (a) impose substantial burdens on not-at-fault producers and (b) they would allow for reductions in the overall volume mandates.

- A. A Rigorous Q-A-P Should Provide Obligated Parties With Sufficient Comfort that Verified RINs are Valid, and Obligated Parties Should Not Be Able to Shift Their Obligation to Meet the Volume Mandates to Third Parties.

The need for a Q-A-P is to provide the industry with guidance as to what EPA believes constitutes "good faith" to avoid civil penalties in the event a party still obtains a valid RIN

despite taking all reasonable efforts to ensure it is valid. Providing consistent guidelines and a set of rules assists companies in understanding their risks, in reducing their costs, and in leveling the playing field. The Q-A-P should weed out any invalid RINs, and RIN verification provides obligated parties with assurances that the RIN is valid. RIN verification also provides obligated parties with an affirmative defense against civil penalties, notwithstanding that the transfer or use of an invalid RIN may be a violation of EPA's regulations. That is more than EPA provides in its other credit programs (e.g., acid rain, CAIR, etc.), including other credit programs in the fuels regulations, where no such affirmative defense is provided. *See, e.g.*, 40 C.F.R. § 80.67(h); 40 C.F.R. § 80.315.

Throughout the stakeholder process, we have asked representatives of the obligated parties for specific examples of what they are most concerned with. The only response is that they want no responsibility for replacing any invalid RINs. But, EPA must enforce the statute as written. Moreover, we can think of no examples where a significant number of invalid RINs are likely to enter the system if subject to a Q-A-P A-type monitoring program. EPA provides no valid rationale for shifting the burden of RIN replacement onto third parties under Option A. Nor is there one.

- B. Imposing a RIN Replacement Obligation on Third-Party Auditors Will Only Impose Additional Costs on Producers and Create Incentives For Fraud, Rather than Eliminate Them.
 - 1. The Proposed RIN Replacement Mechanisms Under Option A Are Either Not Viable or Are Likely to Simply Pass the Burden of Meeting the Volume Mandates Onto Not-at-Fault Producers, In Violation of the Statute.

Under Option A, if the generator of the invalid RIN is unable to replace that RIN, the obligation of RIN replacement shifts to the third-party auditor. As such, EPA proposes to impose a requirement that the auditor institute a mechanism to meet the RIN replacement obligations: “[B]ecause third-party auditors are unlikely to have the same resources as renewable fuel producers, importers, or obligated parties to enable them to replace invalid RINs, we are proposing a requirement that auditors using Option A to verify RINs must maintain a RIN replacement mechanism capable of replacing a minimum percentage of the A-RINs they verify.” 78 Fed. Reg. at 12,167; *see also id.* at 12,173. While EPA does not specify the type of RIN replacement mechanism that must be used, the options considered by EPA are either not currently viable or would likely simply pass the burden of RIN replacement onto the producers participating in the Q-A-P, which is violative of the statute.

EPA considered three possible types of mechanisms that could provide this function: traditional financial assurance instruments, RIN banks, and RIN escrow accounts. EPA had indicated that these are not the only possible ways a RIN replacement mechanism could work, but the biggest question for producers remains the potential costs for participating in a Q-A-P A. This is dependent on the RIN replacement provisions and the mechanism employed by the auditor. While EPA has purportedly reviewed Q-A-P proposals from several parties, we are not yet aware of any company that has identified its chosen RIN replacement mechanism and the estimated cost that the producer will have to bear. Without understanding these fundamental issues, producers cannot understand the full implications of EPA's proposal.

Of the mechanisms considered, only the RIN bank or RIN escrow accounts appear even feasible. EPA has already indicated that it did not believe liability insurance could be used, unless the policy could cover the replacement obligation of the auditor. A surety bond and letter of credit are typically not provided to entities without the appropriate financial capital, which EPA purports to be the purpose of requiring a RIN replacement mechanism.

NBB is concerned with the use of RIN banks and a RIN escrow account as EPA provides no explanation as to how RINs are obtained to be placed in the bank or in escrow. “A RIN bank would be a repository for valid RINs . . . and which could be used as a source of replacement RINs in the event that any one of the members was required to replace invalid RINs.” 78 Fed. Reg. at 12,175. A RIN-escrow account is like the RIN bank but is funded only by a single auditor and would be supervised and managed by a third-party escrow agent. Based on discussions with potential auditors, it is expected that the auditors would require that the RIN banks and escrow accounts would be filled and replenished by RINs from the producers participating in the Q-A-P for the relevant auditor or auditors. Even if none of their RINs were ever found invalid, but RINs would need to be removed based on another party’s invalid RINs, these other not-at-fault producers are bearing additional financial burdens for the actions of others. Even if the producer did generate an invalid RIN, the auditor is likely to request the 2% of RINs upfront, and the producer still would have to provide replacement RINs to EPA for its invalid RINs. Thus, either a not-at-fault producer is paying the bill, or the producer who may have inadvertently generated an invalid RIN has to pay the bill twice.

EPA states that the costs of the RIN replacement mechanism are likely to be reduced because the RIN auditor “would eventually be able to use the proceeds from the sale of RINs in the escrow account to fund the purchase of new RINs.” 78 Fed. Reg. at 12,176. But, EPA does not require that the proceeds be used from the sale of RINs to purchase more RINs, and producers could continue to be required to provide RINs every year at a significant loss. This presents a clear conflict of interest where the auditor’s interests compete with the interests of the producers being audited.

Moreover, because auditors are not required to buy the RINs themselves and can simply pass the costs onto the participants, this RIN replacement obligation provides them no additional incentives to comply with Q-A-P. Instead, there actually may be an incentive to verify RINs and then seek the additional value by selling the RINs in the banks and in the escrow account, as they get ready to expire. This creates a substantial conflict of interest, and calls into serious question the ability of these auditors to be objective. Further, even if the auditor was using the proceeds to purchase new RINs to replenish the RIN bank or escrow account, the auditor may be reluctant to identify invalid RINs to EPA if it is required to replace those RINs. This undermines the purpose of imposing an obligation on the auditor to provide additional assurances that the Q-A-P is being implemented properly. EPA provides no explanation as to how the auditor can remain objective under these circumstances.

2. Imposing RIN Replacement Obligations on Third Party Auditors Without Having Obligated Parties as an Ultimate Backstop Provides No Additional Benefit to Ensuring Adequate Oversight.

The Q-A-P Proposal should provide sufficient incentives to ensure continued oversight over the third-party auditor. Under a buyer beware program, that oversight is conducted by the buyer of the RIN to ensure the RINs it purchases are valid. As described above, the RIN replacement requirement would not appear to replace this function. The costs of replacing the RIN could simply be passed on to the participants in the Q-A-P. Rather the risk of losing its registration and the risk of civil penalties for not complying with the Q-A-P serve as the only incentives.²³

EPA contends that the third-party auditors are the appropriate parties to replace the RINs, in lieu of obligated parties, because they “would have the greatest oversight.” 78 Fed. Reg. at 12,178. But this makes little sense. The purpose of the Q-A-P is allow obligated parties and producers to have a consistent set of requirements and have an independent verifier of the RINs to provide the assurances to obligated parties that the RINs are valid. In other words, the third party auditor simply conducts the appropriate due diligence for the obligated party. The third party auditor does not become the obligated party.

Moreover, who is watching the auditor. If, on the other hand, obligated parties retain the ultimate obligation to replace the RIN, as contemplated by the statute, there will be an added layer of oversight over the actions of the auditor.

3. The Third-Party Auditor Should Not Be Able To Own and Sell RINs.

While a RIN bank and RIN escrow may make sense on paper, the devil remains in the details. The RIN bank would be established, funded and managed by its members. RINs in RIN banks would expire just like other RINs. Auditors could regularly withdraw older RINs from the bank and replace them with newer RINs. Similar provisions would apply to the RIN escrow accounts. In essence, EPA’s proposal gives the third-party auditors carte blanche to play in the RIN market. This is a fatal flaw in EPA’s proposed approach.

EPA provides no support for why the auditor should have authority to play in the RIN market.²⁴ Under both the RIN bank and RIN escrow options, EPA’s proposal would appear to allow the auditors to buy and sell RINs. NBB is concerned that such authority could create incentives for the auditors to verify invalid RINs, so that they may obtain value from the RINs placed in the RIN bank or in escrow and then require the participants in the Q-A-P to replace those RINs. Presumably EPA believes that auditors should have the ability to own and sell RINs in order to purchase additional RINs to place in the banks/escrow account, but the proposed

²³ “If a RIN was improperly verified, the QAP auditor could be liable for committing the prohibited act of verifying a RIN without following the requirements of the EPA-approved QAP plan.” 78 Fed. Reg. at 12,177 n.10.

²⁴ With respect to its GHG cap and trade program, the California Air Resources Board, for example, has found that the “potential for a conflict of interest must be deemed high” where the independent verifier (or any staff member) in the last five years, owned, bought, sold, traded or retired offset credits under the program. Cal. Code Regs. tit. 17, § 95979(b)(2).

regulations provide no such restriction on an auditor's use of the RINs in the RIN bank or RIN escrow account.

EPA also considered, but rejected, allowing the RINs in the RIN bank or escrow account to not expire, allowing them to provide perpetual backing for its members' replacement responsibilities, as long as the RINs were not withdrawn to replace invalid RINs. 78 Fed. Reg. at 12,176. Allowing RINs in a bank or in escrow not to expire may reduce the need for auditors to continue to replace expiring RINs, reducing the burden on producers. EPA rejected this approach, however, because it found that EPA would have to stipulate that RINs placed in a RIN bank could not be withdrawn for any reason other than to replace invalid RINs and such a restriction could be problematic in cases *where an auditor wanted to disassociate from a bank*. *Id.* NBB agrees that such RINs should be limited to replacement of invalid RINs, but does not understand the concerns regarding an auditor "disassociating" from a bank. Again, this appears to stem from EPA's belief that the auditors should own and sell the RINs. As noted above, this ability raises significant concerns as to the ability of the auditor to remain objective.

As an alternative, EPA could establish a RIN bank or escrow account from which auditors would be required to contribute as new participants sign up for the Q-A-P. In such a way, the participant pays an "entry fee" in the form of 2% of the RINs expected to be verified based on the highest annual production over the last three years. The RINs, then, could be withdrawn by the producer whose RINs were subsequently deemed invalid (or the auditor if the producer is no longer a viable entity) and such RINs would not expire and could only be used to replace invalid RINs. If a producer withdraws RINs, it must replace those RINs in the bank, or it can retire RINs outside the bank system. The RINs withdrawn can only be up to the contribution by the producer, and the obligated party would retain the obligation to retire any additional RINs above that amount. This would address the concern regarding an auditor "disassociating" from a bank, may reduce the overall costs of the program on producers, and gives the obligated party additional comfort with respect to replacement of RINs. As new participants enter the Q-A-P, the bank gets new deposits. Annually EPA can assess the health of the bank or escrow account and can also seek additional deposits from auditors or producers that have had a history of issuing invalid RINs through enforcement actions. These RINs are arguably "excess" RINs as they would be above the required volumes and EPA is allowed to give them the appropriate "credit."

If EPA determines that these RINs should expire given the restrictions on the life of a credit and re-enter the marketplace, the unused RINs should return to the producers providing them and allow the producers to provide new RINs every year and obtain the value of the expiring RINs.

- C. Any Costs Associated with Imposing the RIN Replacement Obligation on the Third-Party Auditor are Likely to be Passed Onto the Producer as part of the Cost of Participating, Creating Disincentives for Producers to Participate.

EPA contends that, by releasing the obligated parties from bearing any risk for RIN replacement, "[s]maller producers would thus have access to a larger number of obligated parties as potential customers than they might have under the existing regulations, where obligated parties are always subject to a replacement obligation if the RINs they have retired are deemed

invalid.” 78 Fed. Reg. at 12,178. However, EPA provides no support for this assumption, and most small producers do not sell directly to obligated parties, nor would EPA’s proposed program require obligated parties to purchase fuel or RINs directly from the small producers. Without an assured market, producers must carefully consider the additional costs they will likely incur in participating in Q-A-P A. The costs of the RIN replacement mechanism under Option A are likely to be passed on to the participants of the Q-A-P (i.e., producers), and significant costs may either drive producers out of the market or retain the status quo. Thus, EPA is correct to consider the cost implications of the RIN replacement requirements. However, NBB believes that an objective consideration of these cost implications indicate that the three-tiered system proposed by EPA is fatally flawed, and would not provide the proper incentives to bring RIN integrity back into the system.

Indeed, EPA’s proposal is likely to impose substantial costs on producers, creating disincentives to participate until these costs can be better understood and reduced. EPA is proposing to phase in the RIN replacement mechanism to balance the benefits of encouraging early implementation of the more robust Q-A-P A program with the cost of early implementation. 78 Fed. Reg. at 12,173-12,174. In the first phase from 2013-2015, the auditor’s RIN replacement responsibility would be capped at a level equal to 2% of up to the last five years’ of A-RINs verified by the auditor. EPA indicated the final rule would include a cap for 2016 and later years, but does not propose a particular level. *Id.* at 12,174. If EPA retains the five year requirement, NBB believes that the cost of the program will be overly burdensome in comparison to the risk. Moreover, it makes little sense why the number of RINs an auditor must retain increases over time (see EPA Table IV.D.5-1, reproduced below), when it is more likely that invalid RINs may slip through the system in the earlier years of the program. Indeed, the risk of losing a registration if the Q-A-P is not properly implemented and of incurring civil penalties are sufficient incentive to ensure the Q-A-P is operating properly.

TABLE IV.D.5-1—EXAMPLE OF APPLICATION OF RIN REPLACEMENT CAP UNDER OPTION A

	A-RINs verified by the auditor	2% cap	Maximum number of A-RINs that the auditor would be responsible for replacing
2013	50,000,000	1,000,000	1,000,000
2014	30,000,000	600,000	1,600,000
2015	35,000,000	700,000	2,300,000
2016	40,000,000	800,000	3,100,000
2017	60,000,000	1,200,000	4,300,000

While NBB opposes shifting the RIN replacement obligation to non-obligated parties, to actually assist the ability of producers to participate in the early years of the program, the RIN cap should be 2% of up to no more than the current year or the last two years of A-RINs verified by the auditor. To insure against the unlikely event that the number of invalid RINs exceed this amount, the obligated party should retain the obligation to replace RINs above that amount, and EPA could allow for a reassessment of the percentage for 2016 and later. As described above, NBB does not believe that a non-obligated party RIN owner should be able to continue to transfer the RINs once it becomes aware that the RIN is invalid. Ensuring an invalid RIN is retired prior to its use for compliance will further minimize the necessity to replace RINs to

make the program whole. In addition, in the unlikely event that the number of invalid RINs is more than 2% in any given year, EPA can increase the cap in later years. Since EPA is proposing to require Q-A-P providers to renew their registration every year, EPA can even make a case by case assessment as to the number of RINs that should be retained prior to approving the new registration (up to a maximum level).

D. Although NBB Does Not Believe a Three-Tier System is Appropriate, EPA Has Identified Limited Alternatives to Option A and Should Consider a Broader Range of Potential RIN Replacement Options.

As described above, NBB does not support a three-tiered system, and believes the Q-A-P Proposal must be substantially simplified. Even under its three-tiered system, however, EPA must reconsider its proposed approach for RIN replacement for Option A.

In the Q-A-P Proposal, EPA identifies two alternative approaches to the RIN replacement process for Option A -- the Modified Option A Approach and the Hybrid Approach. EPA does not provide sufficient explanation as to why these approaches are not reasonable. As an initial matter, these alternatives, unlike EPA's proposed approach, properly keep the ultimate obligation of RIN replacement on the obligated party.

EPA's Modified Option A approach would require obligated parties to retain their RIN replacement obligation, but require the auditor to carry third-party liability insurance to pay costs of replacement. EPA goes on to state that the obligated party would only be subject to RIN replacement up to amount that insurance will pay, and there would be no incentive to force the insurance company to pay if EPA did not require obligated party to replace RINs above what was covered. 78 Fed. Reg. at 12,175. Rather than consider requiring the obligated party to pay above that amount, however, EPA just rejects this approach.

Under the "hybrid" approach, the obligated party would retain the replacement responsibility, but the auditor would be required to carry a third-party liability policy to cover the obligated party's potential losses due to the use of invalid A-RINs. EPA rejected this approach because EPA claimed it is essentially what is available under Option B, which gives parties flexibility to decide what level of coverage and risk they are willing to bear. But, EPA ignores that the level of risk under Option A is significantly less than Option B because of the ongoing monitoring. Nonetheless, NBB is concerned that requiring insurance to make up the entire potential obligation will be difficult to obtain and prohibitively expensive.

Thus, while NBB opposes the shifting of RIN replacement onto the auditor or other producers, NBB suggests alternatives to these approaches may be available, such as a modified hybrid approach. Under this approach, the obligated party retains the ultimate responsibility to replace the RINs, but an auditor should be required to have a financial assurance instrument in order to purchase RINs or repay the obligated party to replace up to two percent of the RINs it is expected to verify in any given year. Cabining the potential liability of the auditor would ease its ability to obtain the financial assurance instruments. Obligated parties also keep a stake in the game to provide oversight over these parties. The reduced risk of ongoing monitoring and the additional benefit of only having to replace RINs above a certain amount should provide

incentives for obligated parties to purchase Q-A-P verified RINs, while ensuring the program is made whole.²⁵

E. A Limited Exemption for Invalid RIN Replacement Under Option B, Temporary or Otherwise, is Inconsistent with the Statute and Exceeds EPA's Authority.

Under Option B, EPA proposes to provide a temporary limited exemption for invalid RINs. This exemption would only apply to replacement by parties other than the RIN generator.²⁶ EPA goes on to state however that the "issue is not whether some percentage of RINs should never have to be replaced." 78 Fed. Reg. at 12,184. NBB disagrees with this last statement. A 2% exemption, on its face, could result in a reduction in the volume mandates. This is contrary to the statute and exceeds EPA's waiver authority.

Indeed, EPA's purported support for the 2% is the "uncertainty" in "precisely" meeting the volume requirements. 78 Fed. Reg. at 12,184. As an initial matter, NBB does not agree that the statute inherently allows a reduction of the volume mandate. While the percentage standards are to be based on EIA projections of gasoline and diesel fuel volumes, the statute also requires EPA's regulations to "ensure" the minimum volumes are met. Moreover, EPA has interpreted "based on" in Section 211(o)(3) to allow it to deviate from the EIA projections, 78 Fed. Reg. 9282, 9294 (Feb. 7, 2013), and EPA can adjust the volumes if it believes that EIA's projections have been too high such that the individual obligations in the aggregate do not meet the actual mandated volumes. Thus, contrary to EPA's statement that this is an "acceptable source of uncertainty," 78 Fed. Reg. at 12,185, EPA has authority to true up the actual volumes. That EPA has declined to do so (and that no one has challenged) does not allow EPA to expand its authority to potentially reduce the volumes under the statute through its Q-A-P Proposal. Section 211(o)(7) imposes clear boundaries on EPA's discretion to lower the statutory volumes. 42 U.S.C. § 7545(o)(7). An exemption based on an obligated parties failure to purchase eligible fuel is not among the reasons EPA can reduce the standards and is contrary to the purposes of the statute -- to require use of renewable fuels in the transportation fuel sector.

EPA asserts that such an exemption "could help provide a means for those small producers to sell their RINs, particularly during the first two years while auditors are learning to implement QAPs." 78 Fed. Reg. at 12,184. As explained above, it is believed that small producers will be required to participate in Q-A-P A, not Q-A-P B. And, as explained above, the availability of a Q-A-P B program actually may harm small producers in the long run. Thus, it is unclear what benefit the 2% exemption would provide to small producers, unless there is a requirement to purchase RINs from small producers.

EPA assumes that the 2% exemption would provide obligated parties additional incentive to utilize Q-A-P B RINs, and EPA would limit this exemption to the first two years of the Q-A-P B program. As explained above, this exemption exceeds EPA's authority. While NBB understands the purported intent of EPA to provide parties with a startup period to promote the

²⁵ NBB also opposes the temporary 2% exemption for RIN replacement under Option B, because, as further outlined below, providing the exemption exceeds EPA's authority.

²⁶ EPA references producer throughout the proposal. However, the RIN "generator" is the more appropriate term.

use of Q-A-Ps, the exemption should not be provided at all and, in no event, should it be extended beyond two years.

VIII. EPA'S PROPOSED "SELF-IMPLEMENTING ADMINISTRATIVE PROCESS" SHOULD ALLOW FOR CORRECTIVE ACTIONS, WHERE APPROPRIATE, IN LIEU OF REQUIRING RIN REPLACEMENT IN EVERY CASE.

EPA proposes a self-implementing administrative process for the replacement of RINs determined to be invalid under Q-A-P A and Q-A-P B. But, this program is long and drawn out, and does not adequately distinguish between clear cases of fraud, which should be enforced, and inadvertent errors, which should be corrected.

EPA has recognized that there are several errors that could occur under the RFS2 regulations that, through no fault of the producer, may result in the generation of invalid RINs. 77 Fed. Reg. at 1344-1345. EPA has provided a process to correct such RINs in the regulations, 40 C.F.R. § 80.1431(c), and through guidance. For both Option A and Option B, EPA is proposing a self-implementing administrative process, which first looks to the generator of the RIN to replace invalid RINs. Under the proposal, when the Q-A-P provider identifies an invalid RIN, the RIN generator must take one of three possible corrective actions within 30 days of being notified of the potentially invalid RIN (PIR):

- (1) Retire a valid A-RIN of the same D-type as the PIR, either by purchasing it or generating a new valid RIN and separating it from the physical volume that it represents;
- (2) Retire the invalidly generated RIN (if still in the RIN generator's possession); or
- (3) If the RIN generator believed the PIR was in fact valid, submit a demonstration and seek a determination from the third-party auditor and EPA that the RIN is valid.

EPA does not explain how this administrative process takes into consideration RINs that may be invalid for reasons that can be corrected without having to generate a new RIN.

In addition, EPA has provided guidance on remedial actions that can be taken in the event of other violations of the regulations. While some elements of the Q-A-P may review actions that do not lead to the invalidity of a RIN, they may identify a violation of the regulations. EPA does not explain the process in such a situation. Again, a producer should be able to take the appropriate correction without facing significant, if any, penalties.

EPA proposes requiring that third-party auditors notify EPA and the renewable fuel producer of potential problems, including but not necessarily limited to fraud, errors, and/or omissions, within 24 hours after a problem has been identified. 78 Fed. Reg. at 12,189-12,190. NBB believes that such notification should be made to the producers within 24 hours, but that time should be provided to determine if a correction can be made (e.g., pursuant to 40 C.F.R. § 80.1431(c) and EPA guidance) before being reported to EPA. After that time, a report can be made to EPA, including a determination as to the potential correction. Moreover, NBB supports EPA's proposal that third-party auditors indicate in the EMTS whether a RIN has been verified,

and to “flag” RINs generated at a facility “until problems are rectified and confidence is restored to both the third-party and EPA that newly generated RINs are valid.” *Id.* at 12,190. Thus, the producer may already be affected by the “flag” in the EMTS. This, with the potential for reduced or no penalties as noted above, would promote participation in a Q-A-P and resolution of potential issues quickly, rather than undergoing a long drawn out process as in the proposal.

Along these same lines, EPA’s proposed revision to the reporting requirements for generators of RINs to require reporting of invalid RINs is inappropriate. Parties may dispute the validity, and, without the availability of an affirmative defense, the producers should be able to reserve their ability to deny such claims. Such reporting is also unnecessary to the extent the auditor is required to report RINs that have not been verified, and producers are required to submit error reports to the EMTS. Thus, generators of RINs should only be required to report whether they have retired RINs as a result of any corrective action undertaken as a result of the verification process.

IX. THIRD-PARTY AUDITORS MUST BE TRULY INDEPENDENT AND MUST HAVE APPROPRIATE QUALIFICATIONS.

Under both options, third-party auditors would need to meet minimum qualifications (e.g. independence and professional competency requirements). NBB agrees that third-party auditors must be independent, but such independence should not be limited to independence from producers being audited. EPA should also consider additional standards of professionalism for those providing verification services under the Q-A-P.

A. The Auditor Must be Independent From the Producers Being Audited, but also from All RIN Owners.

For the engineering review and attest engagement requirements, EPA defined an independent third-party as a party that was not operated by the renewable fuel producer (or any subsidiary or employee of the producer) and free from any interest in the renewable fuel producer’s business. Similar provisions have also appeared in RFS1 and other fuels programs when a third-party is required to independently test fuel samples, audit reporting and recordkeeping requirements, and/or conduct in-use compliance surveys. NBB, therefore, agrees that the auditor must be independent from the facilities that it is auditing.

But, potential conflicts of interest in this case do not end at the facility’s door. Unlike these other cases, here there are other parties that directly benefit from the sale of a RIN, not just the producer. EPA recognizes that other parties besides producers may have a conflict of interest with third-party auditors that might promote the improper validation of RINs. “For example, a third-party auditor could also be acting on behalf of a RIN-owner, which may be an incentive to validate RINs fraudulently to sell to other parties.” 78 Fed. Reg. at 12,187. NBB agrees that this is a significant risk, and that, while third-party auditors should be independent from the producers whose RINs they verify, the auditors also should be totally independent from the RFS program.

EPA specifically requests comment on whether the auditor should also be independent of other parties. 78 Fed. Reg. at 12,187. The short answer is yes. EPA indicated that the

“proposed rulemaking is not intended to discourage any current efforts that an obligated party or other intermediary may take to ensure compliance with RFS requirements, and requiring that third-party auditors be independent of all parties may hamper existing efforts by industry to mitigate invalid RIN generation.” *Id.* But, this is why EPA has proposed to make the Q-A-P voluntary. If obligated parties choose to continue to engage in current practices, they do not need to purchase Q-A-P A or Q-A-P B RINs. In order to promote consistency in the review for which an affirmative defense is available, however, these third party must be truly independent.

Moreover, as described above, the third party auditors should have no role in the sale or purchase of RINs. This creates a financial incentive to declare RINs valid in order to reap the economic benefits of selling the RINs. In short, the auditors should not be able to own RINs or even have a stake in a “bank” or “escrow” account that engages in the purchase or sale of RINs. This means not only the auditor and its employees, but also any affiliated companies, their employees, and consultants.

- B. Parties Engaged in a Q-A-P Should Not be Required to Periodically Update Their Engineering Review or be Subject to Annual Attestations, and, Thus, the Auditor Need Not be Excluded from Those Parties Conducting Third-Party Engineering Review and Attestations.

EPA also seeks comment on whether the auditor should be excluded from those conducting third-party engineering review and attestations. 78 Fed. Reg. at 12,187. EPA notes that “there may be a limited number of qualified independent-third party auditors capable of implementing QAPs for a facility if we do not allow independent third-parties that conducted engineering reviews or attest engagements to also implement QAPs for a given facility.” *Id.* While NBB agrees that such an exclusion may unnecessarily exclude qualified individuals from conducting a Q-A-P audit, the periodic engineering reviews annual attest engagements would appear to be superfluous for any domestic producer participating in the Q-A-P.²⁷

Renewable fuel producers that are registered with EPA have already undergone a third-party engineering review. If these registered producers participate in an EPA-approved Q-A-P, they should not be required to periodically updated their reviews or be subject to annual attest engagements, while a part of the Q-A-P. The Q-A-P provides the monitoring of the facility and the assurances with respect to compliance that these requirements were intended to provide.

Moreover, NBB does not believe that the auditor should be excluded from those conducting initial third-party engineering reviews for newly registered producers. The Q-A-P is not verifying the engineering report, but ongoing operations of a facility in compliance with such report. Indeed, these parties can advise the producer if and when the engineering reports need to be updated based on any changes to the facility or in EPA’s regulations (e.g., as new feedstocks are approved). Moreover, EPA has indicated that “we are proposing that a separate engineering

²⁷ NBB addresses foreign producers and importers of renewable fuel separately in these comments.

review would no longer be required if a facility is covered by an Option A QAP.”²⁸ 78 Fed. Reg. at 12,170.

NBB also believes that parties engaged in verification process should not be required to undergo an annual attest engagement, thus eliminating any concern with a potential conflict of interest. These entities are undergoing substantial monitoring of their operations, and it is unclear what benefit an annual attestation provides. At a minimum, EPA should allow the annual site visit under a Q-A-P to be conducted in lieu of or in conjunction with the annual attestation to reduce the costs on the producer.

EPA also seeks comment on whether third-party auditors should act as agents in the generation of RINs for renewable fuel producers. 78 Fed. Reg. at 12,190. Because of the potential conflict in having the same party generating the RIN, verifying the RIN, NBB does not believe such delegation is appropriate. However, NBB believes parties that are designated to merely enter the appropriate information into the EMTS system should still be able to act in such capacity. This may result in reduced errors.

C. NBB Agrees that the Q-A-P Provider Must Have Appropriately Qualified Persons on Staff To Implement a Q-A-P.

NBB agrees that a “key element to ensure the effective implementation of Q-A-Ps at renewable fuel production facilities would be that auditors have the necessary professional expertise and credentials.” 78 Fed. Reg. at 12,187. A licensed professional engineer on the team conducting the audit should be required, though NBB agrees that companies that register as a third-party auditor do not need to be solely be constituted of professional engineers. *Id.*

NBB also believes that, because of the wide range of issues being reviewed, it also makes sense that the third-party auditor have a certified public accountant or a certified fraud investigator on staff, if not both. In addition to the production process, the auditor must have the relevant experience to review the paper trails and the data entry requirements. Thus, NBB envisions, for example, at least a 5-person dedicated team with the requisite technical and financial skills to properly administer the Q-A-P. Each member must have at least a 4 year degree, and the team must include a licensed chemical engineer, a certified accountant or fraud investigator, and a licensed process engineer.

Although NBB believes a set of core competency requirements may be beneficial, it does not believe that the Q-A-P should be delayed as EPA develops professional competency standards to validate RINs. EPA notes that “several independent third-parties have developed sufficient expertise with RFS to provide useful validation services to obligated parties, and we believe that there exist adequate incentives for parties to ensure that third-party auditors understand the RFS program sufficiently to prepare and implement QAPs.” 78 Fed. Reg. at 12,188. The RFS is still relatively new, so EPA should consider that the audit team collectively have substantial experience in related fields, which should be at least 20 years total. EPA could also require the companies provide periodic training on the RFS requirements and show that

²⁸ NBB did not see this proposal in the proposed regulatory language, but supports eliminating the requirement that these facilities undergo the periodic updates of the engineering reviews so long as they are participating in the QAP.

these parties are experienced in the RFS requirements or similar programs. EPA could assist in providing such training programs.

D. NBB Agrees that EPA Should Include Additional Requirements for Foreign Third-Party Auditors to Ensure EPA's Ability to Oversee and Enforce Such Foreign Entities.

EPA recognizes "that foreign third-party auditors may have unique challenges compared with domestic third-party auditors." 78 Fed. Reg. at 12,189. Although NBB did not see proposed regulatory language, EPA indicates that the Q-A-P Proposal includes additional registration requirements for foreign third-party auditors similar to those outlined for foreign RIN owners (see 40 C.F.R. § 80.1467). *Id.* These requirements include: submitting reports in English and providing translated documents in English upon demand from EPA inspectors or auditors; submitting themselves to administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity; and posting a bond covering a portion of the gallon-RINs that a foreign RIN owner owns. NBB agrees that these additional requirements are necessary "to ensure enforcement of RFS regulations at the foreign RIN owner's place of business." *Id.* However, NBB believes that the current bonds required under 40 C.F.R. § 80.1467 are often very minimal, and do not serve as sufficient deterrent. Thus, NBB requests that EPA consider increasing the bond requirements to 10 percent of the value of imports in a year.

Indeed, the potential difficulty in enforcing against a foreign third-party auditor provides additional basis for why obligated parties should retain the obligation to replace RINs in the first instance. In incurring an obligation under the statute, these parties by definition have engaged in business transactions with the United States and, therefore, are more amenable to lawsuit and enforcement.

X. THERE SHOULD BE TRANSPARENCY AS TO HOW THE Q-A-Ps ARE BEING IMPLEMENTED AND A REVIEW AFTER THREE YEARS TO ENSURE THE PROGRAM IS OPERATING AS INTENDED AND NOT CAUSING UNDUE INTERFERENCE WITH THE MARKET.

A. NBB Agrees that Q-A-P Providers Should be Registered With EPA, and Generally Agrees with the Proposed Registration Requirements.

Except for the RIN replacement requirements and as otherwise noted regarding the auditor's independence and professional qualifications, NBB generally agrees with the proposal to require Q-A-P Providers to Register with EPA, and with the proposed registration requirements under 40 C.F.R. § 80.1450(g), 78 Fed. Reg. at 12,209. In addition to removing the requirement for a RIN replacement mechanism, NBB believes EPA must revise two components of the registration requirements -- the affidavit regarding conflicts of interest and the list of

producers it intends to audit.²⁹ NBB also seeks clarification on the requirement that the auditor obtain professional liability insurance.

First, among the proposed requirements for registration is that the third-party auditors submit an affidavit attesting to their independence. 78 Fed. Reg. at 12,187. Again, NBB agrees with EPA's proposal, but does not believe it goes far enough. EPA should request any necessary documentation to support statements in an affidavit, and make clear that the affidavit must be under oath. In other words, EPA must go under the covers to ensure that all potential conflicts of interest are disclosed, and not merely take the word of the auditor.

Second, EPA would require a list of facilities the auditors intend to audit. But, this is an issue of the chicken and the egg. Without an approved Q-A-P, it is unclear how a Q-A-P Provider will be able to sell its services.³⁰ While EPA may have "pre-registered" some Q-A-P Providers, once the rule is finalized, a producer is not likely to sign up with a Q-A-P Provider unless it has already received EPA's approval. Thus, EPA must reconsider this requirement, and, instead, require the Q-A-P Provider to notify EPA, either through the EMTS or otherwise, when it signs up a new participant. EPA already requires updates each time an auditor wishes to verify RINs for additional renewable fuel producers or new facilities. 78 Fed. Reg. at 12,188. At a minimum, EPA should make clear that registration is not dependent on having a list of participants already in hand.

NBB also does not necessarily oppose the requirement that an auditor obtain errors and omissions insurance, so long as it is available and the costs of such insurance does not add significantly to the overall cost of participation. Again, NBB is concerned that any RIN replacement by an auditor will, in fact, be paid for by the participating producers, and opposes the shifting of RIN replacement obligations away from obligated parties. Nonetheless, EPA proposes "that the 2% cap on A-RIN replacement would not apply to invalid RINs that were erroneously verified based on negligence, error, or omission of the auditor, including any failure by the auditor to properly implement its QAP." 78 Fed. Reg. at 12,180. While NBB believes that the RIN replacement obligation should not be placed on the auditor's shoulders, NBB also believes that a requirement to have professional liability insurance may be appropriate to address cases of negligence by the auditor, but requests that EPA provide an analysis as to the availability of such insurance. Removing the RIN replacement obligation may make errors and omissions insurance more readily available, and the presence of such insurance would alleviate some of the concerns that obligated parties no doubt will raise if they retain the ultimate responsibility for RIN replacement.

²⁹ NBB also believes the reference to information required under 40 C.F.R. § 80.76 is inappropriate for third-party auditors. While the requirements include some basic information about a company, those requirements refer to operating facilities. EPA should simply list the basic information that is required.

³⁰ As explained above, NBB believes the RIN replacement obligations of the third-party auditor must be eliminated, which would similarly require conforming amendments to the registration requirements and other relevant provisions.

B. NBB Agrees that An Auditor Should Submit Annual Reports to EPA to Maintain Their Registration, But Requests Prompt Approval of Such Renewals.

EPA proposes to require annual renewals of a third-party auditors registration. “The renewed registration submissions would include updates to information required for initial registration and an affidavit by the auditor that it is in full compliance with applicable QAP regulations.” 78 Fed. Reg. at 12,189. The affidavit would include a specific certified statement that the third-party auditor (1) has only verified RINs that it reviewed under an EPA-approved Q-A-P, (2) has informed EPA and RIN generators about all potentially invalid RINs that it discovered, and (3) has fulfilled its RIN replacement obligation if applicable. “Third-party auditors that fail to accurately and completely renew their registrations will no longer be registered and therefore can no longer implement QAPs and verify RINs.” *Id.* The registration renewals must be submitted by October 31. Although NBB opposes the requirement that auditors have replacement obligations for invalid RINs, NBB supports annual review of a Q-A-P Provider’s implementation of the Q-A-P, and agrees that such renewable must be submitted at least 60 days prior to the end of the applicable calendar year. NBB requests, however, that EPA approve such renewals promptly to ensure a smooth transition each year. Alternatively, the renewals should be automatic unless EPA determines the renewal package is incomplete, revised Q-A-Ps have not been submitted, or EPA has reason to believe that the auditor is not complying with the approved Q-A-P.

EPA also seeks comment “on whether to require that third-party auditors have an annual attest engagement similar to those required of other parties currently required under § 80.1464.” 78 Fed. Reg. at 12,191. To assist EPA in reviewing the renewal applications, EPA could require a certification from an appropriate auditor as part of the renewal submittal, as evidence to support the affidavit that the Q-A-P Provider is complying with the program. This requirement should be in lieu of any additional attest engagement requirements imposed on the producers participating in that Q-A-P.

C. EPA Should Clarify the Requirements for Auditors to Update their Q-A-P, and the Effect of Denying or Revoking a Registration on Producers Participating in that Auditor’s Q-A-P.

For both Option A and Option B, EPA is proposing that a Q-A-P must be submitted to EPA for approval every year, and that the Q-A-P becomes valid when EPA notifies the party that it has been approved. 78 Fed. Reg. at 12,173, 12,182. The Q-A-P Proposal also provides that a separate Q-A-P is required for each different feedstock/production process/fuel type combination (i.e., pathway), and a Q-A-P for a given pathway may be used for multiple facilities. *Id.* In addition, EPA proposes that a Q-A-P would need to be revised if the renewable fuel producer makes a change in feedstock, production process, or fuel that is not covered by the Q-A-P. *Id.* Finally, EPA proposes that it may revoke a third-party auditor’s registration at any time if it determines that the third-party auditor has failed to meet its regulatory requirements, and that EPA can deny a registration application from any third-party auditor that employs any person that was involved in the verification of RINs for a third-party auditor whose registration was revoked. *Id.* at 12,189. Although it does not support a three-tiered system, NBB requests various clarifications on these provisions to the extent they may apply to any final verification process approved by EPA.

First, it is unclear how the Q-A-P annual approval process is different from the requirement that the auditor undergo an annual renewal registration, and the timing of the approval process under proposed 40 C.F.R. § 80.1469(d). Instead, EPA should require that the approval of the registration renewal be subject to any revisions that may be necessary to the already approved Q-A-Ps. Any updates to the Q-A-Ps should generally be done throughout the year to the extent EPA revises the regulations or new facilities with different pathways join a particular Q-A-P. Moreover, 40 C.F.R. § 80.1469(d) provides no information as to the timing of annual approvals, except that the Q-A-P is only in effect once EPA has notified the Q-A-P Provider that it has been approved. EPA should provide sufficient time before a Q-A-P expires to review and approve the Q-A-Ps to ensure no gaps in coverage for the participating parties. Alternatively, EPA should provide for a type of “permit shield” for RINs being verified pending EPA’s approval, so long as the renewals were submitted on time.

Second, it is unclear whether a Q-A-P is dependent on a particular pathway or a particular facility. It is our understanding that the Q-A-P is designed for a particular pathway (which may be facility specific for those facilities that have their own approved pathways), and may apply to more than one facility. In such a case, it is unclear why a particular Q-A-P must be updated if a facility, for example, begins to utilize a new feedstock that may already be covered by another approved Q-A-P implemented by the Q-A-P Provider. A facility is not likely to undergo significant changes to its production process, but EPA should clarify that updates would only be needed if the Q-A-P Provider does not already have an approved Q-A-P that would be applicable to the change. NBB agrees that, to the extent the facility is no longer covered by a particular Q-A-P Provider’s overall program, that Q-A-P Provider must submit a new Q-A-P to EPA for that facility prior to verifying any RINs or that facility must seek coverage by another Q-A-P Provider. In either case, a new Q-A-P or an update to the registration would be submitted to EPA. In addition, EPA is proposing “that renewable fuel producers would have to acknowledge through an update of their registration that a third-party auditor will implement a QAP and verify RINs at the renewable fuel producer’s facility.” 78 Fed. Reg. at 12,190. This should be sufficient information for EPA rather than requiring a new Q-A-P be submitted for approval each time a change may occur at a facility. Such a requirement may overwhelm EPA, and affect the ability of participants to make changes to their facilities.

Finally, NBB does not dispute that EPA should revoke a registration to the extent that the Q-A-P Provider is not properly implementing the program. But, EPA should, again, give some type of permit shield to the participants of the Q-A-P to transition to another appropriate Q-A-P Provider. EPA should provide notice to the participants that it is revoking the Q-A-P Provider’s registration, and such shield should apply only to the extent those participants submit an intent to seek coverage (and obtain coverage) from another Q-A-P Provider within 30 days of EPA’s notification. NBB is also concerned that EPA will unduly deny registrations based on the hiring of an employee that may have had nothing to do with the reasons why another Q-A-P Provider’s registration may have been revoked, and thus does not believe the mere hiring of an employee is adequate grounds to deny a registration. In any case, the participants of the Q-A-P Provider’s program should be given time to find a new Q-A-P Provider.

D. EPA Should Provide Transparency as to the Third Party Auditor's Registration and Q-A-P Approval Status.

As noted above, EPA indicates that a Q-A-P becomes effective upon notification by EPA that it has been approved. This notification should be made available, at a minimum, to the participants of the Q-A-P. NBB recommends that EPA maintain a webpage with the list of all parties that have submitted a Q-A-P and registration request to EPA and the status of such applications. The page should include a list of those pathways for which the Q-A-P Provider has an approved Q-A-P. This page should be updated anytime a new Q-A-P is submitted and anytime there is a change or possible change in the status of a Q-A-P or in the status of the Q-A-P Provider's registration.

EPA also seeks comment on whether we should require that third-party auditors' registration information, including Q-A-Ps, be made publicly available. NBB supports making as much information regarding the operation of a Q-A-P to the public as possible. At a minimum, the Q-A-Ps should be available to the public (even if redacted) based on a FOIA request. Producers and obligated parties alike should be able to review these Q-A-Ps. Moreover, EPA should conduct a review in 3 years to ensure the Q-A-P is operating as intended, and small producers are being able to enter the market on a level playing field. EPA should then propose any revisions to the program as necessary.

In addition, EPA is proposing that the third-party auditors would be required to submit quarterly reports, in line with existing RFS quarterly reporting deadlines. These reports would identify: (a) how many RINs the auditor has verified the previous quarter; (b) the facilities audited and the dates of those audits; and (c) for Option A, the size of the replacement mechanism obtained to cover the potential RIN replacement liability. 78 Fed. Reg. at 12,190. Although, again, opposing the requirement to have a RIN replacement mechanism, NBB generally supports requiring quarterly reporting by the Q-A-P Provider, and requests EPA consider how this information can be provided to the public. Similar to the reporting of other EMTS data, NBB believes EPA should provide information as to the number of Q-A-P RINs that have been verified *and sold*, including the number of RINs being retired and the reason therefore.

E. NBB Seeks Clarification as the Reporting and Recordkeeping Requirements for Third-Party Auditors.

EPA proposes that the verification of RINs will be noted through the EMTS. It also seeks "comment on mechanisms that the market will employ to differentiate such RINs across the supply chain and how EPA may facilitate such transfers in the context of EMTS." 78 Fed. Reg. at 12,190. NBB does not believe EPA need "facilitate" such transfers, except to the extent it provides the transparency and review of the program as described above.

NBB does not dispute that a third-party auditor retain appropriate records. It is concerned, however, that a requirement to retain records of all verification and validation activities related to the implementation of a Q-A-P is overly broad. To the extent information provided by a producer is viewed on-site or may contain confidential business information, the producer should retain the ability to ask for those records back. As noted above, the auditor should conduct its review of a particular facility's operations under the strictest of confidence. The producer is already subject to recordkeeping requirements for relevant documentation.

XI. NBB SUPPORTS EPA'S PROPOSAL TO ESTABLISH GUIDELINES FOR CONDUCTING "DUE DILIGENCE" UNDER THE RFS2 PROGRAM, BUT IS CONCERNED WITH VARIOUS ELEMENTS OF THE Q-A-Ps.

A. Although NBB Does Not Support a Three-Tiered System, Any Q-A-P Should Not Include Superfluous or Overly Burdensome Requirements.

Under Option A, an obligated party would not be responsible for replacing invalidly generated RINs if it established an affirmative defense and could use invalidly generated "A-RINs" for compliance. The Q-A-P requirements for Option A "would be more comprehensive since obligated parties would be expected to exercise little or no oversight over the auditor process under this Option." 78 Fed. Reg. at 12,169. Under Option A, Q-A-P requirements would include ongoing monitoring of operations at a renewable fuel production facility. EPA states: "We would consider these aspects to require 'batch' level monitoring, or as frequent as information becomes available or can be collected." *Id.* Other components would be evaluated on a more limited basis but on a specified schedule, requiring "facility" level monitoring on a quarterly basis. EPA also states: "Note that the components proposed for monitoring, whether on an ongoing or periodic basis, are components that are already regulated under the RFS program." *Id.* EPA requests comment on the components for ongoing or periodic monitoring, as well as comment on whether EPA "could better strike the necessary balance between the costs of implementing the quality assurance program versus the benefits for the RFS program." *Id.* at 12,170. Option B's Q-A-P requirements would be less rigorous than Option A's, with the primary difference being the frequency of monitoring under Option B being quarterly. Many of the same troubling elements of Option A are also present in Option B.

Throughout the stakeholder process, NBB repeated what it believed to be a main goal of the Q-A-P -- to provide a consistent set of guidelines for parties to conduct oversight over RIN generation. EPA provides general guidance as to what a Q-A-P should include, but allows third-party auditors to develop their own systems of meeting those elements. NBB applauds EPA's efforts, and appreciates its reaching out to stakeholders to ensure a reasonable, but effective monitoring program. NBB generally agrees that EPA has identified the appropriate elements, but has comments and clarifications on certain of the requirements as outlined below. Because the elements under Option B are similar to those under Option A, NBB focuses its comments on the elements as described under Option A, but the comments apply equally to Option B. As described above, NBB believes there should be only one verification system along the lines described above. In each case, whether the monitoring is "ongoing" or "quarterly" or some other time frame depends on the particular element and the facility's operations. Rather, the more appropriate term may be "real-time" monitoring. EPA should not prescribe particular timing of this review, but should ensure that the approved Q-A-P's verification process is sufficiently rigorous for purposes of verifying fuel production and RIN generation. Thus, NBB only provides these comments to allow EPA to further consider particular aspects of its proposal.

1. Feedstock-related components

For Option A, EPA is proposing 12 required elements “designed to ensure that the feedstocks used in the production of renewable fuel qualify to generate RINs.” 78 Fed. Reg. at 12,170. These components are summarized below.

TABLE IV.A.1.A-1—OPTION A: QAP MONITORING FREQUENCY—FEEDSTOCK-RELATED

	Component	Ongoing monitoring	Quarterly monitoring
1-1	Feedstocks are renewable biomass	X	.....
1-2	Separation plan for food or yard waste submitted and accepted.	.....	X
1-3	Separation plan for municipal solid waste submitted and approved.	.....	X
1-4	Feedstocks meet separation plan	X	.....
1-5	Crop, crop residue feedstocks meet land use restrictions.	X	.....
1-6	Feedstocks with additional recordkeeping	X	.....
1-7	Contracts for feedstocks compare to production	.....	X
1-8	Feedstock processing, storage equipment match engineering review.	.....	X
1-9	Accuracy of feedstock energy calculation .....	.....	X
1-10	Feedstock valid for D code, consistent with EMTS.	X	.....
1-11	Feedstock consistent with production process	X	.....
1-12	Feedstock is not renewable fuel where RINs generated.	X	.....

First, as EPA is aware, it has approved an aggregate compliance approach for the feedstocks from crops grown in the United States and Canada. NBB requests clarifications as to what types of documentation would be required to verify feedstocks qualify under the aggregate compliance approach. Currently, these feedstocks are exempted from the recordkeeping and reporting requirements that apply to foreign feedstocks (except Canada). EPA should make clear that it is not imposing new requirements on parties utilizing feedstocks from U.S. and Canadian crops that undermine the aggregate compliance approach. Rather, it should be sufficient that the producer has sales contracts, invoices or bills of lading that evidences the feedstocks fall under the aggregate compliance approach. EPA also states that the Q-A-P “would be required to verify that contracts exist for ongoing delivery of the type and amount of feedstocks used to produce renewable fuel, and that information in the contracts is consistent with production numbers. The QAP would also be required to verify that feedstock processing and storage equipment is appropriate, sufficient, and in working order to handle and process the feedstocks being used.” 78 Fed. Reg. at 12,170. Although NBB agrees that producers should obtain appropriate contracts from feedstock providers, actual contracts for “ongoing delivery” are not required, and producers often purchase feedstock from a variety of sources. Also, often facilities do not “store” feedstock as they are often batch plants, and may purchase only the amount of feedstock needed for a particular batch. Nor is storage and handling equipment part of the engineering review. Thus, it should be sufficient, that the producer have the appropriate documentation showing the type of feedstock and amount that is coming in to the facility, so that the Q-A-P Provider can confirm the inputs with the output of fuel produced.

NBB also has concerns with the requirement that the “feedstocks used to produce renewable fuel must be valid for the D code being claimed under § 80.1426 (or have an approved

petition under § 80.1416) and must be consistent with the information reported in EMTS.” 78 Fed. Reg. at 12,170 (emphasis added). A particular feedstock may arguably fall into more than one code, and EPA has updated the feedstock codes without always providing the regulated community with these updates. To the extent an error in the EMTS codes is found, but the underlying feedstock actually used is eligible, the producer should be able to correct errors in the EMTS without affecting RIN validity and without facing penalties, even if the RIN has already left the facility by the time the Q-A-P Provider can verify this aspect of the program. EPA should make this clear in the final rule.

Finally, as a clarification, it is unclear why the elements under the quarterly monitoring are required at all. The feedstock energy calculations should be reviewed as they are done, and if the other elements are undergoing ongoing monitoring, why would the auditor need to review, for example, that a separation plan is in place. Rather, the auditor would only need to know if updates have been made to the plan to ensure it is comparing activities against the most updated plan.

2. Production process-related components

EPA is proposing 10 required elements “designed to ensure that the renewable fuel production process is appropriate for the RINs being generated.” 78 Fed. Reg. at 12,171. These components are summarized below.

TABLE IV.A.1.b-1—OPTION A: QAP MONITORING FREQUENCY—PRODUCTION PROCESS-RELATED

	Component	Ongoing monitoring	Quarterly monitoring
2-1	Mass and energy balances .....	.....	X
2-2	Workforce size .....	.....	X
2-3	Process-related factors used in feedstock energy calculation.	.....	X
2-4	Production process consistent with EMTS	X	.....
2-5	Production process consistent with D code	X	.....
2-6	Certificates of analysis verify fuel	X	.....
2-7	Verify existence of quality process controls .....	.....	X
2-8	Volume production consistent with other reports required by EPA or other government entities.	.....	X
2-9	Volume production consistent with storage and distribution capacity.	.....	X
2-10	Volume production capacity is consistent with RFS registration.	.....	X

While NBB does not dispute that a mass and energy balance may be appropriate, it questions EPA’s statement that the Q-A-P elements only relate to items already required under the regulations. For example, the regulations *do not* require retention of documents regarding chemical or energy inputs, nor do they require retention of documents regarding production of wastes. 78 Fed. Reg. at 12,171. Nor should they. Facilities may keep track of this information for purposes of tracking production costs, but these are not elements required under the RFS2, nor are they necessary. EPA should make clear that these documents are not required to be maintained under the RFS2 program, and should give facilities the flexibility to maintain the records in a manner they deem appropriate and sufficient for the verification process.

NBB also questions the need for the Q-A-P to “verify workforce size and conduct random employee interviews to confirm the production process.” 78 Fed. Reg. at 12,171. A

facility's workforce may vary during a particular year as demand ebbs and flows. In addition, not all employees understand or are involved in every aspect of the production process, thus there are likely few employees who would have the adequate knowledge to respond to questions from the auditor. Alternatively, the auditor may be required to interview many employees, potentially affecting the operation of the facility. Again, employee information is not documentation required under the RFS2 regulations. Nonetheless, staffing levels could be appropriate information to provide to an auditor to ensure it is an operating facility, but random employee interviews appears unduly burdensome. The on-site visits to the facility, which are generally done with plant managers or persons with most knowledge as to the operation of the facility, also provides access to employees. Again, the actual production of fuel and the inputs and outputs should be sufficient information to determine if the facility is "operating as expected." *Id.*

As with the feedstocks, NBB has concerns with the requirement that the "production process technology and capacity used matches information reported in EMTS and in the facility's RFS registration." 78 Fed. Reg. at 12,171. Again, the producer should be able to correct errors in the EMTS without affecting RIN validity and without facing penalties, even if the RIN has already left the facility by the time the Q-A-P Provider can verify this aspect of the program. Also, it is unclear why the production process being consistent with the EMTS and the RFS registration must be verified on an ongoing basis. This is just inherent in reviewing whether the fuel is being produced under an approved pathway. Moreover, a facility generally does not change its production process, as such changes likely would require significant capital and modification to equipment. In such cases, the relevant information that must be reviewed is any updates to the registration and, when the on-site audits are conducted, confirmation that no such changes have been made or are in the works.

NBB agrees that review of fuel quality assurance programs and of certificates of analysis are appropriate to be included. But, such programs and certificates may not require testing of each particular batch, and EPA should make clear when approving Q-A-Ps that compliance with industry programs, such as the BQ-9000, are adequate and that the producer need not engage in additional testing in order to simply provide more information to the auditor. Nonetheless, NBB does question the requirement that auditors the Q-A-P verify the "existence of quality process controls regarding test equipment (e.g., accuracy of flow meters, temperature gauges), and would be required to monitor equipment integrity to ensure proper procedures for equipment replacement, maintenance, and cleaning are in place." 78 Fed. Reg. at 12,171. Again, NBB does not necessarily dispute that a Q-A-P provider should confirm that quality process controls are in place to ensure that temperature gauges and flow meters are in operating condition, only to the extent these are required to adequately measure the amount of fuel produced and being transported. Such controls are not required under the RFS2 program, and the audits should not be used to verify compliance or report compliance issues with any other potentially applicable regulatory programs. These audits should not be used as a fishing expedition.

Finally, NBB opposes the inclusion of a requirement to review "other applicable reports generated by the producer." 78 Fed. Reg. at 12,171. EPA references other government reports, which have different requirements, are irrelevant to RFS, and potentially subject to separate audit requirements. EPA has no authority over the facility's compliance with other government agency programs. This would also require the auditor to be familiar with these differences,

which may not be the case. Moreover, if EPA does believe this review is appropriate, it should also find that compliance with audits by other agencies, such as the USDA, should be sufficient evidence that the plant is operating properly, or find other means to streamline all the audits that may be required at a particular facility. As noted above, other agency reports could be used as alternative documentation that the facility is reporting actual production volumes, but should not be a requirement of the review process. This is another illustration as to why EPA’s proposal may be overly prescriptive, rather than giving the parties additional flexibility in conducting the “ongoing” monitoring of biofuel production.

3. RIN Generation-Related Components

EPA is proposing 9 required elements “to ensure that the renewable fuel being produced qualifies to generate RINs, and that the number of RINs generated is accurate.” 78 Fed. Reg. at 12,172. These components are summarized below.

TABLE IV.A.1.c-1—OPTION A: QAP MONITORING FREQUENCY—RIN GENERATION-RELATED

	Component	Ongoing monitoring	Periodic monitoring
3-1	Renewable fuel sold for qualifying uses	X	
3-2	Standardization of volumes	X	
3-3	Renewable fuel matches D code or petition	X	
3-4	RIN generation consistent with wet gallons	X	
3-5	Fuel shipments consistent with production	X	
3-6	Renewable content R is accurate	X	
3-7	Registration, reporting, recordkeeping		X
3-8	Equivalence value EV is accurate, appropriate	X	
3-9	RIN generation calculations	X	

Similar to the issues with some of the other components, EPA proposes that the Q-A-P be required to verify “contracts with any company that removes wastes, co-products, off-spec products or any other material other than renewable fuel from the facility,” and “to review bills of lading (BOL), invoices, product transfer documents (PTDs), EMTS inputs, EPA quarterly reports and Energy Information Administration data.” 78 Fed. Reg. at 12,172. These present the same issues of concern as above. These requirements go beyond those required under the RFS2, and EPA has no authority to require review of a party’s compliance with other regulatory programs. In addition, as further described above, while review of inputs and outputs may be appropriate, the recordkeeping and reporting requirements should not affect the validity of a RIN.

NBB does not dispute that the auditor should review the reports to EPA to verify the production is being reported properly. Again, the role of the Q-A-P is not to verify there are no violations at the facility, but to ensure there is production of eligible fuels and the volumes being reported. To the extent there are discrepancies in the recordkeeping and reporting requirements, the producer should be able to correct any such errors and not face potential enforcement by EPA.

Moreover, it is unclear how comparing the current reports with prior reports provide added value. The company is undergoing ongoing or quarterly monitoring. The auditor should be familiar with the overall production capacity of the plant and its ongoing production rates, and demand can be ever changing in this market. As noted above, review of reports to other agencies

are immaterial to the RFS program, as they have different requirements and definitions. Thus, EPA should not require review of the EIA M22 Survey, any state reports, federal and state tax returns, and association dues reports.

Finally, EPA has proposed revisions regarding the producer’s responsibility for ensuring the fuel is sold “for qualifying uses.” Thus, EPA should make clear that the Q-A-P Provider need only ensure that the fuel has properly been designated, and can also review contracts with customers to verify that the producer did not know or have reason to know that the fuel was going to be used for a non-qualifying use. As such, it may not be appropriate or necessary for auditors to contact the customers of a facility, particular those facilities that may only sell to a marketer. The mass-balance analysis should be sufficient to establish that fuel is being produced and the proper volume. Contacts with suppliers may be warranted only in the event the paperwork at a facility is insufficient to adequately support the claims that the feedstock is an approved feedstock under the RFS2 regulations.

4. RIN Separation-Related Components

EPA is proposing 3 required elements “designed to verify RIN separation.” 78 Fed. Reg. at 12,172. These components are summarized below.³¹ As noted above, NBB does not believe producers undergoing a Q-A-P A should not be required to undergo an annual attestation and, therefore, that component should be eliminated. In any event, the annual attestation that may be conducted of the Q-A-P Provider itself should serve, if at all, as a check on the Q-A-P verification process and, thus, should be independent of the Q-A-P.

TABLE IV.A.1.D-1—OPTION A: QAP MONITORING FREQUENCY—RIN SEPARATION-RELATED

	Component	Ongoing monitoring	Quarterly monitoring
4-1	Verify RIN separation	X	.....
4-2	Exported fuel not used to generate RINs	X	.....
4-3	Verify accuracy of annual attestation .....	.....	X

B. The Verification Process Should Include A Site Visit.

As part of the RIN verification process under both Q-A-P A and Q-A-P B, EPA proposes to include onsite visits as part of the audit process. 78 Fed. Reg. at 12,192. As described above with respect to the Task Force’s recommendations, NBB supports requiring onsite visits.

EPA states that the “goal of the onsite visit is to verify that plant has the technology to produce, store, and blend biofuels at registered levels, is operating in accordance with the facility’s registration, and that the RINs generated since the last visit are valid.” 78 Fed. Reg. at 12,192. NBB agrees that onsite visits are necessary to ensure there have been no major changes at the facility that might affect its registration, and ensure that the facility appears to be in operating condition.

³¹ NBB separately provides comments on the producer’s ability to separate RINs, and the proposed changes to the export RVO requirements.

EPA is also proposing that RINs generated for up to 100 days after the last audit could be verified, unless the real time monitoring data or other information obtained by the Q-A-P auditor prior to the onsite audit indicates that RINs are invalid. 78 Fed. Reg. at 12,192. For Option A, it does not appear appropriate to have a time restriction on when RINs can be verified. While NBB agrees that, if information obtained by the auditor indicates that RINs are invalid, the Q-A-P Provider should be able to flag and hold further verification of RINs, it does not agree that an onsite visit is required prior to verification. The onsite visits for Option A merely confirm what the ongoing monitoring should be verifying. Under EPA's proposal and given the quarterly monitoring under Option B, the 100 days may be appropriate, but NBB is unclear how this would work in practice and requests clarification. If the onsite visit indicates that RINs were fraudulently being created, then the Q-A-P Provider should stop verifying RINs. If there are some concerns that could be rectified, then the Q-A-P Provider should give the facility time to rectify those concerns before it starts verifying RINs again. In either case, the 100 day limit seems unnecessary and adds confusion into the operation of the program. This is further evidence as to the undue complexity of EPA's proposed three-tier system, and illustrates why NBB's proposed approach should be followed.

EPA is proposing that "new production facilities should be audited before verification of RINs." 78 Fed. Reg. at 12,192. This requirement seems unnecessary, as any new facility must have a third-party engineering review prior to registering with EPA, and there is no generation of RINs until a facility is registered with EPA. Thus, EPA should clarify whether such facilities must undergo essentially two onsite reviews prior to being able to generate RINs.

PART 3: NBB GENERALLY SUPPORTS EPA'S PROPOSED REVISIONS TO ADDRESS ACTIVITIES DOWNSTREAM OF RIN GENERATION

XII. NBB GENERALLY SUPPORTS EPA'S PROPOSED CHANGES TO THE EXPORT AND EXPORTER PROVISIONS, AND RECOMMENDS THAT EPA REQUIRE RETIREMENT OF RINS WITHIN 30 DAYS OF EXPORT.

One of the concerns we have seen in the marketplace is that RINs for exported renewable fuel have not been properly retired. The time lag in which exporters must retire RINs and the lack of transparency in volumes being exported has led to aggressive speculation in the market. This has created confusion as to whether the initial RIN for that fuel remains valid, and whether the requirement that the fuel be used in the *United States* is being met. NBB appreciates EPA's clarification that the original RIN *is not rendered invalid*. NBB also agrees that revisions to the exporter RVO requirements may be warranted to make the export market more transparent. NBB believes, however, additional technical corrections may be required to fulfill the intent of these changes, and that EPA should require the retirement of RINs at the time of export, rather than at the end of the year.

A. NBB Supports the Clarification that Any Exported Renewable Fuel Triggers An Exporter RVO.

Based on discussions in the marketplace, NBB understands that there has been confusion as to when the exporter RVO is triggered based on arguably ambiguous language in the regulation, as well as the lack of information as to what volumes of renewable fuel may be

present in finished fuel that is being exported. Thus, NBB supports the clarification EPA is providing that *any* volume of renewable fuel which is exported, either neat or blended, requires calculation of an export RVO.

EPA is also seeking comment on whether additional amendments should be made such as whether EPA should limit exporter RVO requirements in situations where exporters can document that either no RINs were ever generated for the exported fuel, or that any such RINs were previously retired. NBB does not necessarily oppose removing such obligation in such a case where no RINs were ever generated, but any such requirement should be limited to the producer and not once the fuel is sold or EPA must include stringent designate and track requirements. Renewable fuel may exchange various hands, and it is unclear how EPA would ensure that no RINs were ever generated. For example, if the producer intentionally produces the fuel for export only (including use in Alaska and the U.S. territories), then the product transfer document for the fuel should be marked “For export only, No RINs generated.” Exports also should include notice to EPA as to the amount of renewable fuel that is exported within 30 days of export, and the explanation, and supporting documentation, why no RIN was generated. In this way, EPA can better track fuel production and RIN generation.

NBB does not agree that it should be sufficient to show such RINs were previously retired. Under EPA’s proposal, the RINs are retired *upon export*, which better allows EPA to track how much renewable fuel is actually exported and whether sufficient RINs have been retired.

NBB also recommends clarifying who is the “exporter” with respect to exports going outside the United States. Foreign entities can set up a shell corporation in the United States to export. The shell corporation that “transfers” the renewable fuel would be considered the “exporter” under the RFS2 regulations, but may have no assets. Other regulations define “exporter” differently in order to reach beyond the shell corporation. For example, the Internal Revenue Code defines “exporter” as “the person named as shipper or consignor in the export bill of lading.” 26 C.F.R. § 48.0-2(a)(9). EPA’s greenhouse gas reporting regulations also clarify that the “exporter” is “not the entity merely transporting the domestic products, rather an exporter is the entity deriving the principal benefit from the transaction.” 40 C.F.R. § 98.6. EPA should consider additional provisions to ensure the company that must comply with the exporter RVO is more than a mere shell corporation.

B. NBB Supports Requiring Identification of Renewable Fuel Content for All Exports, and Also For Co-Processed Renewable Fuels.

As EPA explains, current labeling requirements do not require labeling for fuel blends containing no more than five percent biodiesel and no more than five percent biomass-based diesel, and that meet ASTM D975 (“Standard Specification for Diesel Fuel Oils”). This is because the fuels are fungible. However, this has also created an issue for exporters of the finished fuel as they cannot verify the renewable fuel content of the diesel fuel. Thus, “it is possible that some exporters may believe that the fuel they are exporting has a lower biofuel content than it actually does or they may be claiming that it’s straight diesel fuel.” 78 Fed. Reg. at 12,193. In addition, co-processed renewable fuels may also raise concerns as to the actual renewable content of the finished fuel and the resulting number of appropriate RINs.

For exports and co-processed fuels, we propose that EPA add a requirement to measure the volume of the renewable component to fuel blends such that any person that exports fuel or sells or otherwise transfers title to any co-processed renewable fuel to any other person for resale of the product shall measure the volume of renewable component in the shipment exported by using Method B or Method C of ASTM D 6866.

This would be in place of EPA's proposal to require PTDs include "Name and blend level of all blending components in a product containing renewable fuel, if applicable." 78 Fed. Reg. at 12,211 (proposed 40 C.F.R. § 80.1453(a)(5)). NBB is concerned with the proposal to require disclosure of the exact blend level for all domestic sales of diesel fuel. Neither industry standards nor Federal Trade Commission requirements currently require exact blend disclosures for biodiesel/diesel fuel blends. Requiring exact blend level disclosure above that currently required under other regulations can pose problems for transporting fuels in pipelines where fuels are co-mingled. Currently, biodiesel blends up to B5 are considered D975 diesel fuels, and can be transported via pipeline as D975 diesel fuel (i.e., as a "drop-in" fuel). A recent effort by producers, petroleum marketers and petroleum refiners to propose model regulation as to how to label fuels resulted in the ultimate conclusion that exact blend level disclosure for all fuels in the U.S. market did not make sense. EPA should not revise current ASTM or FTC requirements, and any further disclosure requirements should be left to the individual state, regional, or local market/governments if needed.

C. NBB Supports Revisions to the Exporter RVO Requirements to Ensure Prompt Retirement of RINs.

As EPA explains, the "current RFS regulations require exporters to demonstrate compliance with their exporter RVOs on an annual basis, by February 28 of the year following the compliance year in question." 78 Fed. Reg. at 12,193. "EPA is seeking comment on the period of time that should be allowed for retirement of RINs as a result of renewable fuel export, and whether the current deficit carry-over provision in 80.1451(a)(1)(xii) should be eliminated for exporters." *Id.* NBB supports a shorter time frame for retiring RINs for exported renewable fuel, and agrees that the deficit carry-over provision is not necessary for exporters. The deficit carryover was only provided for obligated parties, not for parties that export fuel.

NBB supports requiring retirement of RINs for exported fuel within 30 days of being exported. Thirty days provides a reasonable time period for commercial transactions, taking into account the differences in timing when transporting by vessel or by truck and rail (e.g., exports into Canada). NBB agrees that a shorter time period to retire the RINs provides more certainty as to the amount of RINs available, and better ensures that the volume mandates are being met. EPA notes that exporters may seek to sell RINs as a separate source of revenue, which is why it provided exporters with additional flexibility in the final RFS2 Rule. 78 Fed. Reg. at 12,193. Generally, NBB supports the export of biofuels both as a blended product with diesel or heating oil or as a neat fuel. When 1 gallon of biodiesel is exported, then revenue is created which adds through put to facilities, enhances job growth opportunity and enhances the GHG emissions profile of the exported product. Nevertheless, it is imperative to track exports of biodiesel, other biomass-based diesel fuels, ethanol and all fuels exported that generate RINs under the RFS2 program. NBB agrees with EPA as to the reasons for creating a sounder reporting and tracking requirement on exported renewable fuels.

Requiring retirement of RINs for export will also require revision of the recordkeeping and reporting requirements. Exports will need to be reported into the EMTS. EPA should require that reports include the consignee, the point of exit from the United States, all points of entry and departure from each foreign country through which the fuel will pass, and the final destination of the export. An annual compliance report should also be submitted to ensure ongoing compliance with the export RVO requirements.

EPA should also provide data regarding reported exports, incurrence of export RVOs, and number of RINs retired as a result of meeting export RVOs on at least a quarterly basis.

D. Summary of NBB Proposed Additional Revisions to the Export Provisions.

While NBB generally supports EPA's proposed revisions, it believes additional requirements than proposed by EPA may be required to ensure proper tracking and retirement of RINs with respect to exported renewable fuel. The following provides a summary of those elements that NBB believes are necessary for a transparent export market, which may require additional revisions to the regulatory language:

1. The RVO should be equal to the gallon and RIN value of each gallon exported. If a gallon of biodiesel is exported (D4 RIN), then an RVO for biomass-based diesel (D4 RIN) should be created.
2. Every time a gallon of RFS qualifying biofuel is exported and has a RIN assigned, then the RIN on the gallon exported, no matter the RIN value (1.0 – 1.7), must be retired.
3. The exporter of each gallon of all exported fuel, transportation, heating oil, aviation fuel, or any other fuel shall measure the volume of renewable component in the shipment exported by using Method B or Method C of ASTM D 6866.
4. Report exports to EPA within 30 days shipment, and include the following information:
 - a. A description of the shipment of the exported biofuel product and the mode of transportation
 - b. The name of the vessel
 - c. The departure location and destination location, and foreign ports in between
 - d. The title owner of the biofuel product exported
 - e. The blend level and total volume of the fuel exported
 - f. The name of the exporter that created the RVO on export
 - g. The volume of the RVO
 - h. The name of the exporter that retired RINs due to export, the number of RINs retired and the 38 digit RIN number of each RIN retired.
5. Create a publicly accessible web based system to track the exported fuel and provide that data to the public.

XIII. NBB AGREES THAT BIODIESEL RINS SHOULD NOT BE CONSIDERED INVALID BASED ON DOWNSTREAM USES.

A. Biodiesel RINs Should Remain Valid Regardless of Downstream Uses.

While EISA sought to substantially expand the use of renewable fuels in this country, the RFS volume mandates require use of renewable fuels in or as *transportation fuel*. The statute also provides for the generation of RINs when the fuel is used to replace or reduce the quantity of fossil fuel present in heating oil, or jet fuel. Thus, EPA has read the statute to require that the only renewable fuel eligible under the program are those gallons that are used for “qualifying” uses. What happens to a properly generated RIN if it is subsequently used for a non-qualifying use has been the subject of much debate. NBB agrees that properly generated RINs should not necessarily become invalid as a result of the fuel not being used in or as transportation fuel, heating oil, or jet fuel “downstream” of the renewable fuel producer or importer, “that is after it has left the custody of the producer or importer.” 78 Fed. Reg. at 12,193. In response, EPA is proposing amendments to clarify and expand on existing requirements regarding the designation of qualifying renewable fuel, and is also proposing new limitations on RIN generation for those types of renewable fuel that can be expected to be used in or as non-qualifying fuel. NBB generally supports these proposed changes.

Under Section 80.1426(c), RINs may not be generated for fuel that is not designated or intended for use as transportation fuel, heating oil or jet fuel, i.e., for a “non-qualifying fuel use.” EPA is proposing amendments to Section 80.1426(a) and (c) and to the PTD requirements in Section 80.1453 to require renewable fuel producers and importers to expressly “designate all RIN-generating renewable fuel as *transportation fuel, heating oil or jet fuel on the PTDs* that a renewable fuel producer or importer prepares to accompany a fuel shipment.” 78 Fed. Reg. at 12,194 (emphasis added). The regulations would require that designations be made in good faith, and thus a party that designated a fuel for a qualifying fuel use but that knows the fuel is to be used *in a fuel other than transportation or jet fuel or heating oil (a “non-qualifying fuel use”)* would be in violation of this proposed regulation, and subject to civil penalties. For fuels other than ethanol, biodiesel, “drop in” renewable diesel, biogas and renewable electricity, additional special conditions must also be met to provide adequate assurances that other fuels, which are not typically considered transportation fuel, jet fuel or heating oil, are being used for qualifying uses. While NBB has some concerns as to the definition of “drop-in” renewable diesel (as further described below), NBB agrees that biodiesel RINs should remain valid regardless of the ultimate downstream use of the fuel.³²

As EPA has recognized, biodiesel is a fungible fuel, and can replace diesel fuel in numerous applications, both on-road and off-road. Biodiesel, by definition, must meet the ASTM D 6751 specifications, and thus biodiesel facilities already undergo testing to make sure that these specifications are met. EPA has approved the use of biodiesel in transportation fuels at any blend level (\leq B100). Biodiesel is also used to *replace or reduce* the amount of fossil fuels in

³² There also appears to be some confusion as to what uses qualify as “heating oil.” NBB believes that biodiesel used as or in stationary source applications for power generation/process heat qualifies. NBB hereby incorporates by reference its comments on EPA’s proposed revision to the definition of “heating oil,” which are attached to these comments.

heating oils. All uses of biodiesel should be qualifying events under the RFS2 program at any blend, except for biodiesel exports. As such, NBB agrees that it makes little sense to track the downstream uses of biodiesel since those uses are generally qualifying uses under the statute, *see* 75 Fed. Reg. at 14,687, nor does EPA need to require additional sampling or testing of biodiesel to ensure the fuel is appropriate for transportation fuel. Instead, under the Q-A-P proposal, parties upstream from the ultimate consumer who re-designate any renewable fuel for which RINs were generated for a non-qualifying use would be subject to the proposed RIN retirement provisions in Section 80.1433. Other fuels are not necessarily known as transportation fuels, and thus, NBB agrees that additional registration, reporting and recordkeeping requirements may be necessary to provide EPA with adequate assurances that these fuels are being properly used.

B. EPA Should Review and Conform the Various PTD Requirements that May be Applicable to Biodiesel.

EPA has proposed various changes to a product transfer document that must accompany a gallon of renewable fuel. While NBB generally supports clarifications as to the obligations of producers, the product transfer documents now must contain numerous statements under a variety of requirements, which are superfluous in the case of biodiesel and largely unnecessary. As noted above, all biodiesel uses should be qualifying uses under the RFS2 program, and a biodiesel producer *should not* be required to track downstream uses or be held accountable for the actions of parties downstream from the facility.

The proposed language under 40 C.F.R. § 80.1453(a)(12), 78 Fed. Reg. at 12,211, would require the following be placed on all product transfer documents for transfer of biodiesel:

“This volume of neat or blended biodiesel is designated and intended for use as transportation fuel, heating oil or jet fuel in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.”

Biodiesel also is subject to product transfer document requirements under the ultra-low sulfur diesel fuel program in addition to the RFS2 program. This may be in addition to any state requirements as well, which may not distinguish between types of downstream uses. EPA should consider whether these statements can be consolidated to address the various regulatory programs without conflicting with potential state requirements. While the definitions for other diesel fuels may be different under the various programs, it is not for biodiesel. Biodiesel is fuel that meets ASTM D 6751. This is the standard that is applicable to biodiesel regardless of its use, although the finished fuel may be subject to another ASTM standard such as heating oil (ASTM D 396). There simply is little need for EPA to require long and overlapping statements on biodiesel PTDs.

In addition, since downstream uses does not invalidate the RIN, there is no need for much of the language being proposed. With the exporter RVO now being triggered upon export, the fuel also does not need to be designated for use “in the 48 U.S. contiguous states and Hawaii.” The last sentence in the proposed new language also may cause more confusion, as to when the RVO for non-qualifying uses is triggered. For example, the first sentence does not necessarily

cover neat biodiesel that is intended for use in *blending* into transportation fuel, heating oil or jet fuel. Thus, EPA should clarify and simplify the required statements.

Thus, NBB recommends that EPA require one statement that can cover these various requirements. For example, it should be sufficient to state that: “This volume of fuel is or contains biodiesel for which RINs have been generated under § 80.1426.” For blends, EPA may also require disclosure of the sulfur content to ensure compliance with 40 C.F.R. § 80.590, but should keep in mind all the requirements for PTDs for biodiesel and streamline those requirements to the extent practicable.

C. NBB Supports Revising the Definition of Non-Ester Renewable Diesel for Purposes of the RFS2 Regulations.

NBB has raised various concerns with EPA as to fuel that is entering the marketplace and being coined “renewable diesel,” without any real industry specifications or fuel quality assurances. In the Q-A-P Proposal, EPA states: “Renewable diesel is a product that was originally introduced by companies attempting to create a ‘drop-in’ transportation fuel made from renewable sources that met the same specifications as petroleum based transportation diesel.” 78 Fed. Reg. at 12,194. EPA recognizes that “[s]ome renewable fuel producers are currently generating RINs for fuel that they claim meets the existing definition of renewable diesel, but which is not chemically equivalent to a petroleum diesel fuel under the renewable diesel definition.” *Id.* While EPA points to one example -- product that is primarily composed of triglycerides that have not been chemically converted to a hydrocarbon, and can be produced through simple filtration of vegetable oils with little processing equipment or effort, *id.*, NBB believes there are other fuels in the marketplace that are generating RINs but are not appropriate for use as transportation fuel, heating oil or jet fuel because they do not meet any industry specifications.

To address this issue, EPA proposed to clarify the definition of “non-ester renewable diesel” to require that they must be approved under 40 C.F.R. Part 79 at specific blend levels with diesel fuel. The proposed revised definition is as follows:

Non-ester renewable diesel, also known as renewable diesel, means renewable fuel which is all of the following:

- (1) A fuel which can be used at a blend level approved under 40 CFR Part 79 in an engine designed to operate on conventional diesel fuel, or be heating oil or jet fuel.
- (2) Not a mono-alkyl ester.

78 Fed. Reg. at 12,206 (proposed amendment to 40 C.F.R. § 80.1401). While NBB supports revising the definition and understands that registration under 40 C.F.R. Part 79 means that the fuel may be eligible for use as transportation fuel, it remains concerned with the definition. NBB believes that EPA must ensure that any such fuel also must comply with the appropriate ASTM standards, including for heating oil and jet fuel. Thus, NBB supports the alternative in the Q-A-P Proposal to define renewable diesel to be a fuel “that meets the ASTM D 975 Grade No. 1-D or No. 2-D, and that are homogenous hydrocarbons.” *Id.* at 12,194.

EPA also indicates that it “could then refer to all other fuels that meet the current definition of renewable diesel as viscous non-ester renewable diesel, and they would be subject to the special conditions related to the distribution and sale of renewable fuel that is not typically sold for use in or as transportation fuel, heating oil or jet fuel. This approach would not remove anyone from the program and could give greater certainty to the industry.” 78 Fed. Reg. at 12,194. NBB agrees that EPA should include provisions to ensure that off-specification or no specification fuels are not allowed to be eligible under the RFS program. EPA could, however, also include additional references to existing ASTM standards that would help ensure the fuel is appropriate to be used for a qualifying use, such as heating oil. NBB provides a proposed revised definition to address this issue in Appendix A, Part 3.

EPA also seeks comment on whether biodiesel and renewable fuel diesel producers who generate RINs should be required to sample and test their fuels to ensure that the fuel is appropriate for use as transportation fuel, and what specific sampling and testing requirements would be appropriate. 78 Fed. Reg. at 12,194. NBB does not believe such testing requirements are necessary for biodiesel since all biodiesel under the RFS program must meet ASTM D 6751 and already go through quality assurance testing.

D. NBB Generally Supports the Requirements for Certain Fuels, Not Including Biodiesel, to Confirm they are Appropriate for Qualifying Uses.

EPA recognizes that certain fuels outside of biodiesel and ethanol are not typically used as transportation fuel, jet fuel or heating oil. In order to verify that these other fuels are produced for use as a transportation fuel, heating or jet fuel, EPA is proposing conforming registration, recordkeeping and reporting requirements to ensure these fuels are being used for a qualifying use. These include requiring that renewable fuel producers or importers that produce these other fuels include affidavits in their reports from the downstream parties to verify that these fuels were used in or as a qualifying fuel and keep records relating to the blending activities to allow the Q-A-P providers and the EPA to verify that RINs were properly generated. NBB generally supports these requirements to ensure that these other fuels, which are new to the marketplace and not necessarily produced for use in transportation fuel, heating oil or jet fuel, to establish their use as a qualifying use to generate RINs.

EPA also solicits comments on how these new registration requirements should apply to currently-registered entities. The options include requiring an immediate (within 30-60 days) registration update, or allowing the new submissions to occur at the facilities’ next 3-year registration update. NBB believes that EPA should require an immediate registration update, but that the longer time period may be necessary in order to obtain all the required documentation.

EPA would also create a new obligation to retire RINs for any person who uses or designates a renewable fuel for an application other than transportation fuel, heating oil or jet fuel. 78 Fed. Reg. at 12,195. NBB agrees that the burden of using fuel for a qualifying fuel use should be on the party re-designating or using the fuel for a non-qualifying use and not the producer when the fuel has already been designated upstream as a qualifying fuel. The fuel can change several hands, and the producer should not be required to track the fuel downstream once it leaves its facility.

NBB supports the requirement that the RIN be retired within 10 days of re-designation.

XIV. NBB SUPPORTS EPA'S CLARIFICATION REGARDING THE USE OF RENEWABLE FUEL IN OCEAN-GOING VESSELS.

In the Q-A-P Proposal, EPA notes that “[s]ome parties have questioned whether MVNRLM that is blended into ECA marine fuel is “fuel for ocean going vessels” such that RINs generated for the renewable fuel component of MVNRLM become invalid upon that use.” 78 Fed. Reg. at 12,196. EPA further states that: “It is the Agency’s interpretation that the definition of ‘fuel for use in an ocean-going vessel’ in §80.1401 does not include MVNRLM that is blended into ECA marine fuel.” *Id.* NBB agrees with EPA’s interpretation, and with its conclusion that only a trivial quantity of such fuels is used to produce ECA fuel for ocean-going vessels.

PART 4: OTHER ISSUES IN THE Q-A-P PROPOSAL

XV. NBB AGREES THAT MORE TRANSPARENCY ON RIN GENERATION AND USE IS REQUIRED.

In the final RFS2 Rule, EPA provided assurances that it would treat any information submitted with a claim that it was confidential business information (CBI) as CBI in accordance with existing Agency regulations at 40 C.F.R. part 2, subpart B. In the early part of 2012, NBB is aware that EPA sought information from producers and obligated parties alike with respect to a Freedom of Information Act (FOIA) request for information related to biomass-based diesel RIN generation and sales. NBB submitted a general response and requested EPA make a class determination with respect to certain of the information it proposed to disclose. EPA, to date, has not responded to this request.

In the Q-A-P Proposal, EPA now proposes to release information that NBB specifically explained constituted CBI on various levels. Moreover, despite numerous requests by NBB that EPA provide more information as to the obligated parties’ compliance with the RVO requirements, the proposal includes no such information on the demand side. NBB believes the release of information solely on the supply side is insufficient, and remains concerned with EPA’s proposal.

A. EPA Must Also Provide Information Related to Obligated Parties’ Purchase and Use of RINs, and Should Do So On A Consistent and Timely Basis.

In the Q-A-P Proposal, EPA indicates that it is considering approaches to increasing public access to information collected by the RFS program. 78 Fed. Reg. at 12,197. EPA is proposing to make certain RFS registration and reporting information publicly available because “we believe that greater transparency will work hand-in-hand with our Q-A-P process to improve the integrity of information submitted for RFS compliance and deters fraudulent behavior.” *Id.* While, as further described below, NBB believes EPA’s proposal would improperly release CBI for producers, NBB agrees that more transparency is warranted. But, it also believes that transparency on the demand side is equally, if not more, important to protect against market volatility.

While EPA provides some information as to RIN retirement, there are several reasons why a RIN may be retired and such information is only provided on a yearly basis. This is wholly insufficient to ensure that EPA is properly enforcing the obligations of *the obligated parties*. Indeed, unlike renewable fuel producers, who are not required to participate in the RFS program, compliance by obligated parties is mandatory and adequate information should be available to the public to ensure EPA is enforcing the program properly. Thus, EPA should provide on a monthly basis information on RIN purchases and retirement by obligated parties. More transparency provides more certainty in the marketplace and allows the market to function with less speculation and volatility.

In addition, the information released by EPA should be provided on a consistent basis every month. Other agencies that provide monthly information generally release that information at the same time each month, or to identify when the next month's data should be anticipated. While EPA updates its EMTS data, it is not updated on a consistent basis, and the public does not know when to expect the data. In the meantime, speculation as to what EPA's numbers may be remain high, and, as a result, prices can fluctuate dramatically in a given period of time. NBB requests that EPA provide updated information on a particular day each month, e.g., the 15th of every month or the second Thursday of each month, so that there is consistency in the release of information, and the market can act accordingly.

B. NBB Opposes Release of Producer Information on a Company by Company Basis.

EPA is proposing to summarize and publish aggregated registration and Q-A-P information required under 40 CFR §§ 80.1450 (b), (c), and (g) from independent third-party auditors and renewable fuel producers and importers that are registered with the RFS program. EPA proposes to publish this information *by facility* and on a monthly basis. This information would include the company name, facility name, facility type/fuel product, total permitted capacity, production volume, production process type, feedstocks, D-Code, and any co-products. EPA erroneously contends that this “information would not reveal proprietary production processes.”³³ 78 Fed. Reg. at 12,197. Indeed, while some of the information is not CBI and

³³ Indeed, this statement is contrary to the numerous assurances EPA provided regarding maintaining the confidentiality of the information submitted for purposes of the RFS program. For example, EPA instituted a system that it asserted, among other things, “[i]mproves security and transmission of confidential business information (CBI) through registration and authentication.” EPA, *CDX Benefits*, <http://www.epa.gov/cdx/benefits/index.htm> (last updated January 24, 2012). Access to these programs is limited to EPA and its contractors, and transaction information remains available only to the buyer and seller. EPA has indicated that it has employed procedures, “including comprehensive system security plans (SSPs),” to protect the CBI from unauthorized disclosure. 75 Fed. Reg. 35,451, 35,451 (June 22, 2010). EPA, thus, has consistently recognized the sensitive nature of such information, particularly with respect to future production plans. Regarding the required Production Outlook Reports, EPA stated that “[a]ll information submitted to EPA will be treated as confidential business information (CBI), and if used by EPA in a regulatory context will only be reported out in very general terms.” 75 Fed. Reg. at 14,730. Thus, participants in the program relied on EPA's assurances that it would take efforts to maintain the confidentiality of information submitted. In public comments on the proposed rule, numerous comments disputed EPA's need for much of the information it proposed to require under the RFS program based on confidentiality concerns.

already made available by EPA,³⁴ EPA proposes to disclose information of the type and in a manner that NBB explained in its request for a class determination that it, in fact, does reveal CBI.

EPA contends that “we want to ensure that we continue to properly process CBI claims and protect company’s confidential information.” 78 Fed. Reg. at 12,197. Under FOIA Exemption 4, commercial or financial information obtained from a person that is privileged or confidential (*i.e.*, CBI) is exempt from public disclosure. 5 U.S.C. § 552(b)(4). The purpose of Exemption 4 “is to protect persons who submit confidential financial or commercial data from competitive disadvantages that would result from disclosure.” *Greenberg v. Food & Drug Admin.*, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (citation omitted). The exemption is also intended to assist the government to ensure it is able to obtain the information needed to make regulatory decisions. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 873 (D.C. Cir. 1992). Both of these purposes support EPA withholding the specific information regarding biodiesel companies pursuant to Exemption 4 under FOIA.

CBI is exempt from disclosure if: (1) the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’s competitive position; or (2) the information is voluntarily submitted information, and its disclosure would be likely to impair the Government’s ability to obtain necessary information in the future. 40 C.F.R. § 2.208; *see also Critical Mass Energy Project*, 975 F.2d at 878 (citation omitted). It is important to note that a showing of actual harm is not required to maintain a CBI claim. *See Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557, 559 (D.D.C. 1980) (citations omitted). Rather, a likelihood of substantial competitive injury can be found by demonstrating that disclosure of the information would provide competitors with valuable insights into a company’s operations, give competitors pricing advantages over the company, or unfairly advantage competitors in future business negotiations.

First although EPA’s regulations require the covered information to be submitted to EPA, the RFS is an incentive program designed to promote the use of renewable fuel, and participation by renewable fuel producers is not required. The CAA itself does not require producers to produce fuel under the program, nor does it require this information be disclosed. Rather, EPA established the RIN as the means of tracking compliance with the RFS program, placing the burden on renewable fuel producers to generate RINs. As part of its compliance program, EPA requires renewable fuel producers to register and submit numerous reports to participate in the program.³⁵ Because of the potential adverse impacts the disclosure of this information may have, EPA should nonetheless consider the impacts of release of this information on EPA’s ability to obtain necessary information in the future. The revised program was also intended to diversify feedstock and improve the rural economy. S. Rep. No. 110-65 at 2-3 (2007). Release of this information as proposed by EPA could have significant adverse impacts on the biodiesel market and on companies, particularly smaller companies that would undermine these purposes.

³⁴ EPA already provides a list of companies registered under the RFS2, including biodiesel producers and obligated parties, on its website. NBB does not contest the release of names of those companies participating in the program.

³⁵ The D.C. Circuit has found that no provision of FOIA “obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act.” *Critical Mass Energy Project*, 975 F.2d at 880.

In any event, since the information is required to be submitted under EPA's regulations, it can be shown that the disclosure of the information is likely to cause substantial harm to competition in the biodiesel industry. Biodiesel sales are the result of negotiations on volumes and prices based on, among other things, feedstock, production costs, and transportation costs. In order to protect price points and marketing strategies utilized by each company, it is industry practice on the part of both biodiesel producers and their customers, including marketers and obligated parties, to keep negotiated terms confidential. The information EPA has indicated it seeks to disclose can reveal these contract terms that otherwise are kept confidential, and can be used by competitors to their advantage including: (1) annual and monthly production volumes and RIN generation; (2) monthly co-products; (3) RIN generator versus fuel producer; and (4) production volumes over time. As such, each of these constitutes CBI, and the release of this information can result in significant competitive harm.

EPA states, with no support, that it "believes that release of this information would not cause substantial harm to the competitive position of a Part 80 business submitter." 78 Fed. Reg. at 12,198. As NBB (among others) explained to EPA, information at this level of detail can, in fact, reveal information regarding a company's production process, marketing position and pricing. Based on this information, annual sales volumes of biodiesel production and imports can be estimated by dividing RINs by the 1.5 equivalence value established for biodiesel. Based on information that EPA also proposes to disclose (e.g., location, feedstock, capacity, etc.), competitors can utilize the information disclosed by EPA to compare against estimated production costs and trace gallon prices. In this way, competitors, including producers of other advanced biofuels, and customers can estimate profit margin and production costs, thereby giving competitors insight into a company's competitive strengths and weaknesses. See *Lion Raisins v. U.S. Dept. of Agriculture*, 354 F.3d 1072, 1081 (9th Cir. 2004); see also *NRDC v. Leavitt*, No. 04-01295, 2006 WL 667327 (D.D.C. Mar. 14, 2006) (affirming EPA's withholding of individual companies' pesticide stockpile information as CBI). This is particularly true for batch plants that are not on a continuous production schedule, and for smaller, localized companies where production costs may be easier to estimate. EPA's claim that it is not proposing to disclose information on a "batch" level misses the point.³⁶ 78 Fed. Reg. at 12,197. Indeed, a batch can be as high as a month's worth of production, so, by definition, monthly production can disclose information at a "batch" level. Tracking this information over time can also provide competitors insights into marketing plans, including potential growth areas. Every linkage of information would allow competitors to undermine their competitors' marketing strategies at very little cost.

While EPA uses an ethanol facility as an example, the ethanol production process is more generic than biodiesel production. As exemplified by the number of specific petitions that have been approved for biodiesel and renewable diesel, there are numerous processes and feedstocks than are used in the production of biodiesel. These decisions are based largely on location, pricing and the ability to market. Thus, this information can reveal specific production processes of biodiesel facilities. Thus, the ethanol facility example is misleading and simply inapplicable to biodiesel.

³⁶ Nor does NBB agree that EPA is not disclosing information "at the broader company-level." EPA's proposal includes both RIN generator and fuel producer. Depending on the corporate relationship, this can provide information at a company-level.

It is general practice in the biodiesel industry to keep this type of business information confidential, and such information is not otherwise reasonably attainable without the consent of the companies. In particular, terms of sales are exclusively maintained between the buyer and seller, even in the case where producers use marketers to sell their biodiesel products. Many companies restrict access to sales information to a limited number of employees, and many companies utilize computer programs for tracking sales and production volumes and restrict access to this data. In addition, many companies include confidentiality provisions in their sales contracts. While the specific practices each company engages in to maintain such confidentiality may differ, it is generally accepted in the industry that such information should not be disclosed outside the buyer/seller relationship.

NBB also vigorously disputes that this information is already available. EPA contends that “all renewable fuel producers report this information to the U.S. Department of Energy’s National Renewable Energy Laboratory, which publishes the information on their Web site.” 78 Fed. Reg. at 12,197. Interestingly, EPA does not include the website in its proposal, nor does it explain why its disclosure then provide any additional information that is necessary. NBB is not aware of any such disclosures on a facility-by-facility basis. In fact, other agencies have recognized the confidential nature of this type of information, and take efforts to only report data related to biodiesel production in the aggregate. For example, the Confidential Information Protection and Statistical Efficiency Act, Pub. Law No. 107-347, Title V, protects information collected for statistical purposes from improper disclosure and requires agencies to ensure that the information is not used for nonstatistical purposes, including disclosure under FOIA. Recognizing confidentiality concerns even when information is provided in the aggregate, agencies, such as the U.S. Census Bureau, will not publicly disclose production statistics if individual company’s information can be reasonably ascertained. EPA should similarly retain specific company information confidential. Nor does EPA provide any examples of where monthly volume production and co-product production are revealed in information that is filed with the U.S. Security Exchange Commission in their annual 10-K and quarterly 10-Q reports in the company’s overview or on their public websites. In any event, the waiver by one company cannot waive the CBI for another.

C. At Most, EPA Should Only Provide Producer Volume Information in the Aggregate and at the Level of the PADD.

Again, NBB agrees that more transparency may be warranted, but does not agree that the information EPA proposes to provide and the form it proposes to do so does not reveal CBI. NBB is aware that numerous companies have asserted the information to be CBI, and thus, that some parties have not claimed CBI or have requested information does not waive the CBI claims of all parties. Indeed, even if EPA only discloses the names of those companies that have expressly waived or waived their claims by default, such information can still undermine the CBI claims of those companies that have not made such a waiver and whose names EPA agrees not to disclose. “Whenever the claims of two or more businesses apply to the same information, the EPA legal office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).” 40 C.F.R. § 2.205(d)(3). EPA also should make clear that, to the extent it determines the information can be disclosed, any such determination is limited to the

specific information being disclosed and will have no effect on any other information submitted by biodiesel producers under the RFS.

For all the reasons provided above, NBB opposes release of producer information on a facility by facility level, much less on a batch level. Instead, EPA should provide the information on RIN generation and by feedstock and production process in the aggregate based on PADD. This would provide the public with information as to where the fuel is being produced and in what quantities without unduly revealing CBI of any particular facility. While EPA may consider releasing the information on a state or small level, given that facilities are spread out and there are few facilities, if any, in certain states, the PADD level provides EPA with more opportunity to ensure that the information provided would not reveal facility specific information for those states or regions that have few facilities producing the particular fuel or using a particular feedstock.

XVI. EPA'S REGULATORY FLEXIBILITY ACT REVIEW IS INADEQUATE AND ITS DETERMINATION THAT THE PROPOSAL WILL NOT HAVE SIGNIFICANT ECONOMIC IMPACTS ON SMALL PRODUCERS IS ARBITRARY.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis for a rule that will have a significant impact on a substantial number of small entities. But, EPA only lists small petroleum refineries (less than 1500 employees) as potentially affected by this regulation to find that "this action will not have a significant economic impact on a substantial number of small entities." 78 Fed. Reg. at 12,205. EPA goes on to state that this action will not impose any requirements on small entities, and that "[w]e continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts." *Id.* EPA, however, fails to provide the "factual basis for such certification" as required under the Regulatory Flexibility Act. 5 U.S.C. § 605(b).

To support a certification that the proposal will have no significant economic impacts on small entities, EPA must do more than make mere conclusory statements. It must consider which small entities will be affected, whether adequate economic data have been obtained, and the economic implications/impacts of the proposal, including any uncertainties with the data. *See Small Business Administration Office of Advocacy, The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act*, at 6-8 (Oct. 2010), available at http://www.sba.gov/sites/default/files/RFA_in_a_Nutshell2010.pdf.

A certification must include, at a minimum, a description of the affected entities and an estimate of the cost of the impacts that clearly justifies the "no impact" certification. The agency's reasoning and assumptions underlying its certification should be explicit in order to obtain public comment and thus receive information that would be used to re-evaluate the certification. Clearly, an agency should identify the scope of the problem and the impact of the solution on affected entities before moving forward with a regulatory proposal.

Id. at 7. EPA’s certification is arbitrary and fails to comply with the requirements of the Regulatory Flexibility Act. *See N. Carolina Fisheries Ass’n v. Daley*, 16 F. Supp. 2d 647, 651-53 (E.D. Va. 1997) (finding unsupported certification that rule did not have a significant economic impact in violation of Regulatory Flexibility Act).

It is perhaps telling that EPA’s proposal only identifies small “petroleum refineries” for purposes of its Regulatory Flexibility Act review. But, just above, EPA identifies 485 respondents and 192,270 burden hours.³⁷ Moreover, the whole purpose of the rule is to allow small *renewable fuel* producers to have an avenue to be active in the market again. As explained earlier in these comments, it is likely that small producers will be “required” to participate in a Q-A-P A under EPA’s proposal in order to provide additional markets for their RINs. Thus, it is clear that the rule will have an impact on small producers, and EPA must consider these impacts.

Again, EPA’s Q-A-P Proposal appears to be addressing the unfounded complaints of the petroleum sector rather than addressing the concerns of small renewable fuel producers. That EPA is confused as to the purposes of establishing an affirmative defense is illustrated by its discussion with respect to its Regulatory Flexibility Act review. EPA states:

While this voluntary program *could be beneficial for both larger and smaller refineries it could be particularly beneficial for smaller petroleum refineries* if they choose to participate. In the current climate, *these smaller producers* have been forced to offer their RINs at a significant discount relative to RINs from larger producers, assuming they can find obligated parties or distributors willing to purchase them at all. While there will be some cost to opt into the program, we believe these costs will be offset by leveling the playing field between larger producers and small producers, allowing small producers to effectively compete in the market.

78 Fed. Reg. at 12,205 (emphasis added). Even if the reference to small “petroleum” refineries was merely a typographical error that was merely overlooked, it illustrates the minimal analysis EPA has undertaken to understand the potential impacts of the rule on small producers. It provides no support for its belief that these costs will be offset, and, as NBB explains above, we believe that the RIN replacement mechanism will be the key cost consideration for Option A, yet EPA provides no analysis of its potential costs. EPA’s purported belief is further belied by the fact that a larger producer that can utilize a Q-A-P B likely can sell their RINs at a lower cost, making small producers unable to compete. There is no support in the record or otherwise to assert that obligated parties will suddenly start paying higher prices for A-RINs if they can meet their mandates with B-RINs.

Thus, EPA must analyze the potential impacts of the proposal on small producers as required by the Regulatory Flexibility Act. The Regulatory Flexibility Act requires EPA to include a description of “any projected increase in the cost of credit for small entities.” 5 U.S.C.

³⁷ NBB questions the total costs estimated by EPA as a result of the QAP Proposal, but EPA provides no explanation for its analysis.

§ 603(d)(1)(A). EPA's proposal fails to provide any analysis of the potential costs of the Q-A-P program, particularly with respect to the Option A RIN replacement mechanism requirement. NBB continues to believe such costs will be significant, even with EPA's proposed cap. The Regulatory Flexibility Act also requires that agencies consider alternatives that will achieve the agency's goal while minimizing the burden on small entities. 5 U.S.C. § 603(c), (d)(1)(B). EPA's Q-A-P Proposal does not consider alternatives to its three-tier system nor does it adequately consider alternatives to the RIN replacement mechanism for Option A.

NBB understands there are many variables when assessing markets, and EPA cannot predict whether obligated parties will, in fact, purchase "A-RINs" and from whom. However, EPA's proposal must at least explain the potential adverse consequences of its proposal so that the public can fully understand its impacts. The Regulatory Flexibility Act requires a meaningful opportunity for the public to comment on regulations that will have a significant impact on small entities.³⁸ 5 U.S.C. § 609(a). Moreover, even if EPA could contend that the rule would not have a "significant" impact, it may use its discretion to coordinate with the Small Business Administration and small entity representatives for any rule that "may have a greater than de minimis impact on a substantial number of small entities." 5 U.S.C. § 609(c). Surely that is the case here, and calls for EPA to utilize its discretion to meet with small business concerns and understand the potential impacts of the rule. EPA has failed to meet its obligations under the Regulatory Flexibility Act, relying merely on conclusory statements that illustrate only what EPA hopes will occur. That is an insufficient basis to establish an entirely new, extremely complex, and overly burdensome requirement on small producers, and EPA must not rush into an unproven and inadequately analyzed program.

³⁸ EPA is also required to periodically review such rules. 5 U.S.C. § 610.

COMMENTS OF THE NATIONAL BIODIESEL BOARD ON
THE RFS RENEWABLE IDENTIFICATION NUMBER (RIN)
QUALITY ASSURANCE PROGRAM; PROPOSED RULE,
78 Fed. Reg. 12,158 (Feb. 21, 2013)

Docket ID No. EPA-HQ-OAR-2012-0621

APPENDIX A
Proposed Regulatory Language

Part 1 - Proposed revisions to address concerns regarding “date of transfer”

Revise § 80.1428(a)(3) and (6) as follows:

§80.1428 General requirements for RIN distribution

(a) RINs assigned to volumes of renewable fuel.

* * *

(3) An assigned RIN cannot be transferred to another person without **simultaneously** transferring an appropriate volume of renewable fuel to that same person pursuant to §80.1428(a)(4).

(6) Any transfer of ownership of assigned RINs must be documented on product transfer documents generated pursuant to § 80.1453.

(i) The RIN must be recorded on the product transfer document used to transfer ownership of the volume of renewable fuel to another person; or

(ii) The RIN must be recorded on a separate product transfer document transferred to the same person **on the same day** as **on** the product transfer document used to transfer ownership of the volume of renewable fuel.

Revise § 80.1452(c) as follows:

§ 80.1452 What are the requirements related to the EPA Moderated Transaction System (EMTS)?

(c) Starting July 1, 2010, each time any party sells, separates, or retires RINs generated on or after July 1, 2010, all the following information must be submitted to EPA via the submitting party’s EMTS account within five (5) business days of the reportable event. Starting July 1, 2010, each time any party purchases RINs generated on or after July 1, 2010, all the following information must be submitted to EPA via the submitting party’s EMTS account within ten (10) business days of the reportable event. The reportable event for a RIN purchase or sale occurs on the date of transfer **per § 80.1453(a)(4) of ownership of the RIN(s) as indicated on the Product**

Transfer Document for the applicable RIN(s). The reportable event for a RIN separation or retirement occurs on the date of separation or retirement as described in § 80.1429.

- (1) The submitting party's name.
- (2) The submitting party's EPA company registration number.
- (3) The generation year of the RINs.
- (4) The RIN status (Assigned or Separated).
- (5) The D code of the RINs.
- (6) Transaction type (i.e., RIN buy, RIN sell, RIN separation, RIN retire).
- (7) ~~The date of transfer per § 80.1453(a)(4), if applicable~~ *The date of the reportable event.*
- (8) For a RIN purchase or sale, the trading partner's name.
- (9) For a RIN purchase or sale, the trading partner's EPA company registration number.
- (10) For an assigned RIN purchase or sale, the renewable fuel volume associated with the sale.
- (11) Quantity of RINs involved in a transaction.
- (12) The per gallon RIN price or the per-gallon price of renewable fuel with RINs included.
- (13) The reason for retiring RINs, separating RINs, buying RINs, or selling RINs.
- (14) Any additional information that the Administrator may require.

~~(d) All information required under this section shall be submitted on forms and following procedures prescribed by the Administrator.~~ *Alternative method of reporting buy and sell transactions in EMTS. For buyers and sellers of assigned RINs that agree to utilize this alternative reporting method, the reporting requirements of paragraph (c) of this section are modified as follows:*¹

(1) The seller of assigned RINs shall do the following:

- (i) Report the sell transaction in EMTS within five (5) business days of shipping, and;***
- (ii) Indicate that the alternative reporting method is being utilized; and***

¹ This is EPA's proposed new § 80.1452(d). Although NBB agrees more flexibility is needed with respect to reporting of RIN transaction events in the EMTS, these changes may not be needed if the other changes proposed by NBB are made. The alternative method of reporting into the EMTS is due to EPA's interpretation that the date of transfer occurs when the title of the fuel transfers. This has caused problems not just in accounting methods at facilities, but also has raised disputes among parties as to when a RIN must transfer even if payment of the fuel has not yet been made. EPA should not impose an arbitrary timeline that may have an effect on commercial transactions.

(iii) Report the date the renewable volume is shipped in place of the date of transfer (c)(7) in the EMTS sell transaction report; and

(iv) Report a unique identifier and provide a product transfer document (PTD) that meets all requirements of § 80.1453 and that includes the unique identifier agreed upon by the buyer and seller.

(2) The buyer of assigned RINS shall do the following:

(i) Report the buy transaction in EMTS within five (5) business days of receipt;

(ii) Indicate that the alternative reporting method is being utilized;

(iii) Include the unique identifier provided by the seller under paragraph (g)(1)(iii) in the EMTS buy transaction report; and

(iv) Report the date the renewable volume is received in place of the date of transfer (c)(7) in the EMTS buy transaction report.

Revise § 80.1453(a)(4) and (5) as follows:²

(a) On each occasion when any party transfers ownership of renewable fuels or separated RINs subject to this subpart, the transferor must provide to the transferee documents identifying the renewable fuel and any RINs (whether assigned or separated) which include all of the following information, as applicable:

(1) The name and address of the transferor and transferee.

(2) The transferor's and transferee's EPA company registration numbers.

(3) The volume of renewable fuel that is being transferred, if any.

(4) The date of the transfer *of the applicable gallons of renewable fuel*.

(5) ~~[Reserved]~~ *The date of the transfer of the RIN, if different from the date of transfer of the applicable gallons of renewable fuel.*

(6) The quantity of RINs being traded.

(7) The D code of the RINs.

(8) The RIN status (Assigned or Separated).

(9) The RIN generation year.

(10) The associated reason for the sell or buy transaction (e.g., standard trade or remedial action).

² EPA has proposed to revise § 80.1453(a)(5) to require "Name and blend level of all blending components in a product containing renewable fuel, if applicable." NBB believes this proposed revision is unclear and unnecessary for biodiesel or biodiesel blends.

(11) Additional RIN-related information, as follows:

(i) If assigned RINs are being transferred on the same PTD used to transfer ownership of the renewable fuel, then the assigned RIN information shall be identified on the PTD.

(A) The identifying information for a RIN that is transferred in EMTS generically is the information specified in paragraphs (a)(1) through (a)(10) of this section.

(B) The identifying information for a RIN that is transferred in EMTS uniquely is the information specified in paragraphs (a)(1) through (a)(10) of this section, the RIN generator company ID, the RIN generator facility ID, and the batch number.

(C) The identifying information for a RIN that is generated prior to July 1, 2010, is the 38-digit code pursuant to § 80.1425, in its entirety.

(ii) If assigned RINs are being transferred on a separate PTD from that which is used to transfer ownership of the renewable fuel, then the PTD which is used to transfer ownership of the renewable fuel shall include all the following:

(A) The number of gallon-RINs being transferred.

(B) A unique reference to the PTD which is transferring the assigned RINs.

(C) The information specified in paragraphs (a)(11)(i)(A) through (a)(11)(i)(C) of this section, as appropriate.

(iii) If no assigned RINs are being transferred with the renewable fuel, the PTD which is used to transfer ownership of the renewable fuel shall state “No assigned RINs transferred.”.

(iv) If RINs have been separated from the renewable fuel or fuel blend pursuant to § 80.1429(b)(4), then all PTDs which are at any time used to transfer ownership of the renewable fuel or fuel blend shall state “This volume of fuel must be used in the designated form, without further blending.”.

Revise § 80.1460(b) as follows:

§ 80.1460 What acts are prohibited under the RFS program?

(b) RIN generation and transfer violations. No person shall do any of the following:

(4) Transfer to any person a RIN with a K code of 1 without transferring an appropriate volume of renewable fuel to the same person ~~on the same day~~.

Part 2 - Requirements for the Generation of RINs, 40 C.F.R. § 80.1426(a)(1), (c)(1)

EPA's Proposed Revised Language (compared against current regulatory language – proposed deletions shown as strikethrough and proposed additions shown in bold, italics)	NBB Proposed Revised Language
<p>(a) General requirements.—(1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if the fuel:</p> <p>(i) Qualifies for a D code pursuant to § 80.1426(f), or EPA has approved a petition for use of a D code pursuant to § 80.1416; and (ii) is demonstrated to be produced from renewable biomass pursuant to the reporting requirements of § 80.1451 and the recordkeeping requirements of § 80.1454; and (A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at § 80.1454(g) are deemed to be renewable biomass. (B) [Reserved] as otherwise approved by EPA, and is demonstrated pursuant to the reporting requirements of § 80.1451 and the recordkeeping requirements of § 80.1454, or other records maintained by the producer, to be produced in accordance with the applicable pathway.</p> <p><i>(ii) Is designated on a product transfer document (PTD) for use as transportation fuel, heating oil, or jet fuel in accordance with § 80.1453(a)(12); and</i></p> <p>(iii) Was produced in compliance with the registration requirements of § 80.1450, the reporting requirements of § 80.1451, the recordkeeping requirements of § 80.1454, and all other applicable regulations of this subpart M. For renewable electricity, biogas, and any renewable fuel other than ethanol, biodiesel, or renewable diesel, is distributed and sold in accordance with § 80.1426(f)(10), § 80.1426(f)(11), or § 80.1426(f)(12), as appropriate.</p> <p>***</p> <p>(c) Cases in which RINs are not generated. —(1) Fuel producers and importers may not generate RINs for fuel that is not designated or intended for use as transportation fuel, heating oil, or jet fuel <i>does not satisfy the requirements of subsection (a)(1) of this section.</i></p> <p>*****</p>	<p><i>[revised]</i> (a) General requirements.—(1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if the fuel:</p> <p>(i) Qualifies for a D code pursuant to § 80.1426(f), or EPA has approved a petition for use of a D code pursuant to § 80.1416; and</p> <p>(ii) is produced from renewable biomass;</p> <p>(A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at § 80.1454(g) are deemed to be renewable biomass.</p> <p>(B) Feedstocks not deemed to be renewable biomass under subparagraph (A) must be demonstrated to be renewable biomass in accordance with the recordkeeping requirements at § 80.1454(c), (d) or (h).</p> <p>***</p> <p><i>[revised]</i> (c) Cases in which RINs are not generated.—(1) Fuel producers and importers may not generate RINs for fuel that—</p> <p>(i) is not designated for use as transportation fuel, heating oil, or jet fuel in accordance with § 80.1453(a)(12); or</p> <p>(ii) for renewable electricity, biogas, and any renewable fuel other than ethanol, biodiesel, or renewable diesel, is not distributed and sold in accordance with § 80.1426(f)(10), § 80.1426(f)(11), or § 80.1426(f)(12), as appropriate.*</p> <p>*****</p> <p>*This assumes proposed revisions to § 80.1453(a)(12) and § 80.1426(f) are finalized. In the event these revisions are finalized, EPA also must make conforming changes to cross-references to current (f)(12).</p>

Part 3 - Definition of “non-ester renewable diesel” (40 C.F.R. § 80.1401)

EPA Proposed Revised Definition (added language to existing definition in bold, italics):

Non-ester renewable diesel, also known as renewable diesel, means renewable fuel which is all of the following:

- (1) A fuel which can be used *at a blend level approved under 40 CFR Part 79* in an engine designed to operate on conventional diesel fuel, or be heating oil or jet fuel.
- (2) Not a mono-alkyl ester.

NBB Proposed Revised Definition:

Non-ester renewable diesel, also known as renewable diesel, means renewable fuel which:

- (1) Is not a mono-alkyl ester;
- (2) Can be used in an engine, boiler or similar equipment designed to operate on conventional diesel fuel; and
- (3) is
 - (A) A transportation fuel that meets the ASTM D 975 Grade No. 1 or No.2-D, and that are homogeneous hydrocarbons;
 - (B) Used as or blended with a heating oil, so long as the finished fuel meets the requirements of ASTM D 396, or
 - (C) Used as or blended with jet fuel, so long as the finished fuel meets the requirements of an applicable ASTM standard.*

*As EPA notes, all other fuels that meet the current definition of renewable diesel could be referred to as viscous non-ester renewable diesel and would be subject to the special conditions related to the distribution and sale of renewable fuel that is not typically sold for use in or as transportation fuel, heating oil or jet fuel. Any other fuel that purports to be “renewable diesel” also must undergo the appropriate lifecycle analysis or be covered by a petition approved under § 80.1416 to generate RINs.



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November 8, 2012

Via Electronic Filing

Air and Radiation Docket
Environmental Protection Agency
Mailcode: 6406J
1200 Pennsylvania Avenue NW.
Washington, DC 20460

ATTN: Docket ID No. EPA-HQ-OAR-2012-0223

Re: Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard and Diesel Sulfur Programs, Proposed Rule, 77 Fed. Reg. 61,313 (Oct. 9, 2012); Direct Final Rule, 77 Fed. Reg. 61,281 (Oct. 9, 2012)

Dear Sir or Madam:

The National Biodiesel Board (“NBB”) appreciates the opportunity to offer comments on EPA’s proposed Modifications to Renewable Fuel Standard and Diesel Sulfur Programs. 77 Fed. Reg. 61,313 (Oct. 9, 2012). The proposed rule, among other things, would amend the definition of “heating oil” in the regulations implementing the Renewable Fuel Standard (“RFS” or “RFS2”) program at 40 C.F.R. § 80.1401.¹ On the same day the proposed rule was published, EPA also published a direct final rule that is intended to go into effect on December 10, 2012, unless EPA receives “adverse comment” on the proposed rule. 77 Fed. Reg. 61,281, 61,281 (Oct. 9, 2012). Although EPA has indicated that “[t]his amendment will not modify or limit fuel included in the current definition of heating oil,” *id.*, NBB is concerned that language in the proposed rule and direct final rule has created extensive confusion within the industry regarding the ability to generate Renewable Identification Numbers (“RINs”) for biodiesel and biodiesel blends used as “heating oil.”

¹ EPA is also amending (a) the requirements under EPA’s diesel sulfur program related to the sulfur content of locomotive and marine diesel fuel produced by transmix processors and (b) the fuel marker requirements for 500 ppm sulfur locomotive and marine (LM) diesel fuel. NBB takes no position on these amendments.

NBB is also concerned that the heavier fuel oils that EPA has now included in the definition of “heating oil” do not have the same fuel quality control standards as those fuels that currently are eligible as heating oil.

Because of the above concerns, NBB requests that EPA withdraw the direct final rule, and to the extent necessary, issue a new proposal and final rule that provides much needed clarification as to how EPA defines “heating oil.”

NBB is the national trade association representing the biodiesel industry as the coordinating body for research and development in the United States, founded in 1992. NBB is a comprehensive industry association which coordinates and interacts with a broad range of cooperators, including industry, government and academia. NBB’s membership is comprised of state, national and international feedstock and feedstock processor organizations, biodiesel suppliers, fuel marketers and distributors and technology providers.

In 2010, EPA, in response to comments by NBB requesting clarification to ensure that biodiesel used in heating oil applications is eligible for generation of RINs as biomass-based diesel, confirmed that it read the term “home heating oil” to apply broadly to “all fuel of a type that can be used in homes” and that such term “is typically used interchangeably in industry with heating oil, heating fuel, home heating fuel, and other terms depending on the region and market.” EPA, Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, EPA-420-R-10-003, at 3-38 to 3-41 (2010) (“EPA RFS2 RTC”). As EPA has recognized, biodiesel can replace diesel fuel in numerous applications, both on-road and off-road. In particular, neat biodiesel and biodiesel blends can be used as heating oil for use in homes, but also has been used in lieu of petroleum based heating oil “in furnaces, boilers, stationary diesel engines, and similar applications” in industrial settings. 77 Fed. Reg. at 61,316-61,317; 77 Fed. Reg. at 61,284. In such cases, there is no distinction between biodiesel used as heating oil to produce heat for warmth or to produce process heat/power generation. EPA’s RFS2 regulations similarly do not distinguish these uses for those fuels that meet the definition in § 80.2(ccc). Thus, NBB requests that EPA confirm its position in the RFS2 final rule that biodiesel used “to replace or reduce the quantity of fossil fuel present in . . . heating oil,” 40 C.F.R. § 80.1401, in industrial “furnaces, boilers, stationary diesel engines, and similar applications” can generate RINs, regardless of whether the boiler, furnace, stationary diesel engine or similar application is used for the purpose of generating space heat or process heat/power.

In short, the proposed rule seeks to amend the RFS2 definition of home heating oil, a term which EPA has described as “ambiguous.” This ambiguity has resulted in market confusion, which has been amplified by the proposed rule and is stifling the development of a domestic advanced biofuels industry. Additionally, the amended definition may permit fuels without fuel quality standards to generate RINs. These fuels could have an adverse impact on consumers.

I. EPA's Proposed Addition of Other Fuel Oils to the Definition of "Heating Oil" Does Not Include Any Fuel Quality Control Standards.

In the direct final rule, EPA indicated that it was amending the definition of "heating oil" to "expand the scope" of renewable fuels that can generate RINs as heating oil to include "fuel oil produced from qualifying renewable biomass that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities." 77 Fed. Reg. at 61,281. EPA further states that it is not intending to revise the scope of heating oils covered under the existing definition, which incorporates the definition of "heating oil" in Section 80.2(ccc). *Id.* To those ends, EPA's amended definition would provide:

Heating oil means either of the following:

(1) A #1, #2, or non-petroleum diesel meeting the definition set forth in § 80.2(ccc); or

(2) A fuel oil that, pursuant to §§ 80.1450(b)(1)(ix) and (d)(4), 80.1451(b)(1)(ii)(T), 80.1453(d) and 80.1454(b)(7), is demonstrated to be used to heat interior spaces of homes or buildings to control ambient climate for human comfort, is capable of flowing at 60 degrees Fahrenheit and 1 atmosphere of pressure, and is not used for any other purpose.

77 Fed. Reg. at 61,294. Because EPA is not intending to change the scope of the existing definition, biodiesel continues to fall under the first part of this definition, which references Section 80.2(ccc), and thus, NBB understands the amendment does not change the current eligibility of biodiesel to generate RINs as "heating oil" and does not impose any new requirements on biodiesel producers. See 77 Fed. Reg. at 61,319 ("These proposed [registration, recordkeeping, product transfer document, and reporting] requirements would not apply to fuels qualifying under existing 40 CFR 80.2(ccc) of the regulations.").

However, NBB is concerned that the undefined term "fuel oils" in paragraph (2) may allow substances used as fuels that are not otherwise subject to industry standards under Section 80.2(ccc) to qualify as heating oil.² The fuels listed in paragraph (1) are "fuel oils,"³ but to qualify as "heating oil" under Section 80.2(ccc), these "#1" and "#2" oils must meet certain industry standards. See, e.g., 40 C.F.R. §§ 80.2(fff) (defining #1D as meaning the distillate fuel classification relating to "No. 1-D" diesel fuels as described in ASTM D 975), 80.2(ggg) (defining #2D as distillate fuel classification relating to "No. 2-D" diesel fuels as described in ASTM D 975). In addition, by definition biodiesel must meet the ASTM standard D 6751, 40 C.F.R. § 80.1401, but to be "commercially known or sold as heating oil," it may also be blended to meet ASTM standard D 396. 40 C.F.R. § 80.2(ccc).

² Section 80.2 does not define "fuel oil."

³ Fuel oils include distillates and residual fuels. ASTM has classified at least six types of fuel oils.

EPA indicates that it is expanding its definition because these fuels “are not #1 or #2 diesel and do not contain at least 80 percent mono-alkyl esters.” 77 Fed. Reg. at 61,317. EPA explains that “the expanded definition would include heavier types of fuel oil with larger molecules.” *Id.* at 61,318. While NBB understands these fuel oils will be subject to additional registration, recordkeeping and reporting requirements, EPA’s definition appears to lack reference to any industry standard. Thus, this may allow low quality fuels that would not otherwise fall under paragraph (1) of the definition, because they do not meet the requirements in Section 80.2(ccc), such as the applicable ASTM standards, to now generate RINs under paragraph (2). Because fuel quality and performance is of paramount concern to customers, NBB and the biodiesel industry have worked hard to develop industry wide standards and quality performance programs that ensure the quality of biodiesel sold to consumers. NBB is especially concerned that the incentives to generate RINs under this program may result in backyard and unqualified producers selling fuel of any quality as “heating oil,” adversely affecting the consumer, thereby casting a negative perception of quality on all renewable fuels especially biodiesel.

Moreover, even if the definition is limited to heavier fuel oils, such fuel oils should similarly be held to an industry standard to ensure that quality fuels are being sold in the marketplace. Biodiesel should not be placed at a disadvantage if these fuel oils are able to be produced with no system of controlling fuel quality, while biodiesel producers are subject to a higher standard. This is particularly true when the renewable fuel oil is to be blended with petroleum-based fuel oils, which is not precluded under paragraph (2). Petroleum refiners often use lesser quality products as fuel oil where there is less regulation. This can be seen in the sludge that builds up in underground storage tanks that store fuel oil over time. These fuel oils have not been subjected to the same health effects testing that biodiesel (as a transportation fuel) has undergone. Thus, EPA may be allowing these newly proposed fuels to enter the marketplace with unknown fuel quality and unknown health characteristics. EPA should consider its authority to require such health effects testing for these new fuel oils and, at a minimum, inform the public as to these potential issues.

Furthermore, NBB is concerned with EPA’s assumption that the differences between heavier fuel oils and those already approved as heating oil would “have no real impact on the energy used or the GHG emissions associated with converting the biomass into a different fuel product.” 77 Fed. Reg. at 61,286. EPA further contends that “EPA believes the prior life cycle analysis for heating oil support applying the existing pathways for fuel oil in the RFS2 regulations to the expanded definition of heating oil.” *Id.* Clearly, we understand how difficult and time consuming the life cycle analysis has become, given all the feedstocks and fuels that may eventually qualify for the program. However, the Clean Air Act requires the factual data on which the proposed rule is based and the methodology used in obtaining the data and in analyzing the data. 42 U.S.C. § 7607(d)(3). In this case, EPA merely provides a general summary of its analysis, and does not give the public sufficient information to meaningfully participate. Additionally, EPA does not provide any information in the administrative docket for the rule, merely referencing EPA’s prior lifecycle analysis. Given the information provided and

without understanding the fuels that EPA is considering, the public cannot analyze whether EPA's conclusions are reasonable or supported.

Thus, NBB requests EPA revise the definition and reissue it for public comment, so that the public can have a meaningful opportunity to participate in the rulemaking. Because EPA does not provide adequate information as to the fuels which it believes will or could qualify under the revised definition,⁴ NBB cannot determine whether this rule is noncontroversial. 77 Fed. Reg. at 61,283.

While NBB generally supports EPA's efforts to expand the availability of renewable fuels eligible to generate RINs under the program and agrees that Congress intended home heating oil to be broadly applied to commercial and industrial applications, NBB is concerned with the proposed modifications to the definition of "heating oil," as described above, and thus asks EPA to treat this as an adverse comment.

II. Biodiesel Used as or Blended With Heating Oil Qualifies for Generation of RINs Whether Used for Heating Spaces or Process Heat/Power Generation.

A. EPA's amended definition of "Heating Oil" and support thereof has caused great confusion in the industry.

EPA has defined home heating oil with respect to biodiesel⁵ under the RFS2 to refer to the type of fuel that could be used in homes, not based on the actual use of that fuel in homes. EPA did so in recognition that this type of fuel has other applications outside of residential homes, including industrial applications in furnaces, boilers, stationary diesel engines, and similar applications, and that limiting the term would require the complex undertaking of tracking of the fuel's actual use and would not further the purposes of the Act to promote the use of renewable fuel.

Under paragraph (2) of the proposed new definition of "heating oil," EPA has limited the fuels eligible to those "that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities." 77 Fed. Reg. at 61,281. EPA also states that "[f]uel oils used to generate process heat, power, or other functions will not be included in the amended definition." *Id.* As EPA recognizes, fuel oils outside of the definition in Section 80.2(ccc) are heavier fuel oils that would not have the same physical characteristics of heating oil used in homes. Moreover, they are not typically considered in the marketplace as "heating oil." Because heavier fuel oils are not generally considered of the type of heating oils

⁴ EPA states that "we have received a number of requests from producers to consider expanding the scope of the home heating oil provision to include additional fuels oils that are produced from qualifying renewable biomass but do not meet the regulatory definition of heating oil." 77 Fed. Reg. at 61,317. Thus, EPA has at least some idea as to the types of fuel oils it expects to fall under this definition. The proposed rule and direct final rule, however, lack any detail with respect to such fuels.

⁵ Section 80.2 also applies to renewable fuels meeting the ASTM standards for #1 and #2 fuel oils.

used in homes, to the extent inclusion of such fuels otherwise comply with the statute, EPA properly is limiting the uses of these fuels for the purposes of heating.⁶ 77 Fed. Reg. at 61,317.

EPA further states, however, that it is not intending to revise the scope of heating oils covered under the existing definition, which incorporates the definition of “heating oil” in Section 80.2(ccc). 77 Fed. Reg. at 61,281; *see also id.* at 61,284 (“The amendment will not modify or limit fuel included in the current definition of heating oil at 40 CFR 80.2(ccc).”). As such, NBB understands that the paragraph (1) of this definition continues to allow biodiesel producers to generate RINs (or to not require retirement of RINs) where the biodiesel is used as heating oil or replaces the petroleum content of heating oil in industrial applications for any purpose, not simply “to heat interior spaces.”

Notwithstanding, EPA’s rationale for its restriction in paragraph (2) for “fuel oil[s]” is that “these fuels are not within the scope of ‘home heating oil’ as that term is used in the Energy Independence and Security Act of 2007 (‘EISA’), for the RFS program.” 77 Fed. Reg. at 61,284. EPA states that the “fuel oil must only be used in heating applications, where the sole purpose of the fuel’s use is for heating and not for any other combined use such as process energy use.” *Id.* Again EPA follows this statement with the assurance that “[t]his is in addition to the fuel oils currently included in the definition of heating oil at 40 CFR 80.2(ccc), and will not modify or limit the fuel included in the current definition.” *Id.* EPA then states that, while recognizing that the fuel oils meeting the definition of Section 80.2(ccc) also “could end up being used for other purposes,” the ability to generate RINs “will likely lead to their use for heating of buildings, and not for generation of process heat.” 77 Fed. Reg. at 61,319. These statements regarding fuels meeting the definition of heating oil in Section 80.2(ccc) appear to contradict those EPA made in support of the RFS2 rule and in response to comments. As such, these statements have caused considerable confusion within the industry, and NBB requests that EPA confirm that Paragraph (1) of the amended definition incorporating Section 80.2(ccc) continues to include biodiesel and such biodiesel could be “used to generate process heat, power, or other functions” in addition to heating spaces “to control ambient climate for human comfort.”

Simply put, biodiesel, either B100 or B99, or any other blend of biodiesel⁷ with heating oil, generates RINs when used as a heating oil or replaces for the petroleum content in heating oil -- as defined in Section 80.2(ccc). In essence, biodiesel is heating oil or fuel oil or home heating oil. The direct final rule states:

The existing definition of heating oil at 40 CFR 80.2(ccc) means “any #1, #2, or non-petroleum diesel blend that is sold for use in furnaces, boilers, stationary diesel engines, and similar

⁶ “[S]ome heating oils that meet the current definition could end up being used for other purposes. However, in all cases the heating oil under the current definition has to have the physical or other characteristics that tie it to the type of fuel oil used to heat homes.” 77 Fed. Reg. at 61,319. Such is not the case with the other fuel oils that might fall under paragraph (2) of the proposed amended definition.

⁷ ASTM D6751.

applications and which is commonly or commercially known or sold as heating oil, fuel oil, or similar trade names, and that is not jet fuel, kerosene, or [Motor Vehicle, Non-Road, Locomotive and Marine (MVNRLM)] diesel fuel.” The existing definition of non-petroleum diesel at 40 CFR 80.2(sss) means a diesel fuel that contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats. Thus, in order to generate RINs for home heating oil that is a nonpetroleum diesel blend, the fuel must contain at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, as well as meeting all other requirements of the RFS2 regulations.

77 Fed. Reg. at 61,284. Thus, the existing definition of heating oil at 40 C.F.R. § 80.2(ccc), which is incorporated by reference in the RFS2 regulations, is the definition of B100 or B99, which in the simplest of terms means that ASTM D6751 biodiesel meets the definition of heating oil under the RFS2 regulations.

- B. EPA’s prior interpretation of “Home Heating Oil” with respect to biodiesel included industrial uses for process heat and power generation, not simply “heating” of spaces.

As EPA has previously recognized, the definition of heating oil under § 80.2(ccc) makes no distinction between industrial and residential uses. Nor does it make a distinction between different industrial uses. EISA included “home heating oil” as “additional renewable fuel” that could qualify to generate credits (i.e., RINs) under the RFS2 program. 42 U.S.C. § 7545(o)(1)(A), (5)(E). In promulgating its regulations implementing the EISA amendments in 2010, EPA noted that EISA “does not clarify whether the term should be interpreted to refer only to heating oil actually used in homes, or to all fuel of a type that can be used in homes,” noting the term “‘home heating oil’ is typically used in industry in the latter manner, **to refer to a type of fuel, rather than a particular use of it.**” 75 Fed. Reg. 14,670, 14,687 (Mar. 26, 2010) (emphasis added).⁸ The RFS2 regulations define renewable fuel to include “fuel that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel, heating oil, or jet fuel.” 40 C.F.R. § 80.1401. EPA then incorporated the definition of “heating oil” in 40 C.F.R. § 80.2(ccc). Under that definition, heating oil includes “any #1, #2, or non-petroleum diesel blend that is sold for **use in furnaces, boilers, stationary diesel engines, and similar applications and which is commonly or commercially known or sold as heating oil, fuel oil, and similar trade names**, and that is not jet fuel, kerosene, or MVNRLM diesel fuel.”⁹ 40 C.F.R.

⁸ The term is “typically used interchangeably in industry with heating oil, heating fuel, home heating fuel, and other terms depending on the region and market.” 75 Fed. Reg. at 14,687.

⁹ EPA’s proposed rule and direct final rule state that the existing definition of heating oil at 40 C.F.R. § 80.2(ccc) “means ‘any #1, #2, or non-petroleum diesel blend that is sold for use in furnaces, boilers, stationary diesel engines, and similar applications and which is commonly or commercially known or sold as heating oil, fuel

§ 80.2(ccc) (emphasis added).¹⁰ This regulatory definition does not distinguish among the different uses of heating oil in an industrial setting, referring only to use in “furnaces, boilers, stationary diesel engines, and similar applications” and relying on industry’s usage of the term. Industrial use of heating oil includes use to generate process heat or power generally. As such, the final RFS2 regulations, as written, provide for the generation of RINs with respect to biodiesel designated for use as or used as heating oil “in furnaces, boilers, stationary diesel engines, and similar applications,” even when used to generate process heat or power.

EPA’s own interpretation of the definition of heating oil in § 80.2(ccc) confirms that it includes industrial uses of fuel oils (including biodiesel) in “furnaces, boilers, stationary diesel engines, and similar applications” generally, including uses to power a facility. EPA first defined “heating oil” as part of its regulation of air emissions from nonroad diesel engines and fuel, which included limitations on sulfur content in diesel fuel used in certain applications. 69 Fed. Reg. 38,958, 39,167 (June 29, 2004). Because EPA did not regulate heating oil under these regulations, EPA was distinguishing heating oil (among others) to “prevent the inappropriate use of these other fuels” in nonroad diesel engines. *Id.* at 39,041. In promulgating the definition of “heating oil,” EPA recognized that heating oil could be used for industrial purposes, and it is well understood that industrial uses of heating oil is not limited to heating an area for

oil, and similar trade names, and that is not jet fuel, kerosene, or [Motor Vehicle, Nonroad, Locomotive, and Marine (MVNRLM) diesel fuel.” 77 Fed. Reg. at 61,316-61,317 (emphasis added). The phrase “stationary diesel engines” was included in the initial version of the definition, 40 C.F.R. §80.2(ccc)(2004), and in the definition in effect when EPA promulgated the final RFS2 regulations in March of 2010. However, the definition was amended in April 2010 (effective June 2010) and, with no explanation, no longer included that phrase. 75 Fed. Reg. 22,896, 22,968 (April 30, 2010). Although the new definition was in effect prior to the new RFS2 regulations becoming effective on July 1, 2010, EPA provided no notice that it intended to revise the definition in 80.2 with respect to the RFS2 regulations. Thus, EPA’s incorporation of Section 80.2(ccc) by reference was to the version in effect in March 2010, and, consistent with EPA, we reference that definition throughout these comments. NBB further notes, however, that EPA provided no explanation for the removal of the phrase “stationary diesel engine,” and the removal of this term appears to be inadvertent, and, more important, unrelated to the RFS2 program. As such, its removal is irrelevant to whether heating oil can also be used in these applications for process heat or power generation. Moreover, EPA provided no notice that it was incorporating in Section 80.1401, any amendments to Section 80.2. Regardless, NBB does not believe the removal of the term reflects a substantive change with respect to the RFS2 program, as use in stationary diesel engines, among other things, clearly would be considered a “similar application.” As reflected in the proposed and direct final rules, EPA continues to consider the definition to include use of heating oil in stationary diesel engines, as it applies to the RFS2. Thus, the uses of biodiesel in industrial applications, such as in furnaces, boilers, stationary diesel engines, and similar applications, would fall under Section 80.2(ccc), under either version of the definition.

¹⁰ “MVNRLM diesel fuel means any diesel fuel or other distillate fuel that meets the definition of motor vehicle (MV) or nonroad, locomotive, or marine (NRLM) diesel fuel. Motor vehicle diesel fuel, NRLM diesel fuel, NR diesel fuel, and LM diesel fuel are subcategories of MVNRLM diesel fuel.” 40 C.F.R. § 80.2(qqq). Because biodiesel has many applications, NBB understands the phrase “that is not jet fuel, kerosene, or MVNRLM diesel fuel” to apply to the particular gallon of biodiesel or the biodiesel blend being used as heating oil and, thus, not being used or intended for use as MVNRLM diesel fuel. *In its comments on the RFS2 proposed rule, NBB requested confirmation that any biodiesel for which EPA has approved a pathway, regardless of its ultimate use, generate RINs for biomass-based diesel. EPA did not dispute this understanding.* EPA RFS2 RTC at 3-38 to 3-41.

warmth.¹¹ Industrial boilers, for example, are combustion devices used to produce steam or heat water, which can provide heat to an area or power to a machine. EPA so recognized when it explained that it was not regulating “No. 1 or No. 2 distillate fuel [(i.e., heating oil)] used for stationary source purposes, **such as to power stationary diesel engines, industrial boilers, or for heating.**” *Id.* (emphasis added). Moreover, using heating oil in boilers or furnaces for the generation of process heat or to generate power is, at a minimum, a “similar application” for its use in boilers or furnaces for the heating of a room.¹²

In the RFS2 rule, in confirming that “home heating oil” was not limited to uses in residential homes, the only distinction EPA made in explaining its use of the broader definition of “heating oil” in 40 C.F.R. § 80.2(ccc) was that the fuel must be *capable of use* as heating oil in homes. It is undisputed that biodiesel can be used, and, in fact, is used for heating of homes. For example, Bioheat® is traditional home heating oil blended with biodiesel that is sold for heating of homes. See Bioheat, Bioheat Basics, <http://www.bioheatonline.com/about-bioheat/>. Thus, while biodiesel is not currently used in jet fuel, it cannot be disputed that biodiesel is “actually blended in heating oil or jet fuel, or is a fungible fuel with them in the marketplace and capable of being used in similar equipment.”¹³ EPA RFS2 RTC at 3-41. Biodiesel is “a fuel that meets the marketplace requirements for the type of fuel referred to as heating oil.” *Id.*

In incorporating the definition in 40 C.F.R. § 80.2(ccc), therefore, EPA expressly provided that biodiesel used for process heat constitutes “heating oil” and, thus, qualifies to generate RINs under the RFS2 program. This makes sense given the inclusion of additional renewable fuels for the generation of RINs to the RFS program by EISA and retention of the provision that EPA provide “for the generation of an appropriate amount of credits for biodiesel.” 42 U.S.C. § 7545(o)(5)(A)(ii).¹⁴

¹¹ Indeed, it would be inefficient for a large industrial plant to use boilers or furnaces solely for purposes of heating spaces.

¹² NBB believes that “similar application” is more properly interpreted to mean other types of heating systems at stationary sources, aside from boilers and furnaces. For example, many industrial boilers using natural gas are equipped with backup fuel oil systems, complete with heaters, storage and feed systems that could be used with biodiesel. See generally Susanne Retka Schill, *New policies for GHG reduction open new biodiesel markets*, Biodiesel Magazine, Nov. 20, 2009, available at <http://www.biodieselmagazine.com/articles/3862/new-policies-for-ghg-reduction--open-new-biodiesel-markets>. Nothing in the definition, however, excludes the use of heating oil for a facility’s process heat or power needs.

¹³ For example, in its response to comments on the RFS2 rule, EPA recognized that co-products of a corn ethanol process, such as dewatered distillers solubles, may also be used to displace heating oil for the generation of process heat in the ethanol production facility. EPA RFS2 RTC at 3-42. Unlike biodiesel, however, EPA noted that it did “not believe that this product could be sold commercially as heating oil, and thus may not be valid for the generation of RINs.” *Id.*; see also *id.* at 3-41 (noting “other types of fuel, such as wood, wood pellets, and biogas that are today used to heat homes **and provide energy to businesses but which are not capable of blending into heating oil or replacing it in similar equipment** would not get credit under the RFS2 program for those heating applications”) (emphasis added). *If RINs could not be generated for heating oil used to generate process heat, EPA could, and should, have easily said so in response to these comments.*

¹⁴ EPA may contend that the retention of this provision was in recognition of EPA’s use of “equivalence values” to allow biodiesel to generate 1.5 RINs to the physical gallon. 72 Fed. Reg. 23,900, 23,919 (May 1, 2007).

Indeed, at the time of the EISA amendments, biodiesel was one of the few (if not only) renewable fuels being considered as a replacement for heating oil. See Bioheat, *Bioheat Tech Overview*, <http://www.bioheatonline.com/bioheat%2%ae-tech-overview/> (noting endorsement of use of biodiesel in heating oil products in 2006); LECG, LLC, *Statewide Feasibility Study for a Potential New York State Biodiesel Industry*, Final Report 04-02 Prepared for the New York State Energy and Research Development Authority, at 108-109 (June 2003) (EPA-HQ-OAR-2005-0161-0783) (describing ongoing efforts of heating oil industry and NBB in expanding use of biodiesel). There are a number of real world examples where biodiesel was (and continues to be) used to replace diesel fuels or heating oil. One significant example is use of biodiesel for electrical generation, which illustrates the benefits Congress sought in seeking to expand and solidify the inclusion of biodiesel in the RFS2 program. See Section III.C. below.

Thus, EPA's interpretation of "home heating oil" under the EISA, as it applies to biodiesel (and fuels meeting the definition in Section 80.2(ccc)), was not limited to heating of spaces, but also applies to use of biodiesel and biodiesel blends in industrial settings for process heat and power generation. As such, the existing definition of "heating oil" under the RFS2 regulations, which incorporates the definition in Section 80.2(ccc), allows biodiesel producers to generate RINs, regardless of the ultimate use of that biodiesel (e.g., transportation fuel or heating oil).

- C. Generation of RINs for biodiesel sold for use by stationary sources is consistent with the purposes of the statute, as previously determined by EPA.

Since establishment of the RFS in 2005, Congress has sought the promotion of biodiesel production and use in the United States. See, e.g., 42 U.S.C. § 7545(o)(5)(A)(ii) (requiring EPA provide "for the generation of an appropriate amount of credits for biodiesel"). It further solidified these goals by establishing the advanced biofuel and biomass-based diesel mandates. See 42 U.S.C. § 7545(o)(1)(B)(ii)(IV), (D) (defining advanced biofuel to include biomass-based diesel and biomass-based diesel to include biodiesel). EISA also expanded the RFS program beyond use in motor vehicles to include non-road applications, and allowed renewable fuel "that is used to replace or reduce the quantity of fossil fuel present in home heating oil ..." to be included in the program. 42 U.S.C. § 7545(o)(1)(A). This evidences Congress' intent to have a specific, and increasing, "renewable diesel standard" within the overall RFS.¹⁵

EPA recognized the goals of Congress to expand the use of renewable fuels, even in the heating oil industry, in deciding not to limit "home heating oil" to residential uses only. EPA found that "by using the broader industry interpretation of the term 'home heating oil' to refer to all heating oil that could be used in homes, whether or not it ultimately does, the RFS2

But, this is not limited to biodiesel and, thus, the provision clearly provides EPA discretion to recognize the many uses of biodiesel.

¹⁵ Such standard was proposed and supported by then-Senator Obama, who stated that Congress needed to provide "a far stronger signal," referring to the renewable diesel standard as a "small but bold step to create jobs in rural America, strengthen our economic security, and improve air quality." 151 Cong. Rec. S11824-01, S11826-27, 2005 WL 2756528 (Oct. 25, 2005).

program will be greatly simplified for both regulated parties and EPA enforcement personnel, and appropriate credit will be provided for the use of renewable fuels that displace fossil fuels.” EPA RFS2 RTC at 3-221. “This is in keeping both with the GHG reduction and energy security goals of EISA.” *Id.* Including all industrial uses of biodiesel as “heating oil” in “furnaces, boilers, stationary diesel engines, and similar applications” under EPA’s definition, therefore, is also consistent with the purposes of the EISA.¹⁶

As EPA found, “[i]n addition to simplifying implementation and administration of the Act, this interpretation will best realize the intent of EISA to reduce or replace the use of fossil fuels.” 75 Fed. Reg. at 14,687. In recognizing Congress could not have intended “home heating oil” to be limited to use of heating oil in *homes*, EPA found:

Given the fungible nature of the oil delivery market, this would likely be sufficiently difficult and potentially expensive so as to discourage the generation of RINs for renewable fuels used as home heating oil. This problem would be similar to that which arose under RFS1 for certain renewable fuels (in particular biodiesel) that were produced for the highway diesel market but were also suitable for other markets such as heating oil and non-road applications where it was unclear at the time of fuel production (when RINs are typically generated under the RFS program) whether the fuel would ultimately be eligible to generate RINs. Congress eliminated the complexity with regards to non-road applications in RFS2 by making all fuels used in both motor vehicle and nonroad applications subject to the renewable fuel standard program. We believe it best to interpret the Act so as to also avoid this type of complexity in the heating oil context. Thus, under today’s regulations, RINs may be generated for renewable fuel used as “heating oil,” as defined in existing EPA regulations at 80.2(ccc).

Id. (emphasis added). Upon determining that Congress intended to include uses of heating oil in industrial settings, it only follows that a biodiesel producer also should NOT be required to perform extremely burdensome and cumbersome tracking as to whether the facility purchasing the biodiesel designated for use as heating oil is actually being used to generate warmth or for process heat. Biodiesel is often times produced hundreds of miles away from the end user and sold and resold to several parties within the petroleum distribution chain prior to end consumption. Requiring tracking of home heating oil uses would create substantial disincentives to utilize renewable fuels in these applications, undermining Congressional intent

¹⁶ In the Senate, the expansion of the RFS would have included “motor vehicle fuel, home heating oil, and boiler fuel.” Energy Savings Act of 2007, S. 1321, § 111 (2007). *See also* S. Rep. No. 110-65 at 6 (2007). The inclusion of “additional renewable fuel” in the House Bill that ultimately passed as EISA (H.R. 6) reflects this intent to expand the use of renewable fuels. That the House Bill only referenced “home heating oil” is of little import, as it has a broad meaning and use.

in including “home heating oil” under the program. As EPA recognized, Congress clearly intended to remove this “complexity” with respect to biodiesel.

Indeed, some equipment can be used to provide both the process heating needed and space heating to the facility. When the biodiesel is being used to replace diesel fuel use in boilers, furnaces, stationary diesel engines, or similar applications, it makes little sense to allow generation of RINs in certain cases, but not others. As EPA recognizes, and NBB fully agrees, the recognition that biodiesel used in the industrial and other settings as “heating oil” promotes “the overall cost-effective production and use of renewable fuels.” 77 Fed. Reg. at 61,316. This helps ensure the clear goals of Congress in expanding the RFS and including a specific biomass-based diesel mandate are met.

III. Any Interpretation that May Limit the Generation of RINs for Biodiesel Used as “Heating Oil” is a New Interpretation for which EPA has not Provided Notice and Comment.

A. EPA cannot revise its interpretation of what falls under the existing definition of “Heating Oil” without adequate notice and comment.

As noted above, EPA states throughout the proposed rule and direct final rule that the “amendment would not modify or limit fuel included in the current definition of heating oil.” 77 Fed. Reg. at 61,313. While EPA made clear in 2010 that it was not distinguishing between heating oil used in residential versus industrial applications, EPA’s RFS2 regulations also do not distinguish among the various uses of biodiesel as heating oil in industrial boilers, furnaces, stationary diesel engines, and similar applications. Having determined that “home heating oil” includes industrial applications for renewable fuels that meet the definition of “heating oil” in Section 80.2(ccc) (e.g., biodiesel) in the final RFS2 rule, EPA cannot now limit such industrial applications without undergoing proper notice and comment rulemaking. The current notice is insufficient because EPA has indicated that it is limiting its amendment (and thus exclusion of use of such oils for process heat and power generation) to these new “fuel oils” and had not provided a statement of basis and purpose for any such new determination, including “the major legal interpretations and policy considerations underlying the proposed rule.” 42 U.S.C. § 7607(d)(3).

To the extent EPA now determines that paragraph (1) of the proposed definition of heating oil (i.e., the existing definition) is somehow limited to space heating only, EPA cannot claim that such a change in interpretation of the definition of “heating oil” is mere guidance not subject to notice and comment rulemaking. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *see also General Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002). The Clean Air Act requires notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b), incorporated by reference in 42 U.S.C. § 7607(d)(3); *see also* 42 U.S.C. § 7607(d)(6). With respect to biodiesel, EPA has not given adequate notice of any limitation that it cannot be used as heating oil for process heat or power generation, nor of its determination that “heating oil” under Section 80.2(ccc) was limited to industrial uses for heating purposes only. “The significance of rulemaking cannot be underemphasized. It gives parties affected by a decision an opportunity to participate in the

decision-making process and forces EPA to articulate the bases for its decisions.” *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979) (citation omitted). It also provides aggrieved parties the right to seek judicial review under the Clean Air Act. *Id.* (citing 42 U.S.C. § 7607(b)).

- B. EPA cannot provide a reasoned explanation for deviating from its prior interpretation and limiting the definition of “heating oil” with respect to biodiesel.

Any new interpretation limiting the uses of biodiesel as heating oil under Section 80.2(ccc) is inconsistent and a reversal of EPA’s prior determination in the RFS2 rule. As the Supreme Court has found, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). NBB does not believe that EPA can provide a reasoned explanation for drawing an arbitrary distinction between biodiesel used in boilers, furnaces, etc. for production of heat for warmth or for generation of power. Heat, by definition, is a source of energy. As such, EPA should make clear that there is no such limitation for fuels falling under the existing definition of “heating oil” and the first paragraph of the proposed amended definition.

First, the term “home heating oil” is not defined in the statute, and EPA has properly determined that the term should be interpreted broadly. EPA RFS2 RTC at 3-41. There is no indication that Congress intended to limit the phrase to “heating” of spaces over any other use. Home heating oil is a generic term that can refer to a variety of fuels. Although definitions of these terms are not consistent, it is clear that “heating oil” is not, on its face, limited to heating of spaces.¹⁷ Indeed, EPA has broadly defined “heating oil” elsewhere, recognizing that these fuels are “typically used in the operation of heating equipment, boilers, or furnaces.” 40 C.F.R. § 280.12 (underground storage tanks). In the industry the phrase “home heating oil” is interchangeable with “heating oil, heating fuel, home heating fuel, and other terms.” EPA RFS2 RTC at 3-41. As EPA recognized, typical industry usage was that the term referred to “a type of fuel, rather than a particular use of it.” *Id.* With respect to the RFS2 proposed rule, EPA found

¹⁷ See, e.g., Mich. Comp. Laws Ann. § 207.1003(h) (“‘Heating oil’ means a motor fuel including dyed diesel fuel that is burned in a boiler, furnace, or stove for heating, agricultural, or industrial processing purposes.”); 68 Okl. St. Ann. § 500.3 (“‘Heating oil’ means a motor fuel that is burned in a boiler, furnace, or stove for heating or industrial processing purposes.”); Tenn. Code Ann. § 67-3-103(37) (same); S.C. Code Ann. § 12-28-110(31) (“‘Heating oil’ means a motor fuel subject to the user fee that is burned in a boiler, furnace or stove for heating or industrial processing purposes.”); Va. Code Ann. § 58.1-2201 (“‘Heating oil’ means any combustible liquid, including but not limited to dyed #1 fuel oil, dyed #2 fuel oil, and kerosene, that is burned in a boiler, furnace, or stove for heating or for industrial processing purposes.”); W. Va. Code § 11-14C-2(45) (“‘Heating oil’ means any combustible liquid, including but not limited to, #1 fuel oil, #2 dyed fuel oil and kerosene, that is burned in a boiler, furnace, or stove for heating or for industrial processing purposes.”); Wyo. Stat. Ann. § 40-7-102(a)(ix) (“‘Fuel oil’ means a refined petroleum product, commonly known as heating oil, furnace oil, domestic oil or distillates, used for heating, power generation and cooking purposes, including all grades and qualities.”). See also Maine Rev. Stat. Ann., tit. 10, § 1672(3) (“‘Home heating oil’ means #2 fuel oil sold for heating residential, industrial or commercial space or water.”). The heating of water in the industrial setting has many uses, including generating process heat.

“[t]he majority of commenters believed that renewable fuel blended into heating oil and jet fuel should be allowed to be used for compliance purposes *without regard to the ultimate end use of the fuel*. We believe that this is an appropriate approach.” *Id.* at 3-40.

EPA continues to agree that the term “home heating oil” was left undefined by Congress and “does not have a fixed or definite commercial meaning.” 77 Fed. Reg. at 61,317. EPA similarly confirms that “[u]nder the current definition the relationship of the fuel oil to heating homes is that the fuel oil is of the type that is typically used for and can be used for that purpose.” *Id.* Based on these determinations, we see no reasonable distinction between using biodiesel as heating oil for warmth versus using heating oil for purposes of generating energy.

Second, the same rationale EPA used to determine that Congress did not intend to limit the phrase to only heating oil used in homes is equally applicable to finding Congress did not intend to limit it to heating of spaces.¹⁸ EPA indicated that it was using the definition in 40 C.F.R. §80.2(ccc) to simplify implementation and administration of the Act and use a “broad interpretation based on typical industry usage.” 75 Fed. Reg. at 14,687. “[T]he term home heating oil is used interchangeably in the marketplace with heating oil to refer to the type of fuel used in home, commercial, **and industrial applications**, not to refer to its place of use.” EPA RFS2 RTC at 3-221 (emphasis added).¹⁹ EPA further noted that it is “eliminating the requirement that RINs be retired for renewable fuel present in heating oil **that is used in a commercial or industrial boiler**, and [is] allowing RINs to be generated and used for RFS2 compliance purposes for all renewable fuels designated as or used in heating oil.” EPA RFS2 RTC at 3-221. (emphasis added); EPA recognized that renewable fuel used in “heating oil applications” governed by the RFS1 regulations in Section 80.1129(e) would now be available for RIN generation and compliance purposes. *Id.* at 3-204. Under Section 80.1129(e), “[a]ny obligated party that uses a renewable fuel in a boiler or heater must retire any RINs associated with that volume of renewable fuel ...” 40 C.F.R. § 80.1129(e). Typical industrial applications of heating oil, which is often referred to as No. 2 heating oil, fuel oil, or oil heat, is as fuel in furnaces or boilers. While in residences and commercial buildings this use is largely to provide heating, in the industrial setting this also can include use of boilers or furnaces to generate process heat or for power generation at the plant. For example, biodiesel facilities can use the biodiesel they produce on its own or blended with diesel fuel in boilers to generate heat for their production process. Similar applications include use of these oils in diesel engines or

¹⁸ NBB does not dispute and, for all the reasons EPA identified in the RFS2 rule, agrees with EPA that Congress did not intend “home heating oil” to be literally read to be limited to use of heating oil in residential homes. Nor does NBB believe that EPA has opened the issue of whether the term is limited to residential uses. The only question is for what industrial uses for which heating oil is used can RINs be generated under the RFS2 program.

¹⁹ Comments on the RFS2 proposed rule raised concerns that the use of “home heating oil” in the regulatory text precluded RINs for use of heating oil in commercial and industrial applications, noting “[t]his overly restrictive interpretation should be changed so as to encourage the use of biofuels in stationary source and industrial applications.” Comments of the American Petroleum Institute at 11 (Sept. 25, 2009) (EPA-HQ-OAR-2005-0161-2393). These comments further stated that “the difficulty in ascertaining that fuels which *can* be used for home heating are actually used for home heating suggests that any fuel that can be used as home heating oil should qualify.” *Id.* at 10 (emphasis in original).

generators that provide backup power for the plant. Indeed, making such distinctions would have made little sense in the diesel fuel rule, where EPA sought to ensure against the misuse of *any* heating oil in motor vehicles or nonroad diesel engines.²⁰

As explained above, the only distinction EPA made in explaining its use of the broader definition of “heating oil” in 40 C.F.R. § 80.2(ccc) was that the fuel must be *capable of use* as heating oil in homes. It is undisputed that biodiesel has many uses, including use for heating of homes. Tracking the ultimate use of biodiesel is not currently required, and would be overly burdensome particularly for biodiesel producers who routinely use third parties as marketers or sell to various intermediaries before the biodiesel is ultimately used.²¹ Thus, as EPA found with respect to declining to distinguish residential from commercial or industrial uses, it would be nearly impossible for biodiesel producers to nonetheless track whether the use of biodiesel is for the heating of spaces or for the generation of process heat/power. The ability to use biodiesel in numerous applications makes it distinguishable from the other fuel oils EPA was considering in expanding the scope of the definition of heating oil under the proposed and direct final rules.

Finally, that Congress did not intend to put limits on the use of biodiesel that is eligible to generate RINs under the program, as opposed to expand its use, is clear. Under the RFS1, EPA took a strict reading of the statute, declining to allow renewable fuel used in a boiler or heater, including biodiesel used in applications other than highway uses, to be covered by the program, since they clearly were not used to replace fossil fuels in motor vehicles. EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, Summary and Analysis of Comments*, EPA420-R-07-006, at 3-5 to 3-6 (2007); *see also* 40 C.F.R. § 80.1101(d)(5). EPA recognized the difficulty this posed for “certain renewable fuels (in particular biodiesel) that were produced for the highway diesel market but were also suitable for other markets such as heating oil and non-road applications where it was unclear at the time of fuel production (when RINs are typically generated under the RFS program) whether the fuel would ultimately be eligible to generate RINs.” 75 Fed. Reg. at 14,687. *EPA recognized that, in enacting EISA, “Congress eliminated this complexity.” Id.* (emphasis added).

In expanding the RFS program to include diesel fuel and establishing a specific biomass-based diesel mandate, Congress clearly intended to promote a shift in the diesel fuel market to renewable fuels. Diesel fuel, however, has a broad range of uses, including use in motor vehicles, nonroad engines, and power generators. Congress then also provided for the generation of RINs for additional renewable fuel including renewable fuel used to reduce *or replace* fossil fuel present in home heating oil. 42 U.S.C. § 7545(o)(1)(A). As noted above, at the time the EISA amendments were being considered, biodiesel was already being used for

²⁰ Nonroad diesel engines do not include diesel engines used by stationary sources. *See* 40 C.F.R. §§ 80.2(kkk), 1068.30.

²¹ For these reasons, NBB would be opposed to additional recordkeeping and reporting requirements to require such tracking.

heating oil.²² EPA so recognized in 2007, though believed such uses were minor.²³ 72 Fed. Reg. at 23,966; *see also* Comment Submitted by Delta T Corp., dated Nov. 11, 2006 (EPA-HQ-OAR-2005-0161-0196) (noting that biodiesel meeting ASTM 6751 was believed to be excellent additive or blend component for diesel fuel *and heating oil*). That combined with the provision giving EPA authority to allow for generation of “appropriate credits” for biodiesel makes clear that Congress did not intend EPA to parse out what biodiesel gallons were used for what purpose. The goal Congress had in mind was to *promote the production and use of biodiesel*.

- C. Biodiesel is widely used and increasingly being accepted as an alternative fuel for a variety of industrial applications, including power generation.

There are a number of real world examples where biodiesel is used to replace diesel fuels, including heating oil. To best fulfill Congress’ intent and the purposes of the program, EPA should allow biodiesel to continue to generate RINs as heating oil (or to the extent it is blended with heating oil), regardless of the ultimate use.

One real world example is biodiesel use for electrical generation. The 6 megawatt biofueled backup power system pictured here was installed for the University of California, Riverside's 2001 pilot program and represented a significant milestone in the effort to reduce emissions from standby emergency generators. As the power crisis in California in 2001 unfolded and forced many facilities to deploy portable diesel generators to protect critical operations against blackouts, Southern States Power Company helped the state reduce harmful emissions that normally are associated with this type of equipment.



²² The Energy Policy Act of 2005 required a report on biodiesel which was to include, among other things, impediments from biodiesel “becoming a substantial source of fuel for conventional diesel and heating oil applications.” Pub. L. No. 109-58, § 1823(b)(2).

²³ In the RFS1 rule, EPA properly required the obligated party using the renewable fuel in a boiler or heater to retire any RINs associated with that volume, rather than requiring renewable fuel producers to track the use of its biodiesel. 40 C.F.R. § 80.1129(e); *see also* 72 Fed. Reg. at 23,914.

Temporary backup petroleum diesel-fueled generators typically operate in emergencies without the benefit of exhaust after-treatment to reduce emissions. Using alternative fuels for these necessary backup power sources is a cost effective method of protecting the environment. Fueled on 100% biodiesel (B100), these generators help reduce emissions compared to petroleum diesel in several key areas. Hydrocarbons, a contributing factor in the localized formation of smog and ozone, and sulfur emissions, a major component of acid rain, are essentially eliminated with the use of B100. The exhaust emissions of carbon monoxide, a poisonous gas, are about 50% lower in biodiesel than carbon monoxide emissions from petroleum diesel. Particulate matter, a human health hazard, is reduced by a third, with the smaller particulates reduced by over two thirds.

The demonstration run of the generators, held in August 2001, clearly showed few signs of the telltale smoke associated with diesel fuel. The operation of the generators was part of the weekly scheduled test run by Riverside Public Utilities to ensure readiness in the case of a blackout. The three Cummins generators represent the state of the art in compression ignition engine technology, as well as digitally controlled electrical interconnection equipment. Each 16 cylinder, 3,673 cubic inch, 2,922 HP Turbocharged/Low Temperature After-Cooled computer controlled four cycle industrial engine drives a heavy duty brushless four pole permanent magnet type generator capable of outputting up to two million watts of power at 480 volts. Separate transformers for each generator to increase reliability steps up the voltage to match the 12,470 volt electrical grid operated and maintained by Riverside Public Utilities. The three generators, operating at full output, consume almost 450 gallons of fuel per hour. A 55-gallon drum of fuel is consumed in approximately seven minutes. That is the equivalent of half a quart for every second of operation. A Southern States Power Company ("SSPC") 5,000 gallon onsite tanker trailer provided enough fuel for over 11 hours of operation. SSPC maintained a local tanker truck with biodiesel ready to roll and replenish emergency generator needs on a 24-hour basis.

In addition, biodiesel, in recent years, has increasingly been recognized as a significant part of the sustainability efforts of numerous companies. For example, a growing number of sports teams have recognized biodiesel as being an important part of their move toward greener parks and stadiums. See Biodiesel Magazine, *Pro sports: biodiesel takes them out to the ball game*, Sept. 18, 2009, available at <http://www.biodieselmagazine.com/articles/3764/pro-sports-biodiesel-takes-them-out-to-the-ball-game/>. Some examples of companies using biodiesel in heating oil applications are listed below.

Featured User

Cincinnati Reds

The Reds' Great American Ball Park is among the greenest ballparks in the country.

Their efforts range from composting the grass clippings to using biodiesel blends for facility vehicles and standby emergency generators. Also, the park collects waste cooking oil from their kitchens and concession stands for biodiesel producers to use in making the fuel. In the last season, the Reds generated 8,234 gallons of used cooking oils, some of which was refined into biodiesel. They use biodiesel blends in field and facility maintenance vehicles and equipment, tractors, and stand-by emergency generators.

"In the global effort to be more environmentally friendly, the Cincinnati Reds believe that the use of biodiesel as an alternative fuel source is an important part of our overall greening strategy," said Declan Mullin, Vice President, Ballpark Operations.²⁴

Other Users

Lambert Int'l Airport
 Raleigh-Durham Airport
 Portland Airport
 Burlington Airport
 Ft Lauderdale Airport
 Grand Teton National Park
 Grand Canyon National Park
 Yellowstone National Park
 Kansas City Chiefs
 Indianapolis Colts
 Philadelphia Eagles
 Houston Astros
 Philadelphia Phillies
 San Diego Padres

Moreover, biodiesel can also be used in combined heat and power applications. This Administration has recognized the benefits of using combined heat and power. *See, e.g., Executive Order 13624, Accelerating Investment in Industrial Energy Efficiency, Aug. 30, 2012, 77 Fed. Reg. 54,779, 54,779 (Sept. 5, 2012)* ("While our manufacturing facilities have made progress in becoming more energy efficient over the past several decades, there is an

²⁴ *See Biodiesel Magazine, Pro sports: biodiesel takes them out to the ball game, Sept. 18, 2009, available at <http://www.biodieselmagazine.com/articles/3764/pro-sports-biodiesel-takes-them-out-to-the-ball-game/>.*

opportunity to accelerate and expand these efforts with investments to reduce energy use through more efficient manufacturing processes and facilities and the expanded use of combined heat and power (CHP).”); *see also* DOE and EPA, *Combined Heat and Power: A Clean Energy Solution*, at 3 (Aug. 2012), available at http://www1.eere.energy.gov/manufacturing/distributedenergy/pdfs/chp_clean_energy_solution.pdf (“CHP captures this waste energy and uses it to provide heating and cooling to factories and businesses, saving them money and improving the environment. CHP is a commercially available clean energy solution that directly addresses a number of national priorities including improving the competitiveness of U.S. manufacturing, increasing energy efficiency, reducing emissions, enhancing our energy infrastructure, improving energy security and growing our economy.”). Biodiesel can be used in CHP equipment, and companies have focused efforts on designing such equipment for biodiesel use. *See, e.g.,* Cenergy, *Biodiesel: CHP Cogeneration Module - Pla-Tec*[®], <http://www.2g-cenergy.com/biodiesel.html>.

Indeed, biodiesel “is nontoxic and biodegradable.” DOE Energy Efficiency and Renewable Energy, *Biodiesel Fuel Basics*, http://www.afdc.energy.gov/fuels/biodiesel_basics.html. EPA recently granted temporary waivers for requirements to use low sulfur diesel fuel in New Jersey, New York and Pennsylvania to allow the use of home heating oil in motor vehicle and non-road applications, given potential shortages in supply and disruptions in distribution as a result of Hurricane Sandy. The ability to use biodiesel, which is ultra-low sulfur fuel, in these multiple applications would alleviate any concerns of potential increased emissions or damages to engines. Thus, biodiesel is readily available for use in numerous industrial applications, and confirming its eligibility to generate RINs for all such applications furthers the goals of Congress and promotes increased energy efficiency in all sectors of the economy.

- IV. EPA Should Revise the Proposed Definition, As Necessary, to Ensure that Biodiesel Used as Heating Oil Qualifies for the Generation of RINs.
 - A. Section 80.2(ccc) defines heating oil to include biodiesel blends (B80 or higher), including B100.

Although EPA contends it is not revising the scope of the existing definition of heating oil in the RFS regulations, it is incorporating new terms that, again, are causing confusion in the industry, particularly with respect to biodiesel. For example, although the definition in Section 80.2(ccc) references #1, #2 and non-petroleum biodiesel blends, EPA’s amended definition now uses the phrase “[a] #1, #2, or non-petroleum diesel meeting the definition set forth in § 80.2(ccc).” Paragraph (2) of the amended definition then refers to “fuel oil.” In its RFS2 regulations, EPA does not define #1, #2, non-petroleum diesel, or fuel oil. This definition is extremely confusing for both the biodiesel producer and the distributor of fuel oil.

In 2006, EPA revised the definition of heating oil in Section 80.2(ccc) through a direct final rule to include “any ... non-petroleum diesel blend” in recognition of the ability of biodiesel to be used as heating oil and in response to concerns that the current definition did not

adequately account for B100 and higher biodiesel blends, which have “inherently very low sulfur content.” 71 Fed. Reg. 25,706, 25,709 (May 1, 2006). EPA revised this definition “[t]o accommodate B100 and high concentration biodiesel blends that do not satisfy the specifications for either #1D or #2D diesel fuel.” *Id.* Thus, EPA recognized that biodiesel qualifies as heating oil under the definition in 40 C.F.R. § 80.2(ccc), as B100 or as a blend of B80 or higher (e.g., Bioheat). Since NBB understands that EPA is not intending to change the scope of the existing definition, NBB understands biodiesel continues to fall under the first part of this definition, which references Section 80.2(ccc), and to include B100.

However, Section 80.2 defines “Non-petroleum diesel (NP diesel)” as “a diesel fuel that contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats.” 40 C.F.R. § 80.2(sss). In the direct final rule, EPA states: “The existing definition of non-petroleum diesel at 40 CFR 80.2(sss) means a diesel fuel that contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats. Thus, in order to generate RINs for home heating oil that is a nonpetroleum diesel blend, the fuel must contain at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, as well as meeting all other requirements of the RFS2 regulations.” 77 Fed. Reg. at 61,284. By distinguishing “non-petroleum diesel” and “non-petroleum diesel blends,” questions have been raised if B100 still qualifies as a “blend.” NBB believes that it does, and requests EPA confirm this fact. There is no rationale to require blending with petroleum, particularly when Congress recognized that EPA should give “appropriate credit” to “biodiesel.”

B. EPA should clarify that “vegetable oil” or “animal fat” are not limiting terms.

As noted above, EPA has now stated that, “in order to generate RINs for home heating oil that is a nonpetroleum diesel blend, the fuel must contain at least 80 percent mono-alkyl esters of long chain fatty acids *derived from vegetable oils or animal fats*, as well as meeting all other requirements of the RFS2 regulations.” 77 Fed. Reg. at 61,284 (emphasis added). Congress, however, recognized that renewable fuels may come from a wide range of feedstocks and sought to promote that diversification. The overarching categories of “vegetable oils” or “animal fats” is not limiting, and industry recognizes them to be broader categories to include all natural oils producing a mono alkyl ester of long chain fatty acids, including, for example, used cooking oils or algal oils.

As noted above, in its comments on the RFS2 proposed rule, NBB requested confirmation that any biodiesel for which EPA has approved a pathway, regardless of its ultimate use, generate RINs for biomass-based diesel. EPA has approved various feedstocks for biodiesel, and EPA did not dispute this understanding. EPA RFS2 RTC at 3-38 to 3-41. *Indeed, EPA stated: “we have determined that any fuel product commercially known as heating oil may be valid for the generation of RINs if the fuel is made from renewable biomass.”* *Id.* at 3-42 (emphasis added); *see also id.* at 3-198 (“Similarly, RINs associated with a renewable fuel, such as biodiesel, that is blended into heating oil will continue to be valid for compliance purposes.”). NBB notes that

any biodiesel that has an approved pathway can be used as “heating oil” under Section 80.2(ccc).

- C. Biodiesel producers can separate and sell RINs generated based on use of biodiesel used as heating oil.

Biodiesel facilities can, and have, utilized biodiesel to run “in furnaces, boilers, stationary diesel engines, and similar applications” to generate process heat or power at their plants in lieu of fossil-based fuels. As the biodiesel is being used to replace fossil fuels used as heating oil, it meets the definition of renewable fuel under the RFS2 regulations.

EPA indicated that it is “allowing renewable fuels *used as* or in heating oil and jet fuel to generate RINs.” 75 Fed. Reg. at 14,724 (emphasis added). “Similarly, RINs associated with a renewable fuel, such as biodiesel, that is blended into heating oil will continue to be valid for compliance purposes.” *Id.* “Section 80.1429(b)(4) will allow for separation of RINs for neat renewable fuel or blends of renewable fuel and diesel fuel that the party designates as transportation fuel, heating oil, or jet fuel, provided the neat renewable fuel or blend is used in the designated form, without further blending, as transportation fuel, heating oil, or jet fuel.” *Id.* at 14,726. In certain cases, the biodiesel is used by the production facility itself, without further blending, as heating oil. Even when the biodiesel is blended with diesel or distillate fuels, EPA also indicated that “[t]hose parties that blend renewable fuel with gasoline or diesel fuel (in a blend containing 80 percent or less biodiesel) must separate RINs pursuant to § 80.1429(b)(2).” *Id.* The RFS2 regulations do not specify that the fuel must be used or blended outside the biodiesel facility for the RINs to be separated. Thus, while EPA indicated it is not modifying the current scope of the existing definition of “heating oil,” EPA should also clarify that biodiesel facilities utilizing biodiesel in lieu of or blended with fossil based heating oils in their own boilers, furnaces, stationary diesel engines, or similar applications can (and must) separate the RINs, which are then available for compliance purposes.

The RFS program is intended to promote *use* of renewable fuels in the United States, and, therefore, biodiesel facilities should also be able to gain the added benefit of using renewable fuel rather than fossil fuels in its boilers, furnaces, stationary diesel engines, or similar applications. It makes little sense to require a biodiesel facility to incur the additional costs of purchasing the biodiesel from another source (or to purchase petroleum fuels), and such use still allows RINs to be available for compliance purposes.

Furthermore, the RFS2 program has become complicated by not allowing the valid generation of a RIN due to disallowing certain uses of renewable fuels in the fuels marketplace. Biodiesel is made from waste greases such as recycled cooking oil, animal fats and secondary-use agricultural oils, and it is refined to meet a specific commercial fuel definition and specification. The fuel meets the D6751 fuel specification set forth by ASTM International, the official U.S. fuel-certification organization. Biodiesel is one of the most- and best-tested alternative fuels in the country and the only alternative fuel to meet all of the testing requirements of the 1990 amendments to the Clean Air Act. For this fuel, there should be virtually no disallowed uses (other than export).

Biodiesel is an environmentally safe fuel, and is the most viable transportation fuel when measuring its tailpipe emissions, lifecycle carbon emissions and energy balance. Beginning in 2005 through August 2012, the biodiesel industry has produced 4.3 billion gallons of domestic renewable fuel and biodiesel has reduced lifecycle greenhouse gas emissions by 57.5 billion pounds, the equivalent of removing 5.07 million passenger vehicles from America's roadways.

Tailpipe emissions from traditional diesel – primarily from trucking fleets, school buses and other vehicles – are a significant health and air quality concern. In an update to its National-Scale Air Toxics Assessment earlier this year, EPA cited diesel exhaust as one of the nation's most dangerous pollutants, saying it is “among the substances that may pose the greatest risk to the U.S. population.” Thousands of trucks and buses hit the road every day burning traditional diesel fuel. Substituting higher amounts of biodiesel for traditional diesel fuel and heating oil are the simplest, most effective way to immediately improve emissions.

V. NBB Fully Supports EPA's Determination that Fuels Meeting the Existing Definition of “Heating Oil,” which Includes Biodiesel, Need Not Track The Ultimate Use of Their Biodiesel.

As described above, a broad reading of “home heating oil” for those fuels that fall under Section 80.2(ccc) eliminates the added complexity in having to distinguish between the ultimate uses of biodiesel, which can be used interchangeably with petroleum diesel fuels in numerous applications. Throughout the proposed rule and direct final rule, EPA confirmed that the new registration, recordkeeping and reporting requirements “would not apply to fuels qualifying under existing 40 CFR 80.2(ccc) of the regulations.” 77 Fed. Reg. at 61,319. NBB agrees that such tracking is not necessary and should not be required for biodiesel. This is true even if EPA subsequently determines that RINs associated with biodiesel used for generation of process heat should be retired.

Tracking the ultimate use of biodiesel would be overly burdensome, as biodiesel producers often use third parties as marketers or sell to various intermediaries before the biodiesel is ultimately used. As noted above, biodiesel is often sold and resold to several parties within the petroleum distribution chain prior to end consumption, and can have various uses by the same customer. This is unlike newer fuels EPA appears to be concerned with that are being targeted for use for purposes of heating interior spaces. Thus, EPA should implement an approach similar to that in the RFS1 program, which requires the ultimate user to retire the RINs, or continue to allow the RINs to be used for compliance purposes. As described above, this would be consistent with the purposes of the Act, and EPA would have such authority under Section 211(o)(5)(A)(ii), even if it subsequently determines the term “home heating oil” is more limited.

NBB appreciates EPA's ongoing efforts to ensure the statutory mandates envisioned by Congress in the RFS2 are fulfilled, including ensuring sufficient renewable fuels are available to

meet these mandates and promoting the diversification and expansion of eligible fuels. Thus, NBB believes the requested clarification is appropriate and fulfills EPA's mandate under the statute.

However, if EPA now determines that "heating oil" under the existing definition in the RFS2 rules does not include heating oil used for process heat or power generation, this determination reflects a new (and contrary) interpretation by EPA not previously identified or explained to the public. Thus, it was impracticable to raise the objection during the public comment period on the RFS2 rule, and NBB requests that EPA treat this letter as a petition for reconsideration and convene a proceeding for reconsideration. 42 U.S.C. § 7607(d)(7)(B). If EPA declines to make that finding, this would constitute grounds arising after and a reopening of the rule, restarting the 60 days in which such regulation can be challenged. Failure to address this issue properly could create the wrong incentives to use cleaner burning fuels for heating oil or could result in numerous invalid RINs being generated.

We are happy to discuss this matter further and address any questions you may have. Thank you in advance for your consideration of this issue.

Sincerely,

A handwritten signature in black ink that reads "Anne Steckel". The signature is written in a cursive, flowing style.

Anne Steckel
Vice President of Federal Affairs
National Biodiesel Board