NATIONAL BIODIESEL BOARD

PETITION FOR RECONSIDERATION
AND REQUEST FOR ADMINISTRATIVE STAY

Approval of CARBIO's Alternative Biomass Tracking Program and Alternative Renewable Biomass Tracking Requirement, 40 C.F.R. § 80.1454(h)

Submitted by:

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BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re:	)	
Approval of CARBIO's Alternative Biomass Tracking Program;	)	**EPA Decision Document, Dated January 27, 2015**
40 C.F.R. § 80.1454(h), Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule.	)	**Docket ID EPA-HQ-OAR-2005-0161**

PETITION FOR RECONSIDERATION AND REQUEST FOR ADMINISTRATIVE STAY

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), and the Administrative Procedure Act, the National Biodiesel Board (NBB) respectfully submits this Petition for Reconsideration of EPA's "Approval of CARBIO's Alternative Biomass Tracking Program," dated January 27, 2015 (referred to as the "CARBIO Approval"),[1] under 40 C.F.R. § 80.1454(h) of the Renewable Fuel Standard (RFS) program. The CARBIO Approval constitutes final action related to regulation under 42 U.S.C. § 7545(o), which is subject to 42 U.S.C. § 7607(d). EPA, however, did not provide public notice of the CARBIO application, and, in a letter dated January 27, 2015, expressly denied NBB's request for an opportunity to comment prior to its approval (referred to as the "EPA Letter").[2]

EPA's refusal to allow for public review and comment in approving the CARBIO program and the new information since EPA promulgated the alternative renewable biomass tracking requirement at 40 C.F.R. § 80.1454(h) based on that approval also constitute new grounds for raising objections. The proposed CARBIO program provided the factual predicate needed for the public to meaningfully comment on the survey plan required under the regulation, as well as for the purpose of judicial review. Based on the information on the approved survey plan in the CARBIO Approval, serious questions remain as to whether the CARBIO program provides the assurances required under that regulation. As such, EPA must reconsider the underlying regulation as it relates to biofuel production overseas and EPA's approval of the CARBIO program purportedly pursuant to that regulation.

[1] The CARBIO Approval is attached to this petition as Exhibit A.

[2] The EPA Letter is attached to this petition as Exhibit B. With its request for an opportunity to comment, NBB raised several significant issues that EPA should have considered during its review of the CARBIO program. NBB's ability to raise the objections herein, however, was limited because it did not have all the specifics of the program and, in any event, EPA appears to have ignored these comments in its decision document.

NBB is the national trade association representing the U.S. biodiesel industry. Due to the competitive advantages being gained by Argentinian biodiesel producers, biodiesel facilities operated by NBB's members are directly affected by the EPA action that is the subject of this petition, as well as the feedstock suppliers, marketers and distributors that support the U.S. biodiesel industry. Soybean biodiesel producers in Argentina receive government incentives to export their biodiesel and have targeted the United States to replace their lost market of over 440 million gallons for biodiesel that was previously exported to the European Union.[3] Contrary to EPA's contentions, the CARBIO Approval does not provide greater oversight over those imports, but, rather, it alleviates their regulatory requirements, giving Argentinian biodiesel producers even greater access to the U.S. market. Imports of biodiesel from Argentina are already having an impact on the U.S. biodiesel market, and the CARBIO Approval provides additional advantages to this imported biodiesel over domestic production. Moreover, unlike in Argentina, existing agricultural land in the United States continues to decline, and many U.S. biodiesel producers are participating in quality assurance programs that appear to be more rigorous than the survey plan under the CARBIO Approval. Given these harms and the potential for serious deficiencies in EPA's approval of the CARBIO program, NBB requests EPA stay the CARBIO Approval pending reconsideration.

The CARBIO program departs from the alternative renewable biomass tracking requirement noticed and finalized by EPA in several significant ways. Reconsideration is required to give the public an opportunity to comment and to correct these deficiencies. Thus, by this petition, NBB requests:

- EPA initiate reconsideration proceedings of the CARBIO Approval and, as necessary, reconsider and revise 40 C.F.R. § 80.1454(h) to allow for public comment and to correct the deficiencies in the CARBIO program;

- EPA provide the public with a copy of the CARBIO application, survey plan and amendments for review and comment, including: a description of the areas covered and the satellite imagery used to identify "go" and "no-go" areas; a description of the feedstock suppliers and of the entire supply chain through importation; an explanation of the survey plan and the methodology used to determine the representative samples and number of surveys/desk audits required; and any other information necessary for the public to meaningfully understand the proposed CARBIO program, and thereby the basis of EPA's approval; the list of those companies actually approved by the CARBIO decision; a date and time certain when 2015 biodiesel shipments from Argentina are approved; and

- EPA stay the effectiveness of 40 C.F.R. § 80.1454(h) and the CARBIO Approval pending reconsideration.

In the alternative, EPA should initiate action to revise 40 C.F.R. § 80.1454(h) to promote public participation and to provide more transparency as to the survey plans approved under that regulation, as well as consider the provisions in light of EPA's recent rulemaking on quality

[3] According to Eurostat, 442,671,019 million gallons of biodiesel were imported into Europe in 2012. These volumes were calculated based on the tariff code.

assurance programs for Renewable Identification Numbers (RINs). EPA should revoke the approval of the CARBIO program for cause pending this review process to ensure adequate opportunity for public comment and compliance of the CARBIO program with any revisions to that regulation.

BACKGROUND

I. History of the Rulemaking and the CARBIO Approval

Domestic production of renewable fuels and biodiesel, in particular, are vital to this Country's energy policy. In recognition of this policy, the Energy Policy Act of 2005 established the RFS program under Section 211(o) of the Clean Air Act, which was expressly required to include biodiesel. This policy was again confirmed in the Energy Independence and Security Act of 2007 (EISA), which included increased volume mandates and a separate biomass-based diesel volume mandate within the advanced biofuel requirement. Biomass-based diesel is the first and currently the only fully commercialized, nationwide, domestic fuel that qualifies as an advanced biofuel under the RFS.

In expanding the RFS program under EISA, Congress included additional eligibility criteria for producers to participate in the program. Among the changes in EISA were "new limits on renewable biomass feedstocks" under a revised definition of "renewable biomass." 75 Fed. Reg. 14,670, 14,670 (Mar. 26, 2010). Under the revised definition, "[p]lanted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to [December 19, 2007] that is either actively managed or fallow, and nonforested" would be considered "renewable biomass" under the RFS program. 42 U.S.C. § 7545(o)(1)(I)(i). Based on this revised definition, EPA proposed onerous recordkeeping and reporting requirements for domestic renewable fuel producers who use feedstocks from planted crops or crop residues. 74 Fed. Reg. 24,904, 25,129 (May 26, 2009) (proposed 40 C.F.R. § 80.1451(b)(6)(i)). EPA recognized the "unique challenges related to the implementation and enforcement of the definition of renewable biomass for foreign-produced renewable fuel," but proposed to apply the same requirements on foreign producers as it proposed for domestic producers. *Id.* at 24,941.

Due to the onerous nature of EPA's proposed approach, EPA also sought comment on alternative compliance approaches, including development of an "industry-wide quality assurance program for the renewable fuel production supply chain, following the model of the successful Reformulated Gasoline Survey Association" for a partial affirmative defense. 74 Fed. Reg. at 24,939-24,940. This alternative approach, also referred to as the industry consortium approach, would require parties to participate in and fund a "nationwide verification program for renewable fuel producers and renewable feedstock producers and handlers" implemented by an independent surveyor, and would include "any other elements that EPA determines are necessary to achieve the same level of quality assurance as the requirement included in the RFS2 regulations at the time." *Id.* at 24,940. EPA also requested comment on "whether [foreign producers] should have the same option to use an approved survey consortium in lieu of implementing their own individual quality assurance programs." *Id.* at 24,941. Believing EPA's proposed implementation of the renewable biomass definition to be overly stringent for domestic production, commenters supported alternative approaches to compliance, including the aggregate compliance approach, but they also recognized that any requirements for foreign producers,

particularly in countries with different land use trends than the United States, should "provide additional measures necessary to afford the same degree of enforceability and certainty that renewable feedstocks from foreign countries meet the definition of renewable biomass as those from American biomass suppliers." EPA, *Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments*, EPA-420-R-10-003, at 3-104, 3-109, 3-115, 3-117 (2010).

EPA ultimately finalized three compliance approaches for feedstock from planted crops and crop residues: (1) individual tracking requirements under 40 C.F.R. § 80.1454(c)(1) (for foreign renewable fuel producers) and (d)(3) (for domestic renewable fuel producers using planted crops or crop residue from existing foreign agricultural land); (2) aggregate compliance under 40 C.F.R. § 80.1454(g) (for any producers using planted crops or crop residue from existing U.S. agricultural land); and (3) an alternative renewable biomass tracking requirement under 40 C.F.R. § 80.1454(h) that may be used in lieu of the approaches under (1) and (2). Under the individual tracking requirements, the renewable fuel producer is required to provide records to establish the location where the crops were grown and that such location constituted existing agricultural land and to provide transfer documents through the chain of custody (i.e., map and track). Under the aggregate compliance approach, EPA determined that, so long as the total amount of agricultural land in the United States was below the baseline amount in 2007, feedstocks from crops grown in the United States would be "deemed" to be renewable biomass. 40 C.F.R. § 80.1426(a)(1)(ii)(A). EPA subsequently established a regulation to allow other countries to petition for an aggregate compliance approach under 40 C.F.R. § 80.1457. Canada is the only other country to have an approved aggregate compliance approach.

In establishing the alternative renewable biomass tracking requirement under 40 C.F.R. § 80.1454(h), EPA indicated that it was finalizing the proposed alternative option that was "similar to the model of the successful Reformulated Gasoline Survey Association[, which is referred to as the 'RFG Survey']" (i.e., the industry consortium approach). 75 Fed. Reg. at 14,700. The final regulation provided only very broad strokes as to what such a program would look like, which did not clearly outline the requirements as explained in the proposal. For example, the final regulation did not require participation by all feedstock producers and handlers in the plan, 74 Fed. Reg. at 24,940, providing only that the renewable fuel producer "take all reasonable steps to ensure that each feedstock producer, aggregator, distributor or supplier cooperates with this program." 40 C.F.R. § 80.1454(h)(5)(i). It also moved from a "nationwide verification program," 74 Fed. Reg. at 24,940, to a program applied to an undefined area or an undefined set of producers. The final regulation also differed from the regulation implementing the RFG Survey program, which provides more prescriptive requirements and criteria for EPA's approval of a survey plan. *See* 40 C.F.R. § 80.68; *see also* 40 C.F.R. § 80.1502 (establishing survey program related to E15 sales). Nonetheless, in its regulation, EPA provided assurances that any program approved under the industry-consortium approach must provide the same level of assurances as the individual tracking and aggregate compliance approaches. Thus, there were no harms stemming from the regulation in the abstract, nor was there any incentive at the time to question or challenge EPA's regulation.

On August 29, 2012, EPA received an application to approve an alternative renewable biomass tracking program under 40 C.F.R. § 80.1454(h) from the Argentine Chamber of Biofuels (*Camara Argentina de Biocombustibles or CARBIO).* CARBIO Approval Letter at 1. The CARBIO program purports to cover "the whole soybean biodiesel supply chain from

soybean production through intermediate processing, to biodiesel production." *Id.* Despite, to our knowledge, being the first such application submitted to EPA that it was planning to approve, EPA provided no notice to the public of receipt of the application or its proposed approval. According to the EPA Approval letter, the proposed plan had to be amended several times, yet EPA continued to keep the public in the dark as to its contents.

NBB, nonetheless, became aware of CARBIO's application and, on November 13, 2013, submitted a letter to EPA, requesting an opportunity for the public to comment on CARBIO's application and that EPA consider general comments in its review of the application.[4] In its letter, NBB also requested that EPA consider the CARBIO program in light of the pending rule for a quality assurance program that was intended to provide oversight over RIN generation, raising concerns that EPA should consider due to the potential problems with enforcing the RFS requirements to production outside the U.S. and Canada.[5] In its comments on the RIN Quality Assurance Program, NBB similarly explained that EPA must ensure a rigorous and enforceable program with respect to foreign production of biofuels. (EPA-HQ-OAR-2012-0621-0069 at 22).

Despite EPA's own acknowledgement that enforcing the RFS requirements overseas represents unique challenges, EPA ignored the concerns raised by NBB. On January 27, 2015, EPA sent NBB a letter, denying its request for an opportunity to comment on the CARBIO program. On that same date, EPA issued a letter approving the CARBIO program, which it posted to its website (http://www.epa.gov/otaq/fuels/renewablefuels/documents/carbio-decision-document-2015-01-27.pdf). EPA still has provided the public with few details on the CARBIO program, except for a five-page decision document it included with its approval letter. Nonetheless, the information in that decision document raises substantial questions as to whether the CARBIO program is consistent with EPA's regulations.

II. Land Use in Argentina

In February 2015, EPA released its draft 1990-2013 Greenhouse Gas Emissions Inventory for public comment. *See* 80 Fed. Reg. 9718 (Feb. 24, 2015). According to the draft report, the United States remains a net sequester of CO_2 emissions with respect to land use, land use changes and forestry, and net C sequestration in this sector has *increased* between 1990 and 2013.[6] Since 2007, total cropland in the United States continues to *decrease*.[7] *Compare* 77 Fed. Reg. 1320, 1350 (Jan. 9, 2012) (finding approximately 392 million acres of U.S. agricultural land in 2011), *with* 78 Fed. Reg. 49,794, 49,827 (Aug. 15, 2013) (finding approximately 384 million acres of U.S. agricultural land in 2012).

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[4] This letter is attached to this petition as Exhibit C.

[5] EPA finalized its RIN Quality Assurance Program on July 18, 2014. 79 Fed. Reg. 42,078 (July 18, 2014). NBB submitted a petition for reconsideration on the final rule, which included concerns as to potential gaps in the RIN Quality Assurance Program as it may apply to biofuels produced outside of the U.S. and Canada. This petition is attached as Exhibit D. EPA has yet to provide any response to the concerns raised by NBB on these issues.

[6] *See* EPA, *DRAFT Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2013*, at 6-1 (Feb. 11, 2015), *available at* http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html.

[7] The appropriateness of the aggregate compliance approach applied to U.S. and Canadian crops is not at issue here. Nonetheless, the stark differences between land use changes in the United States and Argentina are relevant as to whether or not the *survey plan* is adequate, and, thus, are addressed herein.

In stark contrast to the United States, total forest area in Argentina continues to decline, while agricultural lands are on the rise. Studies suggest that the rates of deforestation have increased in certain regions "due to rapid expansion of agriculture," even though the national rates may have declined.[8] "Tropical dry forests or wooded grasslands experienced even higher clearing rates" than tropical moist forests.[9] Deforestation in areas with soybean production in Argentina has continued even after the enactment of laws for the protection of forests.[10] The World Bank has noted that "[a]griculture (including land use change and forestry) is the largest contributor to GHG emissions in [Argentina], while contributing less than 6% of GDP…."[11]

III. Statutory Provisions Governing Reconsideration

Under Section 307(d)(7)(B) of the Clean Air Act, the Administrator is required to grant a petition for reconsideration upon a demonstration that it was impracticable to raise a particular objection during the period for public comment (but within the time specified for judicial review),[12] and the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). Reconsideration petitions may be the appropriate forum to raise procedural violations. *Id.* § 7607(d)(9); *see also White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir.), *cert. granted in part*, 135 S. Ct. 702 (2014). The Administrator also has the authority to initiate reconsideration of an action even if she concludes that the standards of Section 307(d)(7)(B) have not been met. *See, e.g.*, 74 Fed. Reg. 66,470, 66,471 (Dec. 15, 2009) (granting reconsideration to clarify ambiguous definitions in regulation); 71 Fed. Reg. 14,665, 14,668 (Mar. 23, 2006) (granting petition for reconsideration due to confusion over EPA's methodology). EPA also must allow for petitions to amend or withdraw agency action under the Administrative Procedure Act, 5 U.S.C. § 553(e). Although a petition for reconsideration does not postpone the effectiveness of a rule, EPA may stay the effectiveness of a rule pending reconsideration, 42 U.S.C. § 7607(d)(7)(B), or through rulemaking. Moreover, EPA may revoke any approval of a survey plan under 40 C.F.R. § 80.1454(h) for cause. 40 C.F.R. § 80.1454(h)(6)(v).

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[8] Conservation International, Deforestation Guide: Argentina, NESTLE.COM, http://www.nestle.com/asset-library/documents/creating%20shared%20value/responsible-sourcing/deforestation-guide-argentina.pdf (last visited March 27, 2015); *see also* Martin Persson, *et al., Trading Forests: Quantifying the Contribution of Global Commodity Markets to Emissions from Tropical Deforestation*, Center for Global Development: Working Paper 384, at 6 (2014); Doane Advisory Services, *A Look at Brazil, Argentina soybean sectors*, AG Professional, Mar. 14, 2013, http://www.agprofessional.com/news/A-look-At-Brazil-Argentina-soybean-sectors-197594841.html. "Over the last seven years [Brazil and Argentina] have added nearly 24 million acres, an amount equal to soybean acreage in Illinois, Iowa and Indiana combined." *Id.*

[9] *See* Martin Persson, *et al., supra* n.8, at 6; *see also* Claudia Ricca, *How Argentina's development choices are fueling climate change in its southern region*, Al Jazeera - English, Dec. 12, 2014 ("Argentina has a rate of deforestation of 0.8 percent per year - twice that of the Amazon region, or about 26 hectares per hour.").

[10] Esmerk Argentina News, *Argentina Deforestation blamed for Cordoba floods*, Los Andes, Feb. 19, 2015; Ricca, *supra* n.9.

[11] World Bank, Latin American and the Caribbean Region: Agriculture and Rural Development Team, *Argentina: Country Note on Climate Change Aspects in Agriculture*, at 2 (Dec. 2009), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Climate_ArgentinaWeb.pdf.

[12] The time for seeking judicial review of a final agency action under the Clean Air Act is 60 days from the date of promulgation, approval or action, "except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). Pursuant to 40 C.F.R. § 23.3, the time of EPA's approval and action is two weeks after the approval and action was signed.

ARGUMENT

I. EPA Must Grant Reconsideration of the CARBIO Approval and, to the Extent Necessary, 40 C.F.R. § 80.1454(h) to Allow for Public Review and Comment.

A. Reconsideration is required because the public could not meaningfully comment on the CARBIO program.

The first requirement for reconsideration can be easily met. EPA denied the public an opportunity to comment on the CARBIO program approved under 40 C.F.R. § 80.1454(h). Despite known concerns as to EPA's ability to monitor and enforce the renewable biomass requirements to production outside of the United States and Canada, EPA has steadfastly refused to provide the public with an opportunity to review the proposed CARBIO program and supporting documentation, or to provide comment. Thus, it has approved the CARBIO program with no ability of the public to ensure its efficacy or compliance with EPA's regulations.

EPA denied NBB's request to review and comment on the CARBIO program, claiming "[g]iven the significant notice and comment process used to develop these regulations, we do not find it appropriate to create additional notice and comment processes for each plan approval as suggested in your letter." EPA Letter at 1. EPA is incorrect on several grounds.

First, the public could not determine the efficacy of the alternative compliance program or the potential harms of EPA's actions to its members until EPA approved a survey plan pursuant to that regulation. In the proposal for the regulation, EPA suggested creation of a "consortium" to establish a quality assurance program along the lines of the RFG Survey program. 74 Fed. Reg. at 24,940. The RFG Survey program, however, addressed a very different compliance scheme involving averaging of emissions and EPA is also able to monitor compliance with testing, which is not the case here. While EPA purported to finalize the proposed alternative approach based on the RFG Survey program, the final rule also only provided broad strokes as to what the program should include. In short, until the CARBIO Approval, the public could not meaningfully assess how the annual survey program might actually operate. *See Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (noting ripeness depends on "whether consideration of the issue would benefit from a more concrete setting") (citations omitted). Thus, it was impracticable for the public to comment on the efficacy and potential implications of the provisions in 40 C.F.R. § 80.1454(h) as it might apply in practice in the absence of a concrete survey plan. *See PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1249-50 (D.C. Cir. 1981) (finding EPA failed to comply with notice requirements under Administrative Procedure Act where regulation could not be understood without subsequent guidance issued by EPA).

Second, there was no proposed regulatory language on which the public could comment, and the final rule appears to have significant differences compared to EPA's explanation of the industry consortium approach in the proposal, making it impossible for the public to predict a program along the lines EPA approved here. EPA referenced a "nationwide verification program" in the proposal, but did not articulate what type of areas would be covered in the final rule. Thus, the public could not have predicted the type of "go" and "no-go" system EPA approved here. The final rule did not require that persons along the entire supply chain

participate in the plan, as was indicated in the proposal, and there was no way to predict that EPA would only require "waybills" to track the feedstock through the supply chain as it did here. It also would appear that the vast majority of feedstock suppliers need only submit "paper" to a database with a zip code to establish compliance under the CARBIO program, which would be subject only to "quarterly desk audits." The CARBIO program, thus, is a far cry from the nationwide sampling program EPA referenced in its proposal and commented on by the public.

Finally, the public could not have anticipated that EPA would approve a program that would appear to not even meet the requirements in EPA's own regulations. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project ("NEDA") v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("It is 'axiomatic,' however, 'that an agency is bound by its own regulations. … 'Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.'") (citations omitted). For example, the CARBIO Approval makes no mention of how the CARBIO program addresses import facilities, which are expressly required to be included in any survey plan. Moreover, the regulations require that the program provide the same level of quality assurance as the individual tracking and aggregate compliance approaches, but EPA has appeared to allow potentially significant gaps in the CARBIO program that provides a lower level of assurance. Thus, in approving the CARBIO program, EPA has changed the regulatory program outlined in 40 C.F.R. § 80.1454(h), requiring notice and comment and significantly altering the stakes of judicial review. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008), *cert. denied*, 559 U.S. 991 (2010). It could not have been anticipated that EPA would not provide the public with an opportunity to comment on these changes, and it is not incumbent upon the public to remind EPA to follow the required procedures under the Act. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (finding EPA cannot "ignore the procedural requirements of §307(d)," even if the agency "gives a decent reason for doing so"). For all these reasons, and contrary to EPA's contentions, the objections raised herein could not have been raised in the context of the 2010 RFS rulemaking.

B. EPA's failure to provide for notice and comment on the CARBIO program violates the procedural requirements of the Clean Air Act and, in any event, was arbitrary and capricious.

EPA's failure to give the public the opportunity to comment on the CARBIO program violates the notice and comment requirements of the Clean Air Act. The Clean Air Act requires notice to give the public a meaningful opportunity to comment on the terms and basis of EPA's regulations. 42 U.S.C. § 7607(d)(3), (4), (5); *see also* 5 U.S.C. § 553(b)(3), incorporated by reference in 42 U.S.C. § 7607(d)(3).

> [N]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)); *see also MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("More to the point, however, this court has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek.") (citations omitted). Public notice and comment gives the parties affected by a decision an opportunity to participate in the decision-making process. *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979).

As described above, EPA has not provided adequate public notice or a meaningful opportunity to comment as required under the Act. As illustrated by the potentially significant gaps in the CARBIO program and lack of transparency here, that EPA must approve the survey plan does not substitute for EPA's obligation to provide adequate notice and opportunity to comment or to replace the need for public input. The D.C. Circuit has stated that it will defer to an agency "so long as we are assured that its promulgation process as a whole and in each of its major aspects provides a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978). Such was not the case here.

Moreover, EPA had discretion to provide additional opportunities to ensure "public understanding and participation" in the process. *Weyerhaeuser Co.*, 590 F.2d at 1028 (citations omitted). This was not a simple application process, nor should it have been decided in a vacuum. Indeed, EPA has provided for public notice and comment when it has been asked to approve compliance plans under the RFS program. *See* 76 Fed. Reg. 76,974 (Dec. 9, 2011). EPA solicited public comment on a separation plan for municipal solid waste simply because it was "the first such plan to be submitted to EPA for approval." *Id.* at 76,975. Given the significant concerns that have arisen with respect to EPA's ability to enforce the RFS requirements with respect to biofuel production outside of the United States and Canada, particularly regarding renewable biomass, EPA similarly should have provided the public with an opportunity to review and comment on any survey plan under consideration, especially the first one. In addition, EPA is not familiar with agriculture production in foreign countries, and the public could provide invaluable assistance to EPA to ensure that the proposed plan will be effective. As such, even if not required under the regulations, EPA's failure to provide notice and comment on the CARBIO program was arbitrary and capricious.

C. The CARBIO Approval reveals potentially significant defects in the CARBIO program, and, thus, the objections raised herein are of central relevance to the rule.

Although EPA provided no documentation to support its decision to approve the CARBIO program, including the survey plan proposed by CARBIO, it is apparent that the CARBIO program has potentially significant gaps and inconsistencies with the requirements in the regulations. These potential defects in the CARBIO program renders the CARBIO Approval arbitrary and capricious.

Under EPA's regulations, any survey plan pursuant to an industry consortium approach must be designed to "achieve at least the same level of quality assurance required in 40 C.F.R. § 80.1454(c)(1), (d) and (g). In establishing the alternative renewable biomass tracking

requirements, EPA never defined or explained that the "survey area" could include some ill-defined "go" and "no go" areas as qualifying as "existing agricultural lands" under the plan. Although it is unclear the size of these "go" areas, they appear to be based on "zip codes" in Argentina. But, EPA had indicated that the "industry-wide quality assurance program for the renewable fuel production supply chain" would be "a nationwide verification program." 74 Fed. Reg. at 24,940. In establishing a petition process for other countries seeking an aggregate compliance approach, EPA recognized that "national-scale land use data is typically the most reliable and transparent, and can more easily be confirmed by the national government," and that "national level data most accurately reflects the broader effects of renewable fuel feedstock production on land use patterns." 75 Fed. Reg. 76,790, 76,821 (Dec. 9, 2010). EPA's decision document does not provide any explanation as to how these go/no-go areas are even delineated.

Nor does the CARBIO program appear to adequately identify "existing agricultural lands," as under the individual tracking and aggregate compliance approaches. Under the individual tracking requirements, EPA lists numerous types of electronic mapping and documents that would be required to show that a farm was "existing agricultural land" in 2007, compared to a "an auditable *cartas de porte* from each farm generating feedstock for calendar year 2007." EPA only references identification of "zip codes" on these waybills, and asserts they have long been used to track "movement of goods between jurisdictions." Given the difference in local divisions and governments in Argentina, this is wholly inadequate for the public to understand how the use of these waybills is comparable to the individual tracking requirements, or how this prevents against land-shifting in areas that have continued to show significant decreases in forestland and increases in agricultural lands, particularly in areas where soybean is grown. In addition, soybeans from Bolivia, Paraguay, Uruguay or Brazil are often shipped to Argentina to be further processed into meal and oil.[13] Again, EPA's decision document does not explain how these concerns are being addressed.

Although also referring to the use of satellite imagery, the decision document provides no explanation of the level of quality assurance in the satellite imagery that will be used to identify these areas. This is in contrast to the requirements for statistical information under the aggregate compliance approach, where EPA required that data submitted on land use be "at least as credible, reliable, and verifiable" as the U.S. data. 75 Fed. Reg. at 76,821. It is also unclear how the satellite imagery alone will identify if the land was "actively managed or fallow" on December 19, 2007. Moreover, unlike the aggregate compliance approach that tracks cropland each year, there is no indication satellite imagery, or other data, will be used to track land use changes within the "go" areas over time.

There is also insufficient information to establish that the survey plan and the methodology in choosing the locations for surveys (versus desk audits) are sufficient "to achieve the same level of quality assurance as the requirement included in the RFS regulations at the time." 74 Fed. Reg. at 24,940. The CARBIO Approval only indicates that all biodiesel producers and crushing facilities will be surveyed at least once a year, but only that a "minimum

[13] For example, in Paraguay, the amount of soybean crushed has expanded more slowly than production, resulting in export of soybean for crushing to other countries, including Argentina. *See* Jan Willem van Gelder and Jan Maarten Dros, *Corporate Actors in the South American soy production chain*, A research paper for the World Wide Fund for Nature Switzerland, at 35 (2002). Argentina and Brazil dominate soybean crushing in South America. *Id.* at 16.

of five percent of grain elevators and farms that supply renewable biomass to the crushing plants" are to be surveyed each year with the rest subject to desk audits. EPA also does not provide an explanation as to how the feedstock gets from the original source to the biofuel production facility and then to the importer, so that the public can understand how these waybills and simple audits of those waybills are sufficient to show that biodiesel produced from eligible feedstock is remaining segregated throughout the supply chain, as necessary.

In addition, Section 80.1454(h)(2) requires the annual compliance surveys be "[c]onducted at renewable fuel production *and import facilities* and their feedstock suppliers." (Emphasis added). Section 80.1454(h)(3) also requires that the independent surveyor conduct "feedstock audits of renewable fuel production *and import facilities*." (Emphasis added). Although EPA confirms that the regulations require the tracking program extend through the entire supply chain, the decision document includes no discussion of how the biodiesel would be imported into the United States, noting only that the plan "covers the whole soybean biodiesel supply chain from soybean production through intermediate processing, to biodiesel production…." Thus, there is no indication that the plan includes import facilities, such as the load port and port of entry.

How EPA addresses import facilities is key to understanding whether the fuel actually being imported complies with these requirements. The CARBIO Approval does not adequately outline who is actually covered by the program and what facilities. While EPA's regulations provide that renewable fuel producers and importers may comply with this requirement by participating in the funding of an organization that arranges to have an independent third party conduct the survey program, it is unclear how one can determine whether biodiesel being shipped from Argentina is in compliance with the CARBIO program. EPA references CARBIO's members, but EPA's regulations require identification of the parties participating and the sites being audited. Moreover, the regulations provide that the "failure of any renewable fuel producers or importer to fulfill or cause to be fulfilled any of the requirements" will cause the option for "such party" to use the alternative quality assurance requirements to be void ab initio. Nor does the CARBIO Approval explain whether the funding requirements have been met to understand when the program starts and ends. None of this vital information can be determined based on EPA's approval document.

These holes and potential deficiencies raise serious questions as to the ability of the CARBIO program to provide the same level of quality assurance regarding the renewable biomass requirements as the other approaches in the RFS regulations. "[A]n agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations.'" *NEDA*, 752 F.3d at 1009 (citation omitted). As such, the objections identified herein are of central relevance to the rule and the CARBIO Approval, requiring reconsideration by EPA.

D. EPA's failure to respond to comments also renders the CARBIO Approval arbitrary and capricious.

EPA could have easily provided comfort to the public that its approval and the CARBIO program meet the regulations. Indeed, the Clean Air Act requires EPA to respond to significant comments, criticisms and new data submitted during the comment period. 42 U.S.C. § 7607(d)(6). Although not provided with an opportunity to comment on the specifics of the

CARBIO program, NBB raised concerns as to the lack of transparency of EPA's enforcement of the renewable biomass provisions for biofuels produced outside the United States and Canada. EPA, however, has chosen to ignore those questions. NBB also identified several issues with any such program as it might relate to biodiesel from Argentina that EPA should consider when reviewing the CARBIO program, which were similarly swept aside by EPA and left unaddressed in its decision document.

NBB requested that EPA make the survey plans and results of the surveys available to the public on an ongoing basis. As EPA explained, the alternative renewable biomass tracking requirement was intended to be a quality assurance program. In its rulemaking for a RIN Quality Assurance Program, EPA recognized the need for transparency to ensure the integrity of the program.[14] Providing for transparency allows the public to monitor how the program is being implemented and to notify EPA of deficiencies. NBB also noted that transparency was a key component in other voluntary certification programs. Yet, the CARBIO Approval makes no mention of whether any information will be provided to the public on an ongoing basis.

NBB also commented that EPA must ensure the plan clearly defines the survey area and the parties subject to the survey requirements. For example, it raised questions on how the program would address import facilities and how new growers would be incorporated into the survey plan. NBB also raised concerns with survey areas being defined in such a manner that it would allow for land-shifting, resulting in substantial new clearings outside the survey areas. This is particularly true here, where there are reports of significant land use changes ongoing in Argentina. The CARBIO Approval does not address these issues.

The only response from EPA was a mere assertion that the CARBIO program includes a "number of important safeguards that do not currently exist for either individual reporting or the domestic aggregate compliance approach." EPA Letter at 2. EPA's only support for this conclusion is a reference to the employ of an independent third-party surveyor. *Id.* But, simply having a third party conduct minimal oversight does not establish "important safeguards." If the program itself provides for inadequate coverage or leaves open significant gaps, it is unclear how the mere fact that an independent surveyor may sign off on its implementation provides adequate safeguards. Moreover, NBB requested that EPA consider the CARBIO program in light of the ongoing rulemaking regarding the RIN Quality Assurance Program. Exhibit C at 1. As EPA is well aware, many domestic producers are participating in the RIN Quality Assurance Program, which provides significantly more oversight than in the CARBIO program. In particular, domestic producers are subject to ongoing audits involving at least two on-site visits per year or at least one on-site visit along with ongoing remote monitoring. While the RIN Quality Assurance Program is voluntary, so is the CARBIO program. Regardless, the same land use concerns in Argentina are simply not present in the United States. Thus, EPA's conclusory statements wholly fail to respond to the serious concerns raised by NBB.

[14] EPA also sought to ensure protection of confidentiality claims, but has not indicated that the CARBIO program and information submitted in support of the application are covered by claims of confidentiality.

II. New Information Since the 2010 RFS Rulemaking Also Calls Into Question the Efficacy of the Compliance Program Outlined in 40 C.F.R. § 80.1454(h) With Respect to Biodiesel Imported from Argentina.

EPA also must reconsider its regulation based on new information that calls into question the efficacy of the compliance program outlined in 40 C.F.R. § 80.1454(h) as it applies to biodiesel from Argentina. EPA indicated it would reconsider the alternative compliance approach in light of new methods for ensuring compliance. Thus, in the alternative, EPA should initiate rulemaking proceedings to revise that provision to be more consistent with new requirements on domestic producers. Indeed, domestic producers that might import soybean oil from Argentina are still subject to the more onerous map and track requirements. Thus, such new information is sufficient cause to vacate the CARBIO Approval until EPA can ensure that the regulation provides the same level of quality assurance as it applies to renewable fuel produced outside of the United States and Canada.

In 2014, EPA finalized the RIN Quality Assurance Program, published at 79 Fed. Reg. 42,078. Like the CARBIO program here, the RIN Quality Assurance Program was intended to assist in ensuring compliance with the RFS program. As part of that rulemaking, EPA recognized that foreign production may require heightened scrutiny due to the difficulty in enforcing the RFS provisions overseas. For example, EPA indicated that quality assurance for foreign production requires review of the foreign production facilities *and the importer* under the same program. *Id*. at 42,091. The concerns regarding enforcing the RFS provisions overseas are particularly acute in those countries, such as Argentina, that do not have the same history of land use as the United States and Canada where agricultural lands have declined or remained steady for years. EPA's ability to enforce these requirements must include review of the exporter in the foreign country (if different from the producer facility) and the importer bringing the fuel into the United States. EPA must reconsider the regulations authorizing the survey plans to ensure they provide such oversight.

EPA also recognized that quality assurance requires a truly independent auditor. EPA agreed with the public that ensuring the independence of third-party auditors is paramount to the successful implementation of effective quality assurance programs. 79 Fed. Reg. at 42,092. In its provisions since 2010, EPA has included much more stringent requirements to avoid potential conflicts of interest than in 40 C.F.R. § 80.1454(h)(2)(i), which only references the requirements in 40 C.F.R. § 80.68(c)(13)(i), and included provisions to help enforce those requirements.[15] EPA also has imposed additional requirements on foreign auditors. EPA has agreed that "by interpreting conflict of interest more broadly, we will raise the standard of independence in the QAP program to a higher level than that seen in other portions of the EPA regulations, especially considering the importance of maintaining an effective QAP." 79 Fed. Reg. at 42,093. Section 80.68(c)(13)(i), however, only references independence from "any refiner or importer." While EPA indicates that CARBIO provided information demonstrating that Peterson Control Union meets the independence criteria in 40 C.F.R. § 80.68(c)(13)(i), a plain reading of this regulation would not include, for example, independence from CARBIO, the producers or any of the

[15] For example, EPA requires an affidavit regarding the auditor's independence, noting the affidavit requirement "is an important piece of registration and potentially valuable if we have to pursue actions arising from alleged conflicts of interest." 79 Fed. Reg. at 42,097.

feedstock suppliers. With the concerns raised on the potential for conflicts of interest, EPA must reconsider its regulation on the independence of the surveyor, and must provide an explanation as to how the independent surveyor in this case meets those requirements.

After the 2010 RFS final rule in which EPA promulgated 40 C.F.R. § 80.1454(h), EPA issued a regulation allowing other countries to submit petitions for an aggregate compliance approach where it expressly recognized the need for public comment. EPA's failure to provide for notice and comment on the CARBIO program makes it inherently less reliable than the individual tracking or aggregate compliance approach, requiring reconsideration of the rule to expressly provide for a period of public review and comment. EPA found that public notice and comment on petitions seeking an aggregate compliance approach under Section 80.1454(g) by other countries "is necessary and important," and that the data and calculations in the petitions should be made available to the public. 75 Fed. Reg. at 76,823-76,824. EPA provided a 60-day public comment period for these petitions. 40 C.F.R. § 80.1457(c). EPA provides no explanation why the survey plan should escape similar public scrutiny.

Thus, in the alternative, EPA should initiate a rulemaking to amend 40 C.F.R. § 80.1454(h) to expressly provide for public notice and comment and include additional provisions which would help ensure that any survey program for an industry consortium approach in countries such as Argentina provides the same level of assurances as the other compliance approaches for the renewable biomass requirements. EPA should vacate the CARBIO Approval for cause pending such revision.

III. EPA Should Stay the Effectiveness of 40 C.F.R. § 80.1454(h) and, thereby, the CARBIO Approval Pending Reconsideration.

NBB has demonstrated that reconsideration is warranted in this case. To mitigate against the harms caused by EPA's failure to comply with the notice and comment requirements of the Clean Air Act and by the approval of an apparently flawed compliance program, NBB requests that EPA immediately stay the effectiveness of 40 C.F.R. § 80.1454(h) and the CARBIO Approval during the reconsideration process pursuant to 42 U.S.C. § 7607(d)(7)(B), or the rulemaking process under EPA's general rulemaking authority under 42 U.S.C. § 7601(a) and the Administrative Procedure Act.

The biodiesel industry in Argentina produces more than 1 billion gallons of biodiesel each year and much of that production comes from soybeans that are not grown in Argentina. "Thanks to a reduction in the taxation of biofuel exports and other tax incentives, the production of biodiesel reached a historical record in September 2014…."[16] An estimated 1.6 million tonnes of biodiesel produced in Argentina were exported "after the cheapness of feedstock soybean oil relative to energy boosted biodiesel blending demand."[17] The Argentinian government props up its biodiesel production through a Differential Export Tax (DET) program where the export tax that Argentina has historically charged on the raw material (soy oil) has been higher than the tax charged on exports of biodiesel. In other words, biodiesel producers in Argentina are

[16] Ricca, *supra* n.9.

[17] *Argentinian biodiesel exports up 41% year on year in 2014 to 1.6 mil mt: Carbio,* Platts McGraw Hill Financial, Jan. 22, 2015, http://www.platts.com/latest-news/agriculture/london/argentinian-biodiesel-exports-up-41-year-on-year-21881303.

encouraged to ship finished biodiesel rather than raw soybean oil out of the country – and in fact that is what they do. In Europe, after approval of Argentinian biodiesel under the European Renewable Energy Directive (RED) Argentinian biodiesel flooded the European marketplace and displaced biodiesel produced in Europe, leading to significant trade disputes between the European Union and Argentina.

"Ongoing trade disputes between Argentina and the European Union concerning the export of biodiesels have led to the country appealing for US environmental approval to ease export."[18] Prior to EPA's approval here, USDA projected biodiesel exports in 2015 of 1.7 billion liters or 450 million gallons.[19] "The green light [by EPA] will effectively make it easier for the South American grains powerhouse to sell its big biofuel output into the United States, potentially jump-starting the local sector which has suffered from a drop in demand from its No. 1 customer, the European Union, due to a long-running trade spat."[20]

Based on EMTS data, the amount of biodiesel and renewable diesel being imported under the RFS program has steadily increased. The current loss of production the U.S. biodiesel industry is facing magnifies the impact of every additional decision EPA is making that is related to biodiesel. As described above, the U.S. biodiesel industry is already at a competitive disadvantage to biodiesel producers in Argentina. They now face different regulatory requirements for using soybean oil from Argentina, and they are also more likely to be subject to additional costs of the more onerous RIN Quality Assurance Program.[21] Indeed, customers are likely to view participation in the EPA-approved CARBIO program as sufficient due diligence, notwithstanding the clear gaps in the program.

The U.S. biodiesel industry, therefore, is already facing severe harms, which will be exacerbated by increased imports from Argentina. EPA should grant immediate administrative relief to alleviate the hardships that would be imposed upon NBB's members if EPA allowed the CARBIO Approval to remain in effect. Given these harms and the significant issues raised by this Petition, EPA should stay the effectiveness of 40 C.F.R. § 80.1454(h) and, thereby, the CARBIO Approval, until EPA can correct these defects.

III. CONCLUSION

For the foregoing reasons, EPA should reconsider the CARBIO Approval and, to the extent necessary to ensure that the alternative renewable biomass tracking requirements provide the same assurances as the individual tracking and aggregate compliance approach, reconsider and revise 40 C.F.R. § 80.1454(h). In particular, EPA should provide the public with an opportunity to comment on the CARBIO program. If EPA continues to believe that the public had an opportunity to comment on these objections, NBB requests that EPA treat this petition as

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[18] *Argentina seeks EPA approval for biodiesel export*, Petro Industry News, May 21, 2013, http://www.petro-online.com/news/biofuel-industry-news/22/breaking_news/argentina_seeks_epa_approval_for_biodiesel_export/25336/.

[19] USDA Foreign Agriculture Service, GAIN REPORT: Argentina Biofuels Annual 2014 (July 1, 2014).

[20] *Update 3-U.S. Approves Argentina proposal to qualify for biofuel credits*, Reuters, Jan. 27, 2015, http://www.reuters.com/article/2015/01/27/usa-argentina-biodiesel-idUSL1N0V626420150127.

[21] EPA declined to give biodiesel producers participating in the RIN Quality Assurance Program liability protections, offering only the purchasers of those RINs with an affirmative defense against penalties.

one for rulemaking and initiate new proceedings to make amendments to these provisions and vacate the CARBIO Approval pending such revisions.

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

January 27, 2015

Victor A. Castro, Executive Director
Camara Argentina de Biocombustibles (CARBIO)
Bouchard St, 454-piso 7 – (C1106ABF)
Ciudad Autonoma de Buenos Aires
ARGENTINA

Dear Mr. Castro:

On August 29, 2012, *Camara Argentina de Biocombustibles* (CARBIO) (also known as the Argentine Chamber of Biofuels), submitted a plan to the Environmental Protection Agency (EPA) pursuant to 40 CFR 80.1454(h) for approval of an alternative renewable biomass tracking program to fulfill the record keeping requirements of the renewable fuels standard program under §80.1454. Addenda to the plan were provided to the EPA and dated December 10, 2012, April 24, 2013, June 11, 2013, July 18, 2013, November 22, 2013, September 1, 2014, and November 26, 2014.

EPA approval of an alternative renewable tracking program is required under 40 CFR 80.1454(h) to replace the record keeping requirements in 80.1454(c)(1), (d) and (g). The alternative renewable biomass tracking plan that you submitted covers the whole soybean biodiesel supply chain from soybean production through intermediate processing, to biodiesel production and includes four sections: (1) annual compliance surveys, (2) land use compliance (3) chain of custody proof, and (4) data management to support compliance surveys.

As described in the enclosed decision document, it is our judgement that CARBIO's Alternate Biomass Tracking Program meets all the requirements outlined in 40 CFR § 80.1454(h), including elements determined by the EPA to be necessary to achieve the level of quality assurance required under 40 CFR §§ 80.1454(c)(1), (d), and (g). The EPA approves the CARBIO program as submitted, including the addenda, with Peterson Control Group as the independent surveyor. CARBIO must obtain EPA approval prior to implementing any modifications to this approved program, including any change in independent surveyor. This approval will remain in effect until such time as it is either revoked by the EPA, or CARBIO informs the EPA that it no longer wishes to implement the CARBIO Alternate Biomass Tracking Program. CARBIO may satisfy the requirement of 40 CFR 80.1454(h)(6)(i) by submitting to the EPA by September 1 of each year, a notice that it intends to continue to implement the approved plan in the forthcoming calendar year. No additional EPA approval will be necessary, unless CARBIO seeks the EPA's approval of amendments to its approved plan. CARBIO must satisfy 40 CFR 80.1454(h)(7)(i)

and (ii) on an annual basis, including ensuring annual receipt by the EPA of CARBIO's contract with its independent surveyor and proof that money necessary to carry out the survey plan for the forthcoming year has either been paid to the independent surveyor or placed into an escrow account. The EPA may revoke this approval at any time for cause, including an EPA determination that the approved survey plan has proved inadequate in practice or that it was not fully implemented.

Sincerely,

Byron Bunker, Director
Compliance Division
Office of Transportation and Air Quality

Enclosure

United States Environmental Protection Agency

Decision Document: Approval of CARBIO's Alternative Biomass Tracking Program
January 2015

Summary

Under the Renewable Fuel Standard (RFS) program regulations, any foreign or domestic renewable fuel producer or RIN-generating importer may meet the recordkeeping requirements in § 80.1454 with an alternative biomass tracking program that has been approved by the EPA. On August 29, 2012, *Camara Argentina de Biocombustibles* (CARBIO) (also known as the Argentine Chamber of Biofuels), submitted a plan to the EPA pursuant to § 80.1454(h)(6) for approval of an alternative renewable biomass tracking program to fulfill the recordkeeping requirements of § 80.1454. After review, the EPA is approving the CARBIO Alternate Biomass Tracking Program as submitted, including addenda dated December 10, 2012, April 24, 2013, June 11, 2013, July 18, 2013, November 22, 2013, September 1, 2014, and November 26, 2014 with Peterson Control Union as the independent surveyor. CARBIO must obtain EPA approval prior to implementing any modifications to this approved program, including any change in independent surveyor.

Background

Under the Renewable Fuel Standard (RFS) Program, renewable fuels are those fuels derived from renewable biomass, (including certain planted crops and waste materials) which are used as transportation fuel, home heating oil or jet fuel and achieve specified greenhouse gas emissions reductions as compared to conventional fossil fuels.[1] To accelerate use of fuels derived from renewable sources, Congress first established requirements under the Energy Policy Act of 2005 designed to encourage the blending of renewable fuels in the United States motor vehicle fuel supply. Congress modified the renewable fuels program under the Energy Independence and Security Act of 2007 to include specific annual volume standards for total renewable fuel and also for three renewable fuel subcategories (cellulosic biofuel, biomass-based diesel, and advanced biofuel). The revised program specifies renewable fuel requirements that must be met on an annual average basis for "transportation fuels," including gasoline and diesel fuels intended for both onroad and nonroad vehicles and engines. However, credit under the program is also available for renewable fuels blended into home heating oil or jet fuel. Compliance is demonstrated through the acquisition by obligated parties (refiners or importers of gasoline or diesel fuel) of Renewable Identification Numbers (RINs) assigned by renewable fuel producers or importers to the renewable fuel they produce or import. Each year obligated parties and renewable fuel exporters submit compliance reports identifying the RINs they are relying on to demonstrate compliance with RFS requirements. Renewable fuel producers and importers, gasoline refiners and importers, diesel refiners and importers, renewable fuel exporters and other

[1] Baseline volumes of fuel from facilities that commenced construction prior to December 20, 2007, or of certain facilities that commenced construction prior to January 1, 2010, are exempt from the minimum 20% greenhouse gas reduction threshold applicable to renewable fuels. See § 80.1403.

parties involved in the RFS program are required to submit reports to the EPA of all transactions relating to RINs.

Under the RFS program regulations, there are also recordkeeping requirements for obligated parties, domestic or RIN-generating foreign producers of renewable fuels, importers and exporters of renewable fuels, and other parties that own RINs. Certain of these recordkeeping requirements are designed to ensure that renewable fuels in the RFS program are made only from renewable biomass, as that term is defined in § 80.1401. Pursuant to § 80.1454(h), any foreign or domestic renewable fuel producer or RIN-generating importer may comply with an alternative renewable biomass tracking requirement instead of the recordkeeping requirements in paragraphs (c)(1), (d), and (g) of § 80.1454. To comply with the alternative renewable biomass tracking requirement, a renewable fuel producer or importer must either arrange to have an independent third party conduct a comprehensive program of annual compliance surveys, or participate in the funding of an organization which arranged to have an independent third party conduct a comprehensive program of annual compliance surveys, to be carried out in accordance with a survey plan which has been approved by the EPA. The program must be designed to achieve at least the same level of quality assurance required in paragraphs (c)(1), (d), and (g) of § 80.1454.

The compliance survey program shall require the independent third party ("independent surveyor") conducting the surveys to do all of the following: conduct feedstock audits of renewable fuel production and import facilities in accordance with the survey plan approved under paragraph (h) of § 80.1454, or immediately notify the EPA of any refusal of these facilities to allow an audit to be conducted; obtain the records and product transfer documents associated with the feedstock being audited; determine the feedstock supplier(s) that supplied the feedstocks to the renewable fuel producer; confirm that feedstocks used to produce RIN-generating renewable fuels meet the definition of renewable biomass as defined in § 80.1401; immediately notify the EPA of any case where the feedstocks do not meet the definition of renewable biomass as defined in § 80.1401; immediately notify the EPA of any instance where a renewable fuel producer, importer, or feedstock supplier subject to review under the approved plan fails to cooperate in the manner described in the regulations; submit to the EPA a report of each survey, within 30 days following completion of each survey; maintain all records relating to the survey audits conducted for a period of at least five years; and permit any representative of the EPA to monitor at any time the conduct of surveys, including observing audits, reviewing records, and analysis of the audit results.

The survey plan under this § 80.1454(h) must include all the following: identification of parties for whom the survey is to be conducted; identification of the independent surveyor; a methodology for determining when the audits will be conducted, the audit locations, and the number of audits to be conducted during the annual compliance period.

No later than December 1 of the year preceding the year in which the surveys will be conducted, the contract with the independent surveyor shall be in effect, and an amount of money necessary to carry out the entire survey plan shall be paid to the independent surveyor or placed into an escrow account. No later than December 15 of the year preceding the year in which the surveys will be conducted, the EPA must receive a copy of the contract with the independent surveyor, proof that the money necessary to carry out the plan has either been paid to the independent

surveyor or placed into an escrow account, and, if placed in escrow, a copy of the escrow agreement.

Failure of any renewable fuel producers or importer to fulfill or cause to be fulfilled any of the requirements of § 80.1454(h) will cause the option for such party to use the alternative quality assurance requirements to be void *ab initio*.

CARBIO's Alternative Biomass Tracking Program Submission

On August 19, 2012, CARBIO submitted a plan to the EPA pursuant to § 80.1454(h) for an Alternate Biomass Tracking Program to meet the recordkeeping requirements under the RFS program. CARBIO provided addenda to this submittal on December 10, 2012, April 24, 2013, June 11, 2013, July 18, 2013, November 22, 2013, September 1, 2014, and November 26, 2014 (collectively, the "CARBIO Alternate Biomass Tracking Program").

EPA Decision

The EPA finds that the CARBIO Alternate Biomass Tracking Program satisfies the requirements of § 80.1454(h). To summarize, 40 CFR § 80.1454(h) imposes on-going requirements for management of an approved alternative renewable biomass tracking plan: it must be conducted by an independent surveyor at production, import and feedstock supplier facilities; it must be representative of the whole survey area; and it must be designed to achieve at least the same level of quality assurance required by 40 CFR §§ 80.1454(c)(1), (d), and (g). 40 CFR § 80.1454(c)(1) requires that foreign producers and importers maintain records of feedstock purchases and transfers to document that their feedstocks qualify as renewable biomass. Producers and importers of certain feedstocks must also maintain records, in the form of maps or electronic data identifying land boundaries where feedstock is produced as well as commercial documents verifying feedstock custody transfers (§ 80.1454(c)(1)(i)). 40 CFR § 80.1454(d) requires that domestic producers maintain those same types of documents, and imposes additional recordkeeping requirements for feedstocks produced from either domestic or foreign land prior to December 19, 2007. 40 CFR § 80.1454(g) imposes additional requirements for agricultural land.

The CARBIO Alternate Biomass Tracking Program is designed and funded to arrange for an independent third party to implement the survey plan. CARBIO's plan is to use the compliance surveys to demonstrate that fuel produced by CARBIO's members qualifies for RIN generation because it is made from feedstock that is "renewable biomass" as that term is defined in § 80.1401. Furthermore, the plan is intended to ensure that qualifying fuel can be traced to pre-identified and pre-approved lands from which "renewable biomass" may be harvested consistent with regulatory definition of that term. The alternative renewable biomass tracking program covers the whole soybean biodiesel supply chain from soybean production through intermediate processing, to biodiesel production.

CARBIO's alternative renewable biomass tracking program includes four sections: (1) annual compliance surveys; (2) land use compliance; (3) chain of custody proof; and (4) data management to support compliance surveys. Pursuant to § 80.1454(h), we find the alternative renewable biomass tracking program submitted by CARBIO adequately meets the requirements under paragraph (h) and is designed to achieve at least the same level of quality assurance required in paragraphs (c)(1), (d), and (g) of § 80.1454.

Specifically, CARBIO has contracted with Peterson Control Union to act as an independent surveyor. CARBIO has supplied information demonstrating that Peterson Control Union meets the independence criteria in 40 CFR 80.68(c)(13)(i). Peterson Control Group is a known certification body with many years of experience in auditing. The survey plan to be carried out by the independent surveyor specifies that all biodiesel producers and crushing plants that are registered with the survey plan shall be visited and surveyed at least once a year. A minimum of five percent of grain elevators and farms that supply renewable biomass to the crushing plants shall be surveyed each year. The sample size is designed to ensure a sufficient and representative sample with 95 percent confidence level. The survey shall apply a random sampling methodology with probability proportional to the size of feedstock quantity supplied for biodiesel production. All feedstock suppliers (farms and grain elevators) that are not subject to a site visit for the survey in any given year shall be subject to a desk audit for their product transfer documents at the time of one of the four quarterly desk audits conducted each year. Each feedstock supplier is required to submit their incoming and outgoing product transfer documents to CARBIO's compliance database which will allow the independent surveyor to review product transfer documents as part of the survey and/or desk audit. The independent surveyor will submit to the EPA a report of each survey and desk audit, within thirty days following completion of each survey and desk audit.

CARBIO's land use compliance plan relies on both satellite imagery and *cartas de porte* (waybill) tracking documents. Argentina has a system for the issuance of *cartas de porte* to authorize the movement of goods between jurisdictions that has been mandatory since 1998. The survey plan will include an auditable *cartas de porte* from each farm generating feedstock for calendar year 2007. In addition, CARBIO will use land cover data from satellite imagery to identify land that was cleared or cultivated prior to December 19, 2007 and actively managed or fallow and nonforested on December 19, 2007. CARBIO would then classify these lands as "go areas" from which feedstocks may be used to produce qualifying RFS fuel and "no go areas" from which feedstocks may not be used to make qualifying RFS fuels.

Ultimately soybeans shipped to crushing plants will be deemed compliant or noncompliant with the renewable biomass definition based on whether the origin listed on the waybill (*cartas de porte*) accompanying the shipment is within the datasets for approved "go areas." The Grain Elevator shall prevent mixing of soybeans from "go areas" with soybean from "no go areas". All crushing plants shall clearly identify soybean oil made from renewable biomass and prevent mixing with oil without this status. The plan provides that CARBIO will immediately notify the EPA where there is evidence that the feedstocks do not meet the definition of renewable biomass as defined in §80.1401 or where a renewable fuel producer, importer or feedstock supplier subject to review fails to cooperate in the manner described in the plan and/or regulations.

CARBIO's method for tracking chain of custody also relies on the same mandatory *cartas de porte* documents described above. The *cartas de porte* accompanies the transport of grain from farm to final destination and must include information on the cargo, carrier, and destination. Farmers must enter zip code information on these documents as they load grains for transport. CARBIO's system will compare the entered zip code with approved "go areas." At the grain elevators, product transfer documents will be generated based on the farm's *cartas de porte* and zip code identifying a "go area" or "no go area." The crushing plants will verify the product transfer document and GIS for "go area" status.

To support the compliance survey plan, CARBIO will use a data management system that would store all the data for its "go areas" as well as non-spatial information about soybean production in those "go areas" to classify the soybeans as renewable biomass or not renewable biomass. The data management system would track the waybills and be capable of providing real time summaries of soybean produced from "go areas" and "no go areas" for the independent surveyor to access and audit.

Decision

The EPA approves the CARBIO Alternate Biomass Tracking Program as submitted, including the addenda, with Peterson Control Group as the independent surveyor. CARBIO must obtain EPA approval prior to implementing any modifications to this approved program, including any change in independent surveyor. This approval will remain in effect until such time as it is either revoked by the EPA, or CARBIO informs the EPA that it no longer wishes to implement the CARBIO Alternate Biomass Tracking Program. CARBIO may satisfy the requirement of 40 CFR § 80.1454(h)(6)(i) by submitting to the EPA by September 1 of each year, a notice that it intends to continue to implement the approved plan in the forthcoming calendar year. No additional EPA approval will be necessary, unless CARBIO seeks EPA approval of amendments to its approved plan. CARBIO must satisfy §§ 80.1454(h)(7)(i) and (ii) on an annual basis, including ensuring annual receipt by the EPA of CARBIO's contract with its independent surveyor and proof that money necessary to carry out the survey plan for the forthcoming year has either been paid to the independent surveyor or placed into an escrow account. The EPA may revoke this approval at any time for cause, including an EPA determination that the approved survey plan has proved inadequate in practice or that it was not fully implemented.

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NATIONAL VEHICLE AND FUEL EMISSIONS LABORATORY
2565 PLYMOUTH ROAD
ANN ARBOR, MICHIGAN 48105-2498

January 27, 2015

OFFICE OF
AIR AND RADIATION

Ms. Anne Steckel
Vice President of Federal Affairs
National Biodiesel Board
1331 Pennsylvania Ave, NW
Washington, DC 20004

Dear Ms. Steckel:

Thank you for your letter of November 18, 2013 to EPA Administrator Gina McCarthy concerning the EPA's consideration of alternative renewable biomass tracking program under 40 CFR 80.1454(h) of the Renewable Fuel Standard (RFS) program regulations. Your letter has been referred to my office for response.

The EPA regulations include record keeping requirements in 80.1454(c)(1), (d) and (g) designed to document that biofuel producers participating in the RFS program use feedstocks that meet the regulatory definition of "renewable biomass." The regulations also allow biofuel producers to request EPA approval of an alternative renewable biomass tracking requirement pursuant to 40 CFR 80.1454(h). These regulations were established as part of the RFS Program following a public notice and comment process in which the National Biodiesel Board (NBB) participated. In keeping with these regulations as finalized, approval for these plans is an administrative action that has been delegated to the Director of the Compliance Division within the Office of Transportation and Air Quality. Given the significant notice and comment process used to develop these regulations, we do not find it appropriate to create additional notice and comment processes for each plan approval as suggested in your letter.

EPA's approval of an alternative renewable biomass tacking program plan from Camara Argentina de Biocombustibles (CARBIO) (also known as the Argentine Chamber of Biofuels) was made after more than two years of extensive review and consideration and after CARBIO made a number of additions to the plan to ensure that it would provide the necessary level of robust oversight. Our approval of CARBIO's Alternate Biomass Tracking Program under 40 CFR 80.1454(h) was based on CARBIO's plan providing equal or greater compliance assurance as the record keeping requirements in 80.1454 (c)(1), (d), and (g). Our decision document for CARBIO's Alternate Biomass Tracking Program is available on the web at http://www.epa.gov/otaq/fuels/renewablefuels/notices.htm.

We appreciate the concerns raised in your letter, and we were cognizant of the technical issues you raised during our review and consideration of the CARBIO plan. While the alternative plan

approach does replace the individual reporting approach currently available to biodiesel producers in Argentina, there are a number of important safeguards required under the alternative approach that do not currently exist for either individual reporting or the domestic aggregate compliance approach for biofuel producers using domestic planted crops and crop residues. Many of the parties utilizing the aggregate compliance approach are NBB members. The approved alternative approach for CARBIO requires that an independent third party surveyor assist the EPA in auditing relevant records and provide periodic reports to the EPA. Third party oversight is not required under either the individual reporting or the domestic aggregate compliance approach.

In September 2014, CARBIO submitted its annual survey plan for 2015 as it has done in past years in preparation for moving forward pending the EPA's approval. CARBIO's plan covers the entire soybean biodiesel supply chain from soybean production through intermediate processing, to biodiesel production. CARBIO has contracted with Peterson Control Union as the independent surveyor. Peterson Control Group is a well-established certification body with long experience in auditing. Argentina established in 1998, and continues to implement, a mandatory *cartas de porte*, or waybill, system for tracking the movement of goods between jurisdictions. CARBIO's plan relies on both land cover data from satellite imagery and auditable *cartes de porte* for individual farms to qualify as qualifying lands. Ultimately, the feedstocks intended for use will be kept segregated from non-qualifying feedstock based on *cartes de porte,* and no mixing will be allowed through the biodiesel production process. The EPA will be supplied a copy of each survey and desk audit within 30 days and must be immediately notified of any non-complying party.

We believe this plan provides significant oversight beyond the individual reporting requirements currently available to producers importing biodiesel from Argentina. Nonetheless, we note that the EPA may revoke this approval at any time for cause, including an EPA determination that the approved survey plan has proved inadequate in practice or that it was not fully implemented.

We are also aware that with this approval, the potential exists for increased biodiesel imports from Argentina, as highlighted in your letter. Your letter, as well as the CARBIO decision and other updated information relevant to assessing the potential for renewable fuel imports, will be considered as appropriate in developing future RFS volume standards.

If you have additional questions, you can contact John Weihrauch of my staff at 202-343-9477.

Sincerely,

Byron Bunker
Director
Compliance Division

EXHIBIT C

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November 13, 2013

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Application by CARBIO, et. al. on behalf of biodiesel companies from Argentina related to the "Alternative Renewable Biomass Tracking Requirement" (40 C.F.R. § 80.1454(h))

Dear Administrator McCarthy:

We hope you are well. Today, we bring to your attention an important matter that if not addressed may allow hundreds of millions of gallons of biodiesel that do not meet any of the renewable biomass requirements of the Renewable Fuels Program (RFS2) to be imported into the United States as early as January 1, 2014.

We understand a number of companies in Argentina, working through their trade association "CARBIO", are requesting the U.S. Environmental Protection Agency (EPA) to approve an "Alternative Renewable Biomass Tracking Requirement" under 40 C.F.R. § 80.1454(h), which, generally, would serve to replace the stringent feedstock recordkeeping requirements of the RFS2 regulations.

We do not believe that any "independent third party" has actually conducted a comprehensive program of annual compliance surveys on any biodiesel facilities or their feedstock suppliers in Argentina. Rather, we believe a plan has been submitted to EPA that outlines a survey program, but that the actual "comprehensive program of annual compliance surveys" has not yet begun. In context of the steps that EPA is taking to insure that RINs being generated actually meet the requirements of the regulations, at best, it would seem premature for EPA to approve a foreign survey plan that cannot meet the requirements of any of the recently proposed quality assurance plans. This is especially true where EPA has provided the public with little to no guidance on what a survey plan under Section 80.1454(h) would entail.

Furthermore, it would seem that any approval under Section 80.1454(h) of a plan by EPA would be premature given that the issue of what constitutes allowable RIN generation is being discussed in two pending rules that have not yet been finalized:

1. 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; and

2. Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS2 Standards; Notice of Proposed Rulemaking, 78 Fed. Reg. 36,042 (June 14, 2013), Docket ID No. EPA–HQ–OAR–2012-0401.

The National Biodiesel Board has commented on both rules. We support additional assurances that foreign producers of renewable fuel are in compliance with the RFS2, and we support additional provisions to assist EPA in the enforcement of the RFS2 requirements, particularly increasing the bond requirements for foreign production of renewable fuels. We commented at length on how a "quality assurance plan" (Q-A-P) should be applied to foreign biofuel producers. Specifically, we are concerned about the jurisdiction of the EPA and the U.S. Department of Justice in reaching into other countries to enforce the RFS2 program. We asked the question: How does EPA best protect obligated parties and the RFS from fraud or invalid RINs that are illegally or invalidly generated from foreign producers? Of particular difficulty is ensuring that EPA's restrictions on the types of renewable biomass that can be used are met. These restrictions require a rigorous tracking program. Again, we think this is an important issue for the EPA to get right, as there are currently hundreds of millions and potentially billions of RINs that will likely be generated under the program. An excerpt of our Q-A-P comments is attached.

In light of the current Renewable Volume Obligation discussion being undertaken as a proposed rule by the EPA, there will likely be huge losses in domestic production if the EPA moves to prematurely approve biodiesel from Argentina to qualify for the program based on a survey plan that has not been subject to public review and that does not have the same level of rigor or oversight as the programs in place for domestic producers. Even as we write, the EPA is in the process of proposing the 2014 Renewable Volume Obligations for Biomass-based Diesel. As you know, many believe the proposal will include a meager 1.28 billion gallons for 2014, and perhaps hold it steady in 2015 at the same volume. Due in part to a "Differential Export Tax"[1] in Argentina, which encourages biodiesel exports over soybean exports, the Argentinian Biodiesel industry has the ability to produce and import to the United States more than 900 million gallons of biodiesel annually.

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[1] ***Understanding DETs (LMC March 2013 DET Analysis)***

The Argentine Differential Export Tax on soybean and soybean related products are as follows:

- *Soybeans - 35%*
- *Soybean Oil – 32%*
- *Soybean Meal – 32%*
- *Biodiesel – 17.5%*

DETs are Differential Export Taxes. In Argentina, export taxes are levied on beans as well as soybean products; however, they create an incentive to process soybeans in the country for export. This is done by applying different tax rates on soybeans and the products from crushing which decline with the degree of processing, being higher on beans than on products. DETs the government to change the balance of exports between beans and products away from that balance that would exist in a free market, with a knock-on effect on soybean crushers elsewhere in the world.

Soybeans can either be used directly as beans, or can be crushed to produce soybean oil and meal. The ***crush margin*** *is the difference between the cost of the beans and the revenue from the meal and oil. This is determined, in turn, by the relative price of the beans compared to the prices of the meal and oil. If the beans become cheaper in relation to products, crushing becomes more profitable and the crush margin increases.*

This "differential" in the DETs arises because ... soybean exports are taxed at the highest rate in Argentina; this is currently set at 35%. A lower export tax rate of 32% is charged on oil and meal. These differences in the rates of taxation increase the profitability of crushing in Argentina, …. The export tax on biodiesel until very recently was set at a net rate of 17.5% (calculated after deducting a 2.5% tax refund from the nominal export tax of 20%). This provides an incentive to process soybean oil into biodiesel for export.

According to the Energy Information Administration, already in 2013, we have seen imports from Argentina come to the United States, even though presumably these gallons do not qualify as RIN generating gallons for purposes of the RFS2. In 2013, without biodiesel from Argentina, the United States will import approximately 350 million gallons of biodiesel, of which approximately ½ will qualify for the Biomass-based Diesel program.

In 2014 it is anticipated, without including biodiesel from Argentina, that as much as 400 million gallons of RIN generating biodiesel and renewable diesel may be shipped to the United States.

Given this outlook for 2014, the total volume of imports including biodiesel from Argentina could be as much as 1.3 billion gallons. Potentially, this import volume could be more than the entire 2014 RVO for Biomass-based Diesel (1.28 billion gallons). Clearly, we do not believe this is the program envisioned by Congress or this Administration.

As you consider moving forward on an "Alternative Renewable Biomass Tracking Requirement" under 40 C.F.R. § 80.1454(h), we urge you to consider the greater context of this decision and the ever present impact it will likely have on domestic biodiesel production.

Due to the difficulty in overseeing foreign production and in taking enforcement actions against foreign producers highlighted in the proposed rules noted above, we also have significant concerns regarding the effectiveness of any survey plan that might have been proposed. According to a case study by the Association of American Geographers, Argentina ranks third in soybean production and soybean consumption due to its large cattle industry, and is a leading exporter of soybean oil.[2] Soybean production in Argentina has grown fast in the past few years, and soybean area continues to increase at a rapid pace.[3] The World Bank has noted, with respect to Argentina, that "[a]griculture (including land use change and forestry) is the largest contributor to GHG emissions in the country, while contributing less than 6% of GDP…."[4] The concerns of the National Biodiesel Board are even more pronounced due to the lack of public notice and opportunity to comment that EPA has provided on its "alternative renewable biomass tracking requirement," as it relates to foreign production.

Thus, we urge you to provide the public with notice and an opportunity to comment on any proposed survey plan for foreign feedstocks and production before EPA takes any action. This is particularly true in light of recent events that may not have been contemplated under the RFS2 proposed rule, and the lack of any meaningful guidance provided to the public as to how EPA might implement a "consortium" approach overseas. We also believe that the implementation and enforcement of the program must be

[2] Kingsland, M. and Hamilton, M. 2010. Population & Natural Resources case study: How can food production be produced sustainably to feed growing populations? In Solem, M., Klein, P., Muñiz-Solari, O., and Ray, W., eds., AAG Center for Global Geography Education. Available from http://globalgeography.aag.org.

[3] Doane Advisory Services, *A Look at Brazil, Argentina soybean sectors*, AG Professional, Mar. 14, 2013, *available at* http://www.agprofessional.com/news/A-look-At-Brazil-Argentina-soybean-sectors-197594841.html. "Over the last seven years [Brazil and Argentina] have added nearly 24 million acres, an amount equal to soybean acreage in Illinois, Iowa and Indiana combined." *Id.*

[4] World Bank, Latin American and the Caribbean Region: Agriculture and Rural Development Team, *Argentina: Country Note on Climate Change Aspects in Agriculture*, at 2 (Dec. 2009), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Climate_ArgentinaWeb.pdf.

transparent to ensure compliance. The public, in addition to EPA, should be able to monitor compliance. Finally, we outline additional issues that EPA should consider prior to approving any such survey plan.

I. EPA Must Give the Public Notice and an Opportunity to Comment on Argentina's Proposal for Alternative Renewable Biomass Tracking.

In the proposed RFS2 rule, EPA outlined possible compliance alternatives for "***domestic*** renewable fuel." 74 Fed. Reg. 24,904, 24,938-24,940 (May 26, 2009) (emphasis added). One such alternative was to require renewable fuel producers to set up and administer a quality assurance program, creating the possibility of a partial affirmative defense. *Id.* at 24,940. The proposal provided no explanation as to how such a plan might apply to foreign feedstocks, only noting that EPA seeks comment on whether foreign producers should be subject to similar requirements as domestic producers with respect to the renewable biomass requirements.

EPA suggested, for domestic producers, creation of a "consortium" to establish a quality assurance program for the *renewable fuel production supply chain*. 74 Fed. Reg. at 24,940. This alternative was purportedly to be patterned after the survey program administered by the Reformulated Gasoline Survey Association.[5] *Id.* The proposal referenced a "nationwide verification program" carried out by an independent surveyor providing oversight of the feedstock designations and handling processes. *Id.* The survey plan would be required to include a methodology for conducting the surveys, and would be required to be approved by EPA. *Id.* The proposal indicated that this alternative approach was intended to merely provide a partial affirmative defense, and would include a means of addressing potential violations. *Id.* Although EPA sought comment on whether the alternatives proposed for domestic producers should also apply to foreign producers, EPA recognized in the proposed rule that "EISA creates unique challenges related to the implementation and enforcement of the definition of renewable biomass for foreign-produced renewable fuel." *Id.* at 24,941.

The consortium approach finalized in the RFS2 Final Rule under 40 C.F.R. § 80.1454(h) differs in significant ways from the proposal, and, moreover, provides only very broad strokes as to what is to be included in any such plan.[6] Among the significant differences from the proposal is that the final regulation does not require participation by all feedstock producers and handlers in the plan, 74 Fed. Reg. at 24,940, requiring only that the renewable fuel producer "take all reasonable steps to ensure that each feedstock producer, aggregator, distributor or supplier cooperates with this program." 40 C.F.R. § 80.1454(h)(5)(i). It also moved from a "nationwide verification program," 74 Fed. Reg. at 24,940, to a

[5] Under the reformulated gasoline program, a refiner or importer can establish compliance based on an average basis, allowing, for example, use of offsets to meet emissions requirements. Under these surveys, EPA is also able to monitor compliance with testing. EPA provided no indication that the alternative tracking program under the RFS2 program would allow for averaging, and testing cannot be conducted to ensure the feedstock meets the renewable biomass requirements at issue.

[6] The proposal did include a reference to a quality assurance program implemented by producers, outlining some specific elements of such program. 74 Fed. Reg. at 24,939. EPA did not finalize this proposed alternative, noting instead that it was finalizing the option that was "similar to the model of the successful Reformulated Gasoline Survey Association." 75 Fed. Reg. 14,670, 14,700 (Mar. 26, 2010).

plan for an undefined "survey area" and "covered area" or an undefined set of producers. 40 C.F.R. § 80.1454(h). The broad category of issues that are to be included in a survey plan also significantly differs from the regulation providing for a survey program under the reformulated gasoline program, which provides more prescriptive requirements and criteria for approval of the survey plan by EPA. *See* 40 C.F.R. § 80.68; *see also* 40 C.F.R. § 80.1502 (establishing a survey program related to sales of E15). EPA provided no guidance in either the proposal or final rule as to the methodology for the surveys to be conducted. That EPA must approve the survey plan under the RFS2 program does not substitute for EPA's obligation to provide adequate notice and opportunity to comment or to replace the need for public input.

The approval of a plan constitutes final agency action, which is subject to judicial review under Section 307(b) of the Clean Air Act. 42 U.S.C. § 7607(b). Given the lack of guidance provided by EPA in the proposed and final rules, EPA has not provided adequate public notice or a meaningful opportunity to comment as required under the Act. 42 U.S.C. § 7607(d). Public notice and comment gives the parties affected by a decision an opportunity to participate in the decision-making process. *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979); *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). The D.C. Circuit has stated that it will defer to an agency "so long as we are assured that its promulgation process as a whole and in each of its major aspects provides a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978). Indeed, it was impracticable for parties to provide comment on the implementation of a survey plan and its potential application to Argentina. While the public could comment as to why foreign producers should be subject to more stringent requirements,[7] only by placing the proposal in context does the public have adequate opportunity to address technical, factual and policy concerns with the so-called consortium approach for foreign feedstocks and production. Considering the rapid expansion of soybean area in Argentina and the very recent history of deforestation and land use changes for such production, providing for public comment ensures that EPA has "negate[d] the dangers of arbitrariness and irrationality in the formulation of rules …." *Id.* (citation omitted). The concerns behind EPA's recent proposals also indicate that EPA should reassess its consortium approach with respect to feedstock from foreign countries. As such, there are grounds to grant a petition for reconsideration of the consortium approach in general, 42 U.S.C. § 7607(d)(7), and EPA should provide notice and comment on any proposed approval of the request for a consortium approach in Argentina.

Moreover, the regulation itself provides that the survey program is intended to "achieve the level of quality assurance required under" the other renewable biomass provisions. 40 C.F.R. § 80.1454(h). EPA's regulation for foreign countries seeking an aggregate compliance approach, which was promulgated after the RFS2 Final Rule, provides for a 60-day public comment period. 40 C.F.R. § 80.1457(c). EPA found that public notice and comment on these petitions "is necessary and important," and that the data and calculations in the petitions should be made available to the public. 75 Fed. Reg. 76,790, 76,823-76,824 (Dec. 9, 2010). EPA provides no explanation why a "consortium"

[7] *See, e.g.,* NBB Comments at 27, EPA-HQ-OAR-2005-0161-2249.2 (Sept. 25, 2009) (distinguishing countries with declining agricultural land from those with increasing agricultural land).

survey plan for feedstock from foreign countries should escape similar public scrutiny, particularly where the aggregate compliance approach has only been applied in countries where agricultural land is stable or declining, which is simply not the case for Argentina. In addition, EPA is not familiar with agriculture production in foreign countries, and the public could provide invaluable assistance to EPA to ensure that the proposed plan will be effective. Thus, EPA should provide for public notice and comment on survey plans submitted to EPA under 40 C.F.R. § 80.1454(h) to ensure that the survey plan provides the same assurances as the other compliance approaches for the renewable biomass requirements.

Even if EPA somehow believes that the public had ample opportunity to comment, EPA has discretion to provide additional opportunities to ensure "public understanding and participation" in the process. *Weyerhaeuser Co.*, 590 F.2d at 1028 (citations omitted). Given the significant concerns that have arisen with respect to quality assurance programs conducted overseas and with respect to EPA's ability to enforce the RFS2 requirements, EPA should provide the public with an opportunity to review and comment on any survey plan under consideration by EPA.

II. EPA Should Ensure Sufficient Transparency of Any Approved Survey Plan Under Section 80.1454(h).

EPA should also consider making the plans and results of the audits available to the public on an ongoing basis. In its proposal for a quality assurance program for RIN generation, EPA recognized that the effectiveness of a quality assurance program is positively correlated to the amount of transparency with its implementation.[8] 78 Fed. Reg. at 12,189. EPA found that providing a level of transparency on the auditors and the quality assurance programs being implemented by them would "allow affected stakeholders to notify EPA of concerns or deficiencies in a third-party auditor's registration or QAP." *Id.* EPA also found that transparency "will work hand-in-hand with our QAP process to improve the integrity of information submitted for RFS compliance and deters fraudulent behavior." *Id.* at 12,197. Under the proposal, this transparency is to be provided on an ongoing basis where EPA has proposed requiring annual renewal of an auditor's registration. *Id.* at 12,189.

Transparency has also been identified as a key component in voluntary certification programs for sustainable production of crops, including soybean. For example, the Roundtable on Responsible Soy Standard for Responsible Soy Production (RTRS) identified a commitment to transparency as necessary for those participating in the certification program, including providing a publicly available summary of information about the performance of each certified organization with respect to each criterion.[9] EPA should provide the public with notice of its proposed determination on the request for a consortium approach for Argentina and give the public an opportunity to comment on the types of information EPA

[8] Although NBB has concerns with the quality assurance program for RINs as proposed, it does believe that EPA should reconsider its "consortium" approach for renewable biomass from foreign countries based on its proposal and the comments submitted, particularly with respect to EPA's concerns regarding foreign production of biofuels. NBB respectfully refers EPA to its comments on the February 2013 proposed rule.

[9] RTRS, *RTRS Standard for Responsible Soy Production Version 2.0_Eng.*, at i, Sept. 16, 2013, *available at* http://www.responsiblesoy.org/.

should provide on an ongoing basis to ensure compliance with the approved plans and with the renewable biomass requirements.

III. EPA Must Ensure that Any Survey Plan Approved Under Section 80.1454(h) is Designed to Achieve at Least the Same Level of Quality Assurance Required Under the Individual Tracking Program and the Aggregate Compliance Approach.

EPA's regulations establish an "alternative renewable biomass tracking requirement" in lieu of the recordkeeping requirements for individual producers under 40 C.F.R. § 80.1454(c)(1) and (d). The regulation requires an independent third party to conduct a comprehensive program of annual compliance surveys to be carried out in accordance with a survey plan approved by EPA. 40 C.F.R. § 80.1454(h)(1). The plan, however, must be "designed to achieve at least the same level of quality assurance required in paragraphs (c)(1), (d) and (g)."[10] 40 C.F.R. § 80.1454(h)(2)(iv). EPA's regulations provide little detail as to what the survey plan must look like except that it must be (1) conducted at renewable fuel production and import facilities and their feedstock suppliers and (2) representative of all renewable fuel producers and importers in the survey area and representative of their feedstock suppliers. 40 C.F.R. § 80.1454(i)(ii), (iii). Although NBB believes that public notice and comment should be provided prior to any determination with respect to any proposed survey plan for Argentina under 40 C.F.R. § 80.1454(h), we provide the following guidance that we believe must be considered as EPA reviews any such plan.

A. Production and import facilities and feedstock suppliers.

Although EPA notes that the survey plan should include production and import facilities and feedstock suppliers, EPA does not adequately define these facilities, particularly with respect to import facilities and feedstock suppliers.

The regulations do not define "import facilities." EPA's regulations include various testing and recordkeeping requirements for imports. *See, e.g.,* 40 C.F.R. § 80.1466. Any survey plan should include a review of these records and inspection of the load port and port of entry.

The regulations also do not define "feedstock suppliers." The feedstock supplier may not be the actual grower of the commodity. EPA recognized as much noting that the producer/importer participating in the alternative tracking program "must take all reasonable steps to ensure that ***each feedstock producer, aggregator, distributor, or supplier*** cooperates." 40 C.F.R. § 80.1454(h)(5)(i) (emphasis added). Given certain commodities, the feedstock suppliers may be in a central location, such as a crushing facility, accepting feedstock grown on cropland from a very broad area. If the aggregate compliance approach is not available, then we assume that, unlike in the United States and Canada, the total amount of eligible agricultural land is not stable or declining in these areas. As noted above, reports indicate that soybean production in Argentina continues to grow at a rapid pace, hitting a record high for the 2012/2013 crop year. China and the European Union remain significant importers of

[10] Paragraph (g) relates to the aggregate compliance approach established for planted crops and crop residues in the United States and other countries that petition and obtain such an approach under 40 C.F.R. § 80.1457.

soybean oil from Argentina and soy production is expanding into other parts of Argentina once considered too dry and uneconomical to produce soy.[11] "Argentina has lost 70 percent of its natural forest, much of it in the last 20 years, with increased soy production."[12]

The proposal should identify the original source of the feedstock and establish requirements to show that, e.g., for crops and crop residue, the feedstock is from "existing agricultural land." It should also provide a detailed explanation of how the feedstock gets from the original source to the biofuel production facility and then to the importer. In other words, the survey plan should ensure that the eligible feedstock is adequately segregated throughout the supply chain. It is only upon fully understanding the production process from the original source of the feedstock and down the chain that the survey plan can be reviewed and compared to the individual tracking requirements.

The annual surveys would confirm that the fuel is being produced from feedstock from the "existing agricultural lands" of the identified sources. If new growers are included in the survey area, it must show that the new growers similarly meet the requirements. This would provide safeguards to ensure that feedstock from outside these survey areas are not being used.

B. Representative of all renewable fuel producers and importers in the survey area and representative of their feedstock suppliers.

Although the producers and importers eligible to rely on the survey plan appear limited under EPA's regulations, EPA makes clear that the survey plan must be representative of all renewable fuel producers and importers in the survey area and their feedstock suppliers. While EPA requires that the survey plan identify the parties covered, the public has not had the opportunity to review and comment on what such a plan might look like for foreign production. The effectiveness of a plan may depend on several factors, including the policies of the country at issue regarding land use, the type of fuel being produced, the type of feedstock being utilized, and the size of the survey area. EPA must ensure the plan clearly defines the survey area and the parties subject to the survey requirements.

As an initial matter, EPA did not provide the public with any parameters as to the "survey area" that can be covered in any such plan. This is unlike the petition process provided for an aggregate compliance approach, which EPA determined must be on a nationwide basis. EPA found that "national level data most accurately reflects the broader effects of renewable fuel feedstock production on land use patterns." 75 Fed. Reg. at 76,821. EPA's proposed rule similarly indicated that an industry-wide "consortium" would be on a nationwide level. 74 Fed. Reg. at 24,940. If the survey area is less than the entire nation, it is likely that the country's policies or land use trends are not similar to those in the United States or Canada. It also would be difficult to determine if there merely have been shifts in land use, resulting in substantial new clearings outside the survey area. In addition, EPA provides no guidance on how the survey plan is to confirm that the lands to be covered met the "existing agricultural land" definition on December 19, 2007. Any evidence indicating that the areas may have been cleared

[11] Anne Herrberg, *Soy production endangers Argentina*, Deutsche Welle, Mar. 9, 2012, *available at* http://www.dw.de/soy-production-endangers-argentina/a-16216304.
[12] *Id.*

post-2007 should require a careful review of the proposed survey area. The initial identification of these lands must be based, at a minimum, on the types of documentation required for individual tracking. In short, the survey area should be carefully delineated, and the compliance carefully tracked.

EPA similarly did not explain how it would determine that the surveys are "representative" of producers/importers in the survey area and feedstock suppliers. Ensuring that the surveys to be conducted are sufficiently representative of the producers/importers and their suppliers is key to ensuring that that this approach will provide at least the same assurances as individual tracking and the aggregate compliance approaches. With the aggregate compliance approach, for example, agricultural lands in the United States and Canada are tracked through extensive and highly reliable surveys conducted by government entities. These surveys have broad coverage, and, more importantly, are subject to strict quality control standards. EPA should ensure that the survey plan includes quality control standards. This is particularly true where, as noted above, it is unclear how far down the chain EPA is going to require the annual surveys to cover.

C. EPA must ensure that the annual compliance surveys are sufficiently rigorous.

EPA's regulations provide merely broad strokes as to what is expected in a survey plan. This includes: (i) identification of the parties for whom the survey is to be conducted; (ii) identification of the independent surveyor; (iii) a methodology for determining when the audits will be conducted, the audit locations, and the number of audits; and (iv) ***any other elements determined to be necessary*** to achieve the level of quality assurance required under the individual tracking program and the aggregate compliance approach. 40 C.F.R. § 80.1454(h)(4).

To achieve the level of quality assurance required, the compliance surveys must include audits along the supply chain within the "survey area." Because EPA cannot inspect or even easily visit other countries, these audits should include on-site visits. Section 80.1454(h) simply refers to audits, and requiring producers ensure cooperation by parties along the supply chain, referring simply to "copies of management plans, product transfer documents, and other records or information." 40 C.F.R. § 80.1454(h)(5)(i). Simply reviewing documentation at a producer or importer's facility does not adequately establish that the feedstock came from, e.g., eligible agricultural lands. In the proposed rule for a quality assurance program for RINs, for example, EPA proposed to require on-site visits as part of the audits. 78 Fed. Reg. at 12,192. EPA noted that the goal of these visits 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." *Id.* Similarly, site visits along the entire supply chain would better ensure that the feedstock is properly being segregated in a manner consistent with the survey plan and the requirements of the RFS2.

In addition, EPA makes no mention of the use of satellite imagery under the consortium approach. Under the individual tracking and aggregate compliance approaches, EPA is able to obtain mapping and nationwide data to track new clearings of land. Requiring the parties to submit satellite imagery of the surveyed lands and surrounding areas would provide additional assurances that new clearings are not occurring, allowing the surveyors to focus on ensuring the feedstock used came from lands within the

surveyed area. Such mapping, however, should not replace ongoing on-site visits of fields and review of new clearings and agricultural production for that year. But, it could provide the public with added assurances that the plan is effective and that the compliance surveys for Argentina are being conducted properly.

D. NBB is concerned that the surveyor is not truly independent.

Independence of the party conducting the audit (here, surveys) is key to ensuring the integrity of the program. EPA so recognized in its proposed rule for a quality assurance program for RINs, noting that the "first, and perhaps the most important, requirement for auditors is that they remain independent of renewable fuel producers." 78 Fed. Reg. at 12,187. Ensuring against a conflict of interest is necessary to avoid incentives to promote invalid verification. *Id.* EPA's regulation for a consortium approach refers to the requirements in 40 C.F.R. § 80.68(c)(13)(i), but that provision refers to independence from the "refiner or importer." Without a better understanding of the survey plan, it is not clear who the "refiner or importer" is in this situation. There are various parties that can be involved in the production and import of the biofuel, including, e.g., the farmer, the feedstock supplier, the biofuel producer, the exporter, the importer, and the purchaser of the fuel. Moreover, EPA notes that an organization may arrange for the surveys, but does not explain what type of "organization" it is referencing. EPA should protect against any conflict of interest that might influence the "independence" of the surveyor.

EPA's regulations also do not provide specific requirements for the independent surveyor's qualifications. Given the range of facilities being reviewed, the surveying entity must ensure that it has appropriately qualified employees who have experience and knowledge regarding the growing practices within the survey area. For example, there are several bodies that provide certification for sustainable production, such as the RTRS. These bodies provide various core competency requirements that could serve as a model for EPA to ensure the surveyors being hired meet the appropriate qualifications.

* * *

Given the questions left unanswered by the RFS2 Final Rule with respect to its potential application to foreign production, EPA should provide the public with notice and an opportunity to comment on requests for approval of a "consortium" approach under 40 C.F.R. § 80.1454(h). At a minimum, it should provide the public with additional guidance as to the actual content of a survey plan, including an explanation of what constitutes a covered survey area, who are the participants in such a program, what facilities are being audited and what are the elements of such audit, how EPA is ensuring against conflicts of interest, and what methodology must be implemented in determining the number and location of the surveys/audits. Consistent with its proposed approach for quality assurance programs for RINs, EPA should also provide greater transparency on the survey plans and their implementation on an ongoing basis. Due to the concerns that have been raised recently regarding potential fraud and the difficulty in policing activities overseas, EPA must take every precaution to ensure that proposals for a consortium approach provide the same level of assurance as the individual tracking and aggregate compliance approaches.

While we believe that public notice and comment is required on any proposed survey plan, we would like to meet with you to determine whether EPA is in fact considering a proposal similar to the one

described herein – and provide you with additional information on the detrimental impacts it is likely to have on our industry.

To arrange a meeting, please call Kirsten Skala at 202.737.8801 or by email to KSkala@biodiesel.org. We look forward to hearing from you on this important issue.

Sincerely,

Anne Steckel
Vice President of Federal Affairs
National Biodiesel Board

cc: The Honorable Tom Vilsack,
The Honorable Dan Utech

Attachment

NBB's comments are as follows:

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. This 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). 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.

EXHIBIT D

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September 16, 2014

Via Electronic and First Class Mail

The Honorable Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460
McCarthy.gina@Epa.gov
Docket: EPA–HQ–OAR–2012–0621

Re: Request for Reconsideration or Clarification of EPA's "RFS Renewable Identification Number (RIN) Quality Assurance Program; Final Rule," 79 Fed. Reg. 42,078 (July 18, 2014)

Dear Administrator McCarthy:

The National Biodiesel Board ("NBB") respectfully submits this Petition for Reconsideration or Clarification of the Final Rule entitled "RFS Renewable Identification Number (RIN) Quality Assurance Program; Final Rule," 79 Fed. Reg. 42,078 (July 18, 2014) (the "QAP Rule"). The QAP Rule establishes a voluntary quality assurance program for the purpose of verifying RINs under the Renewable Fuel Standard ("RFS2") program. It also includes various regulatory provisions related to the treatment of RINs based on activities occurring downstream of a renewable fuel producer. While NBB believes EPA made many positive revisions from the proposed rule, NBB remains concerned that there continues to be unanswered questions or unclear provisions in the QAP Rule requiring reconsideration or, at a minimum, clarification.

NBB is the national trade association representing the United States biodiesel industry. Its membership is comprised of biodiesel producers; state, national and international feedstock and feedstock processor organizations; fuel marketers and distributors; and technology providers. Biodiesel is a key part of the RFS2 program, making up the majority of the advanced biofuel category over the first several years of the program. While NBB has long worked to ensure the integrity of the RFS2 and RIN system, the biodiesel industry took prompt action to work toward

practical solutions to the RIN fraud issues the QAP Rule seeks to address.[1] NBB participated throughout the rulemaking process, including participating in stakeholder meetings on the QAP. In addition, several of NBB's members have engaged pre-approved auditors to verify RINs during the interim transition period and will likely be doing the same under the final rule.

NBB requests reconsideration or clarification on several aspects of the final QAP Rule.

- The final QAP Rule included new provisions to address the export of renewable fuel and retirement of RINs associated with those exports. NBB is concerned with several aspects of the new regulatory language, and believes reconsideration or clarification is warranted to better ensure compliance and transparency.

- While NBB understands that producers are not required to follow the biodiesel they designate for use as transportation fuel, heating oil or jet fuel and agrees that properly generated RINs should remain valid regardless of the actual downstream use, clarification is warranted as to the retirement of RINs by persons downstream of the producer if the fuel is subsequently used for another purpose.

- Given the recent increase in imports and the concerns raised by the public as to whether the requirements of the RFS2 regulations are being met (and enforced) overseas, EPA should reconsider and clarify the application of the quality assurance program to foreign production and imports of renewable fuel. EPA also should clarify and correct the provisions as they relate to foreign auditors.

- The final QAP Rule also does not appear to include provisions with respect to the independence of the auditor conducting the QAPs that EPA recognized as being necessary to ensure the effectiveness of the program. Reconsideration is warranted to clarify the conflicts of interest that must be avoided and to strengthen the requirements to ensure compliance and their enforceability.

- NBB believes further clarification is necessary with respect to the timing of updates to QAPs and an auditor's registration. Also, while EPA agreed that there should be no gaps in coverage while EPA reviews a company's registration renewal, it is not clear how the requirement to annually submit a QAP fits with these other provisions.

- Finally, NBB remains concerned with the new administrative process for addressing potentially invalid RINs. It continues to believe that EPA has not adequately addressed or allowed for corrective actions that may not require retirement of any RINs. A RIN should remain valid if the renewable fuel was produced from renewable biomass, meets one of the approved pathways or petitions, and was sold into commerce for use as or in transportation fuel, heating oil or jet fuel.

[1] 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.

I. BACKGROUND

A. History of the QAP Final Rule

The RFS2 program under Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), requires certain volumes of renewable fuel be "sold or introduced into commerce in the United States (except in noncontiguous States or territories)"[2] each year. To implement the RFS2 program EPA established the RIN system. The RIN was intended to be the "credit" for purposes of the required trading program and to serve as the measurement of compliance. 72 Fed. Reg. 23,900, 23,909 (May 1, 2007). RINs are generated by the renewable fuel producer to represent production of renewable fuel. *Id.*; *see also* 40 C.F.R. § 80.1426(a). RINs are assigned to volumes of renewable fuel, and may be separated under certain circumstances to be traded or used for compliance. 40 C.F.R. §§ 80.1426, 80.1429.

Under EPA's regulations, a RIN is "invalid" under certain circumstances. 40 C.F.R. § 80.1431(a). Invalid RINs must generally be retired or replaced if used for compliance. 40 C.F.R. § 80.1431(b). "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; *see also* 75 Fed. Reg. 14,670, 14,733 (Mar. 26, 2010); EPA, RFS2 Summary and Analysis of Comments at 4-43 (Feb. 2010). Nonetheless, in various cases, EPA does allow for remedial actions that allow "invalid" RINs to remain in the marketplace (or used for compliance). *See* 40 C.F.R. § 80.1431(c); *see also* EPA, *RFS2 Remedial Action Guidance*, http://www.epa.gov/otaq/fuels/renewablefuels/compliancehelp/rfs2remedialactions.htm (last updated June 19, 2014).

From the start of the program, EPA indicated that the RIN system was one of "buyer beware," making it incumbent on obligated parties to undertake some due diligence to ensure the RINs purchased were valid. In late 2011 and 2012, EPA announced three enforcement actions related to invalid RINs generated mostly in 2009 and 2010, with some in 2011. Although EPA provided some enforcement relief with respect to the purchasers of these invalid RINs, EPA did take enforcement actions against obligated parties that had relied on these invalid RINs. EPA further recognized that there was a "widespread failure of obligated parties to conduct adequate oversight." 78 Fed. Reg. 12,158, 12,163 (Feb. 21, 2013).

These cases of fraud led to private party solutions and increased auditing by obligated parties. The quality assurance program proposed by EPA was intended to provide more guidance as to what constitutes appropriate due diligence, so that the industry can understand what may be required rather than face many and varied requests for information and audits. It also sought to provide purchasers of invalid RINs an affirmative defense to limit their liability in light of fraudulent actions by others.

During the development of the proposed rule, EPA also recognized that there was some confusion in the marketplace as to whether certain downstream uses could invalidate an otherwise properly generated RIN, and proposed or requested comment on revisions to the RFS2

[2] Hawaii has opted into the RFS2 program.

program to address downstream uses. In the proposal, EPA requested comments on various topics, but did not provide proposed regulatory language. *See, e.g.*, 78 Fed. Reg. at 12,165 (seeking comment on participation in QAP program by foreign producers); *id.* at 12,193 (seeking comments on options for addressing export of renewable fuel).

NBB submitted substantial comments on the proposal for the QAP Rule, including comments to ensure the integrity of the RFS2 program and RIN system and to ensure a workable and practical program for producers. EPA-HQ-OAR-2012-0621-0069 (referred to herein as "NBB Comments"). In the final QAP Rule, EPA finalized one QAP program for the verification of "Q-RINs," which included new provisions intended to strengthen the integrity of the program, such as those related to the independence of the auditor implementing a QAP. EPA also sought to finalize new regulatory provisions to ensure that RINs are retired for all renewable fuel that is exported "and to address RINs that become invalid downstream of a renewable fuel producer." 79 Fed. Reg. at 42,078.

B. Statutory Provisions Governing Reconsideration

Under Section 307(d)(7)(B) of the Clean Air Act, the Administrator is required to convene a proceeding to reconsider a final rule upon a demonstration that it was impracticable to raise a particular objection to the rule during the period for public comment (but within the time specified for judicial review), if the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). Reconsideration petitions may also be an appropriate forum to raise procedural violations. *Id.* § 7607(d)(9); *see also White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1252 n.5 (D.C. Cir. 2014), *petitions for cert. filed*, 83 U.S.L.W. 3089 (U.S. July 14, 2014) (Nos. 14-46, 14-47, 14-49).

The Clean Air Act requires notice to give the public a meaningful opportunity to comment on the terms and basis of EPA's regulations. 42 U.S.C. § 7607(d)(3), (4), (5); *see also* 5 U.S.C. § 553(b)(3), incorporated by reference in 42 U.S.C. § 7607(d)(3).

> Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)); *see also Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979) ("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.") (citation omitted). That EPA may be responding to comments in the final rule may not be sufficient to satisfy the notice and comment requirements of the Clean Air Act. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (citing *AFL-CIO v. Donovan*, 757 F.2d 330, 339-40 (D.C. Cir. 1985) and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549-50 (D.C. Cir. 1983)).

In addition, the Clean Air Act requires EPA to explain any major changes in the promulgated rule from the proposed rule, and to respond to significant comments, criticisms and new data submitted during the comment period. 42 U.S.C. § 7607(d)(6).

The final QAP Rule included many revisions in response to comments it received, but EPA did not address several significant comments and, even when EPA indicated it was responding to comments, the revisions did not always fully address the changes EPA agreed were necessary or the public's concerns. In addition, the final QAP Rule included new rationalizations and new provisions that the public should have a meaningful opportunity to comment on or that require clarification. Although NBB believes several of these issues may simply be inadvertent errors requiring technical corrections, NBB has submitted this petition for reconsideration and requests that EPA make the appropriate revisions or clarifications.

II. BASIS FOR RECONSIDERATION OF THE FINAL RULE

A. Reconsideration or Clarification is Necessary with Respect to the New Provisions on Export Renewable Volume Obligations.

Under the current RFS2 regulations, properly generated RINs are not rendered invalid if the renewable fuel is exported. Rather, the export of the renewable fuel triggers an obligation to retire RINs. 40 C.F.R. § 80.1430. Compliance with this renewable volume obligation for exports ("ERVO") was done on an annual basis. 79 Fed. Reg. at 42,103. Given some confusion in the industry as to what exports trigger an ERVO, EPA proposed to make certain clarifications to 40 C.F.R. § 80.1430(a) to make clearer that an ERVO is triggered with any export of renewable fuel. 78 Fed. Reg. at 12,193. EPA, however, also sought comment on whether additional changes to the ERVO were necessary, including whether, in the case of exports, RINs should be retired on a shorter time frame than annually. *Id.* Although EPA noted that it "could require the immediate retirement of RINs, at the time of export or within a limited window such as 30 days after export," it did not provide proposed regulatory language. *Id.* EPA also asked whether the deficit carryover provision should be eliminated for exports. *Id.*

In the final QAP Rule, EPA agreed with public comments, including those submitted by NBB, that a shorter time frame for the retirement of RINs related to exports would have advantages in providing greater certainty in the RIN market. 79 Fed. Reg. at 42,104. Although NBB supported this change in its comments, it has concerns with the final regulatory language that it believes EPA should reconsider or clarify through technical corrections. Moreover, EPA did not respond to comments NBB raised with respect to additional revisions necessary to provide greater transparency and to ensure compliance with these requirements.

1. Reconsideration is necessary to ensure compliance with the new ERVO provisions.

While EPA claimed it was moving to a 30-day retirement ERVO, which NBB supports, the regulatory language appears to only require a demonstration of compliance with these requirements on an annual basis and in the same manner as is currently the case.[3] While NBB's

[3] The final regulatory language states that the exporter "must demonstrate compliance with its ERVOs pursuant to § 80.1427(c)." 79 Fed. Reg. at 42,115 (new 40 C.F.R. § 80.1430(f)). New Section 80.1427(c), in turn,

comments referenced retaining an annual compliance report, such compliance report would have been accompanied by additional revisions to the recordkeeping and reporting requirements and greater transparency. NBB Comments at 54-55. The provisions in the final QAP Rule do not adequately address these issues.

NBB's comments requested additional transparency with respect to obligated parties and exporters to ensure compliance and provide more information to the marketplace. NBB also raised concerns regarding the creation of "shell" corporations to avoid the RIN retirement obligations. NBB Comments at 53. EPA responded that the shorter time frame for retiring RINs will "discourage 'shell corporations'" from being formed to export fuel and then fold before retiring RINs. 79 Fed. Reg. at 42,103. But relying on the annual compliance reports under 40 C.F.R. § 80.1451(a)(1) alone is not sufficient. In particular, the regulations do not provide sufficient transparency to give the market the certainty that was the impetus for the change in the deadline for retirement. For example, 40 C.F.R. § 80.1451(a)(1) includes no requirements to report the information we believe is necessary to determine whether the exporter met the requirements of 40 C.F.R. § 80.1430(f), such as information regarding the dates of export and the amounts of each export. Since it is an annual report, it is not clear how ERVOs are to be reported, per batch or combined for the year as a whole. EPA should reconsider these provisions or provide clarification as to how it anticipates ensuring compliance with the new deadlines for retiring RINs based on export of renewable fuels.

In addition, the final QAP Rule does not address the concerns NBB raised that more transparency is needed regarding exports and the RINs being retired. While EPA provides some data on RIN retirements, there is no information provided on RINs retired for export. *See* EPA, *2014 RFS2 Data: RIN Retirements*, http://www.epa.gov/otaq/fuels/rfsdata/2014emts.htm. There currently is no separate code in the EMTS for retirement based on export, although EPA recently announced a revised version of the EMTS to be released in October. NBB encourages EPA to make the proper changes to the EMTS to ensure all the information necessary to ensure compliance is required. NBB further encourages EPA to include a table on its EMTS data webpage showing the exports that have been reported and the RINs that have been retired in response. *See* NBB Comments at 55.

2. Reconsideration is warranted to address new regulatory language not made available to the public at the proposal.

NBB supported revising the ERVOs because treating ERVOs the same as the RVOs of obligated parties is inconsistent with the statute. *See* NBB Comments at 54. 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. Part and parcel of a shorter time frame is that the retired RINs are those generated with and assigned to the fuel or generated contemporaneously with the export.[4] The final QAP Rule, however, allows up to 20% of the ERVO to be "fulfilled using RINs generated in the year prior to the year in which the RVO was

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requires that exporters demonstrate "pursuant to § 80.1451(a)(1)" that it retired RINs in compliance with Section 80.1430(f). *Id.* (new 40 C.F.R. § 80.1427(c)). Section 80.1451(a)(1), however, only requires "annual compliance reports." 40 C.F.R. § 80.1451(a)(1).

[4] NBB supported 30 days rather than an immediate retirement to give parties a reasonable time period for commercial transactions.

incurred." 79 Fed. Reg. at 42,115 (new 40 C.F.R. § 80.1427(c)(3)). This language was not noticed, and EPA made no mention of retaining the ability to use prior year RINs if it was to move to a shorter time period for the retirement of RINs for exports in the proposed rule. *See MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("More to the point, however, this court has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek.") (citations omitted). Further, in the final QAP Rule, EPA provides no explanation for inclusion of this provision. Given the significant differences in the provisions and EPA's new assessment, it was incumbent on EPA to examine the basis for having this provision with respect to exports and explain that to the public. *See Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) ("[A]s we held in *Appalachian Power Co. v. EPA*, [135 F.3d 791, 818 (D.C. Cir. 1998),] the EPA at all times 'retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule,' and therefore must justify its basic 'assumption[s] even if no one objects … during the comment period.'"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (finding EPA cannot "ignore the procedural requirements of §307(d)," even if the agency "gives a decent reason for doing so").

Allowing prior year RINs to be used to meet ERVOs undermines the purpose of the 30-day period for retirement, which is to address uncertainty as to the size of the export market and RIN availability. Indeed, EPA recognized that a shorter time frame would "reduce incentives for exporters to profit from selling RINs received with renewable fuel to obligated parties at a time of high RIN prices and then purchasing and retiring RINs to meet their RVO when prices drop." 79 Fed. Reg. at 42,104. EPA also recognized that the ERVO is intended to ensure RINs are retired so the RINs generated for fuel that is to be exported "do not artificially inflate the RIN market and misrepresent the amount of renewable fuel produced for domestic use." *Id.* at 42,102. If the purpose of the shorter time frame is to provide greater certainty in the RIN market and to ensure domestic use to meet the annual volume mandates, it makes no sense to also allow exporters to use prior-year RINs to meet the ERVOs. While EPA may claim that the 20% provision currently applies, the public has consistently raised concerns that allowing prior year RINs to be used to establish compliance with the volume mandates was improper under the statute. Moreover, the provision was intended to provide obligated parties flexibility to address potential shortages of RINs. Here the ERVO is intended to remove RINs out of the system that do not represent renewable fuels that are being used domestically. It was up to EPA to provide notice to the public and explain why the provision was still relevant, not to the public to anticipate its retention and argue against it.

EPA also included a new provision that exempts certain exports of renewable fuel for which no RINs were generated: "No provision of this section applies to renewable fuel purchased directly from the renewable fuel producer and for which the exporter can demonstrate that no RINs were generated through the recordkeeping requirements of § 80.1454(a)(6)." 79 Fed. Reg. at 42,115 (new 40 C.F.R. § 80.1430(a)(1)). The recordkeeping requirement includes an affidavit signed by the producer of the exported renewable fuel affirming that no RINs were generated for that volume of renewable fuel. *Id.* at 42,118 (new 40 C.F.R. § 80.1454(a)(6)(i)). NBB submitted comments that, if EPA were to provide for such an exemption, additional requirements were necessary so that EPA can better track fuel production and RIN generation. NBB Comments at 53. EPA did not respond to these comments and merely requiring the exporter to retain an affidavit from the producer is not sufficient.

3. An additional technical amendment to the provisions on ERVOs may be warranted.

NBB appreciates EPA's efforts to clarify that the export of any amount of renewable fuel under the program triggers an ERVO, as it explained in the proposal.[5] However, in the final QAP Rule, EPA used a different formulation than in the proposal, applying the ERVO to "[a]ny exporter of renewable fuel, whether in its neat form or blended." 79 Fed. Reg. at 42,115 (new 40 C.F.R. § 80.1430(a)(1)). This is similar to the formulation that caused confusion in the first instance. EPA does not explain why it changed from the proposed rule. NBB suggests that EPA retain the reference to "any amount" of renewable fuel, whether in its neat form or blended.

B. EPA Must Clarify its Intention with Respect to the Treatment of RINs When Renewable Fuel is Subsequently Redesignated for a Non-Qualifying Fuel Use.

In the proposed rule, EPA sought to address concerns that non-qualifying downstream uses may invalidate a properly generated RIN. 78 Fed. Reg. at 12,193. NBB supported clarifying that properly generated RINs remain valid regardless of actions occurring downstream from the producer.

Section 80.1429(f) of the existing regulations provides that any person who uses or designates a renewable fuel for an application other than transportation fuel, heating oil or jet fuel (i.e., a non-qualifying fuel use) must retire any RINs received with that renewable fuel.[6] 40 C.F.R. § 80.1429(f). EPA proposed to tighten the requirements for RIN retirement for any party that redesignates a renewable RIN-generating fuel for a non-qualifying fuel use, and to relieve end users of such an obligation. 78 Fed. Reg. at 12,195. EPA then proposed to remove and reserve paragraph 80.1429(f) of the regulations and add a new Section 80.1433 to require parties that designate fuel for which RINs were generated for a non-qualifying fuel use to retire an appropriate number and type of RINs. *Id.*

However, the final QAP Rule appears to not include any provisions to require the retirement of RINs when the fuel is redesignated for a non-qualifying use. NBB believes EPA intended to and should retain some requirement to retire RINs for renewable fuel used for a non-qualifying purpose. But, the final regulatory language includes no provisions for such retirement.

EPA's intent is hard to discern from the preamble. First EPA states:

> Having added the requirements for 'intended use' PTD language to accompany all volumes of renewable fuel for which RINs were generated and new requirements for tracking and recordkeeping of

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[5] The proposal would have provided that "[a]ny party that owns any amount of renewable fuel, whether in its neat form or blended, that is exported …" incurs an ERVO. 78 Fed. Reg. at 12,208 (proposed 40 C.F.R. § 80.1430(a)).

[6] "Designation" of fuels for particular uses may implicate other provisions regulating fuels (e.g., ULSD regulations). EPA should clarify whether and how the designation of fuel for purposes of the RFS2 program coincides with designations under other fuel programs.

> actual end use for fuels not traditionally used for a qualifying use, we feel that the program goal of ensuring appropriate end use is already addressed and managed through the regulations. *We are therefore not finalizing the proposed § 80.1433 and conforming prohibited act provision for sellers and transferors of RIN-generating renewable fuel.*

79 Fed. Reg. at 42,106 (emphasis added). Later on that same page, however, EPA states that it "proposed and [is] finalizing new requirements for any party that redesignates a renewable RIN-generating fuel for a non-qualifying fuel use":

> To accomplish this, we are removing and reserving § 80.1429(f) of the regulations and adding a new § 80.1433 to require parties that designate fuel for which RINs were generated for a non-qualifying fuel use, i.e. for something other than transportation fuel, heating oil, or jet fuel, to retire an appropriate number and type of RINs. We are also adding a new section 80.1460(g) which prohibits a person from designating a qualifying renewable fuel for which RINs were generated for a non-qualifying fuel use, unless the requirements of § 80.1433 have been met, i.e. an appropriate number and type of RINs were retired when the fuel was redesignated. These changes will relieve end users of the obligation to retire RINs.

Id. The regulatory language does remove 40 C.F.R. § 80.1429(f) and includes a reference to 40 C.F.R. § 80.1433 in the new provisions under 40 C.F.R. § 80.1453(a)(12), though no such provision currently exists. Thus, it is not clear from the regulatory language or the preamble what EPA intended to finalize. In short, EPA must reconsider whether the regulatory language effectuates the requirements as EPA intended. At a minimum, EPA should provide clarification as to any requirements for retirement of RINs based on downstream activities and its rationale for any changes from the proposal.

C. EPA Should Reconsider or Further Clarify Certain QAP Provisions.

1. EPA should reconsider the provisions of the QAP as they relate to foreign production and imports of renewable fuels.

In the proposed rule, EPA stated that the QAP being proposed "would also apply to RINs generated for foreign-produced renewable fuel." 78 Fed. Reg. at 12,165. EPA stated that, to be verified, the associated foreign renewable fuel production facility must be audited under an EPA-approved QAP. *Id.* EPA asked for comment on any issues that could affect the integrity of the proposed program. *Id.* EPA also sought comment on whether additional requirements for registration of foreign third-party auditors were necessary. *Id.* at 12,189. Further, EPA asked for "comment on possible additional program elements that may only be applicable to foreign producers." *Id.* at 12,191. The public did provide comments on these issues. While EPA recognized that a QAP for foreign production of biofuels requires additional elements, the final QAP Rule does not incorporate provisions necessary to ensure these requirements are met.

Moreover, EPA's response to public comments was inadequate, as illustrated by new information since the close of the comment period. As such, reconsideration is warranted to clarify the required elements of a QAP for foreign producers and importers.

a. The final QAP Rule does not clearly identify necessary elements of a QAP for foreign producers and importers.

First, the preamble to the final QAP Rule states that RINs for imported renewable fuel will not be considered verified unless both the foreign production facility and the importer are audited under the same EPA-approved QAP. 79 Fed. Reg. at 42,091. NBB agrees. *See* NBB Comments at 22. However, this requirement does not appear to be reflected in the regulations. Even if EPA intends to only approve QAPs that provide as much (which is not clear from the regulations), the registration, recordkeeping or reporting requirements do not provide sufficient assurances that parties will comply with these requirements. Some examples follow.

- For registration, Section 80.1450(g) requires the auditor to submit names of "producer[s]" to be audited, an affidavit or electronic consent from each such producer reflecting their intent to be audited, and an affidavit stating the auditors independence from "producer[s]."[7]

- For reporting, Section 80.1451(g) references reports for "each facility audited." Facility is defined under the RFS2 regulations as the production facility, not including the importer's facility.[8] 40 C.F.R. § 80.1401.

- For recordkeeping, Section 80.1454(m) references numerous documents, such as "[c]opies of communications sent to and received from renewable fuel producers or foreign renewable fuel producers, feedstock suppliers, purchasers of RINs, and obligated parties," but they do not reference documents that would be from or held by importers.

Similarly, the preamble notes that EPA is finalizing the proposed additional registration requirements for foreign third-party auditors. 79 Fed. Reg. at 42,097. EPA's proposal indicated it was including similar requirements it imposes on other foreign entities participating in the program, including 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. 78 Fed. Reg. at 12,189. While NBB generally agreed with the proposal,[9] NBB's comments questioned whether EPA included proposed regulatory language. NBB Comments at 41. EPA did not respond to these comments, and these "additional requirements"

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[7] NBB also believes reconsideration is warranted with respect to the provisions on the independence of an auditor as further described below.

[8] While EPA does require the importer facility ID, the lack of QAP elements with respect to the importer illustrates that the regulations are not clear as to requiring an audit of the importer as well as the foreign producer.

[9] NBB believes the bond requirements currently in the regulations are insufficient.

still do not appear to be in the regulatory text. At a minimum,[10] it is essential that foreign auditors submit themselves to administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity. While NBB understands that EPA is still reviewing the bond requirements for foreign producers and foreign RIN owners,[11] EPA must also make sure there is some available recourse against foreign auditors. The importance of this issue warrants reconsideration.

Finally, while EPA recognizes that a QAP with respect to foreign production of biofuels will include additional elements, the final QAP Rule does not expressly outline those elements. In its comments, NBB specifically outlined its concerns whether the QAP provides sufficient assurances that the feedstocks used sufficiently qualify for the program. NBB Comments at 22. NBB's comments also referenced the additional regulations as they relate to foreign producers at 40 C.F.R. §§ 80.1465, 80.1466 and 80.1467. *Id.* In the preamble to the final QAP Rule, EPA appears to agree that the QAP for foreign production of renewable fuels will include numerous additional elements:

> [A]n auditor verifying production for a foreign RIN generating producer will need to ensure that the recordkeeping and bond requirements under §§ 80.1466 and 80.1467 are being met. It will also include verifying any certificates of fuel transfer, as well as port of entry testing, none of which are required for domestic RIN generation. This is by no means an exhaustive list, but rather an example to show that there may be significant differences in the requirements to verify a RIN, based on the location of the producer and the type of RIN generation. *With these additional requirements*, we believe foreign-produced RINs verified through a QAP can be treated in the same manner as any RINs verified from domestically produced fuel.

79 Fed. Reg. at 42,091 (emphasis added). Again, what EPA has recognized to be necessary appears to only be memorialized as aspirational goals.

NBB fully supports EPA's decision to finalize only one QAP, but the elements of the final QAP still do not appear to account for the additional recordkeeping requirements required for foreign renewable fuel producers and foreign RIN owners noted above, including those under 40 C.F.R. §§ 80.1466 and 80.1467. While the QAP includes general "RIN generation-related components," the audit requirements appear to focus on the producer level. The preamble states only that the auditor must determine if there is any import or foreign biofuel producer documentation, but the regulatory provisions do not expressly address the additional requirements for RIN generation for imports, particularly those under 40 C.F.R. § 80.1466.[12]

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[10] EPA finalized general provisions requiring that any registration information, reports and records submitted to EPA include an English translation in a separate rulemaking. 79 Fed. Reg. 42,128, 42,154 (July 18, 2014). But, EPA provides no explanation in the final QAP Rule as to why it has not finalized the other "proposed" provisions.

[11] *See* 79 Fed. Reg. at 42,128.

[12] For example, the regulations provide that no foreign producer and importer may generate RINs for the same volume of renewable fuel and that a foreign producer of renewable fuel is prohibited from generating RINs in excess of the number for which the bond requirements of this section have been satisfied. 40 C.F.R. § 80.1466(j).

Indeed, EPA states that it "does not intend to place any additional burdens on foreign producers above what is required for domestic producers,"[13] 79 Fed. Reg. at 42,091, but EPA cannot ignore the additional requirements already in the regulations. Similarly, the requirements for audits only references "a review of documents *generated by the renewable fuel producer*." 79 Fed. Reg. at 42,122 (new 40 C.F.R. § 80.1472(a)(4)) (emphasis added). The requirement for on-site visits also only references "the renewable fuel production facility." *Id.* (new 40 C.F.R. § 80.1472(b)(3)). This focus does not ensure that the regulations are being met on the importer side. EPA did not respond to comments on these issues. For all these reasons, EPA must reconsider the provisions in the QAP Rule as they relate to foreign production and importation of renewable fuels.

b. New information supports reconsidering the QAP provisions as they apply to foreign produced biofuels.

In its comments, NBB proposed that each gallon of imported renewable fuel be validated through the highest level QAP, where each gallon produced and each RIN are validated through a real time monitoring system. NBB Comments at 21-23. NBB also noted that additional requirements with respect to imported renewable fuel may be warranted, regardless of who generates the RIN. *Id.* New information supports the concerns NBB raised with respect to EPA's ability to adequately oversee foreign entities (except those in Canada[14]).

NBB has long been concerned with whether and how EPA is enforcing the renewable biomass requirements for feedstocks 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. These concerns stem from the difficulties in enforcing against foreign entities, which EPA has admitted. These countries also do not have the same history of land use as the United States and Canada, where agricultural lands have declined or remained steady for years.[15] New information provides further support that EPA should reconsider these provisions.

Based on data made available after the close of the comment period, the amount of biodiesel and renewable diesel being imported has steadily increased. In 2012, around 145 million biomass-based diesel RINs were generated by importers and foreign producers. EPA, *2012 RFS2 Data: RIN Generation by Producer Type*, http://www.epa.gov/otaq/fuels/rfsdata/2012emts.htm (data current as of August 7, 2014). In 2013, over 550 million biomass-based diesel RINs were generated by importers and foreign producers. EPA, *2013 RFS2 Data: RIN Generation by Producer Type*, http://www.epa.gov/otaq/fuels/rfsdata/2013emts.htm (data current as of August 7, 2014). Through July 2014, over 300 million gallons of biomass-based diesel RINs already have been generated by importers and foreign producers. EPA, *2014 RFS2 Data: RIN Generation by*

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[13] NBB also notes that the QAP is *voluntary*, but the entire purpose of the QAP is to provide assurances that the RINs were generated consistent with the regulations.

[14] EPA has approved an aggregate compliance approach for Canada, and transport of goods across the border does not raise the same concerns as when they are shipped in from overseas.

[15] Recent reports illustrate that land use protections in other countries (outside the United States and Canada) are insufficient. *See, e.g.*, Marcelo Teixeira, *Brazil Confirms Amazon Deforestation Sped Up in 2013*, Scientific American (Sept. 10, 2014), http://www.scientificamerican.com/article/brazil-confirms-amazon-deforestation-sped-up-in-2013/.

Producer Type, http://www.epa.gov/otaq/fuels/rfsdata/2014emts.htm (data current as of August 7, 2014). Foreign generation of D6 RINs, which was zero in 2012, has also substantially increased.[16]

NBB is also concerned with the lack of transparency of EPA's enforcement (if any) of the renewable biomass provisions for imported fuels. NBB raised concerns to EPA in December of 2013 as to EPA's ongoing review of a proposal from Argentina to use the alternative tracking method for establishing the renewable biomass requirements, including the lack of public notice and comment. NBB has also recently heard that imports from Argentina are relying on very limited documentation to establish compliance with the map and track requirements of the RFS2 regulations. This apparent lack of enforcement further calls into question whether a QAP should be mandatory for imported renewable fuels or additional requirements should be considered by EPA with respect to foreign production of renewable fuels and their importation.

Our major concern is that feedstock from the imported volumes is not being properly monitored by the EPA. Under the RFS2, in order to qualify for the program and generate RINs, biofuels are required to meet a number of feedstock requirements, including but not limited to, specific mapping and tracking of feedstock to ensure that it meets the sustainability requirements of the program. We are not aware of EPA reviewing, verifying or approving any documentation that meets regulatory requirements to support feedstocks being used to generate RINs on imported gallons.

c. The concerns raised by NBB warrant further investigation by EPA and further rulemaking.

In its comments, NBB outlined additional provisions that it believes would strengthen EPA's ability to enforce against foreign production of renewable fuels. These included 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; and strengthening the RIN replacement provisions for invalid RINs associated with imported fuels by having the domestic purchaser of the imported fuel be in line to replace any invalid RIN.[17] EPA did not respond to these comments. As noted above, new information calls into question whether the existing regulations are sufficient to protect against fraud overseas. EPA should reconsider these provisions, and, if necessary, initiate a new rulemaking proceeding.

2. EPA should reconsider the provisions on the independence of third-party auditors to ensure they effectuate the intent of EPA as outlined in the preamble and sufficiently address the concerns raised by public comments.

EPA has recognized that the "first, and perhaps the most important, requirement for auditors is that they remain independent of renewable fuel producers." 78 Fed. Reg. at 12,187.

[16] Much of this RIN generation is associated with biodiesel and renewable diesel from grandfathered facilities. Such facilities must still use feedstock that meets the renewable biomass definition and must comply with the registration, reporting and recordkeeping requirements.

[17] NBB also suggested increasing the bond requirements. As noted above, NBB understands EPA is still reviewing proposed revisions to the bond, and, thus, does not address these here.

The public "overwhelmingly agreed that ensuring the independence of third-party auditors is paramount to the successful implementation of effective QAPs." 79 Fed. Reg. at 42,092. In the preamble to the final QAP Rule, EPA agreed that the conflict of interest provisions in the proposal were insufficient and that additional provisions to ensure objective audits were necessary. But, these changes do not appear to be reflected in the regulatory language. Moreover, the final QAP Rule does not include sufficient provisions to enforce these requirements. Further, EPA did not adequately respond to comments that it must protect against conflict of interests with respect to *all* RIN owners, not just producers (as in the proposed rule) and obligated parties (as added in the final rule). Finally, the public could not comment on the new, broad provision the final QAP Rule includes to protect against the "appearance" of conflict, which may cause confusion in the industry. Thus, reconsideration is warranted to ensure these provisions are sufficient to protect against conflicts of interest.

First, although EPA agreed that there was a potential for conflicts of interest to arise with obligated parties, 79 Fed. Reg. at 42,092-42,093, the final QAP Rule includes only one, limited provision to address these conflicts. The preamble states that the final QAP Rule requires "QAP auditors be independent from obligated parties *the same way they are required to be independent from the RIN generator*." *Id*. at 42,093 (emphasis added). But, the only restriction with respect to obligated parties in the final QAP Rule is that they cannot own or operate the third-party auditor. 79 Fed. Reg. at 42,122 (new 40 C.F.R. § 80.1471(b)(2)). Thus, the conflict of interest provisions with respect to obligated parties are not, as the preamble states they should be, parallel to those with respect to renewable fuel producers. As the public commented, third-party auditors should be independent from obligated parties, as obligated parties obtain benefits from the RINs being verified. Third-party auditors also may verify the obligated parties' compliance with the RFS, providing further incentives to verify RINs that may not be valid. NBB believes this is an oversight and requires technical corrections to ensure that the independent third-party auditor be "free from any interest or appearance of any interest" with obligated parties. If not an oversight, EPA provides no explanation as to why the regulations are so limited, and, thus, reconsideration may be necessary in order to correct this procedural infirmity. Such infirmity is key to ensuring an effective QAP and, thus, is central to the final QAP Rule.

Second, although EPA expanded the conflict of interest provisions in the final QAP Rule, it did not include provisions to ensure compliance. At registration, the proposed rule required an affidavit stating "that an independent third-party auditor is independent . . . of any renewable fuel producer or foreign renewable fuel producer." 78 Fed. Reg. at 12,209 (proposed 40 C.F.R. § 80.1450(g)(7)). Although EPA applied the conflict of interest provisions beyond producers in the final rule, the regulations do not require an affidavit that reflects this broader scope, still only requiring an affidavit stating the auditor's (and now its contractors and subcontractors) independence from "any renewable fuel producer or foreign renewable fuel producer." 79 Fed. Reg. at 42,116 (40 C.F.R. § 80.1450(g)(7)). This affidavit also does not require any evidence that the auditor is or is not providing additional services under the RFS2 program, which the final QAP Rule also purports to guard against. Again, this may have been an oversight by EPA, but EPA provides no explanation as to why it is only requiring an affidavit regarding the auditor's independence from producers or how it intends to enforce the new conflict of interest provisions in the final QAP Rule.

In addition, public comments indicated that an affidavit from the auditor was not sufficient to ensure independence. *See, e.g.*, NBB Comments at 13. Comments suggested that EPA "expand the affidavit requirement to include any documentation to support statements in the affidavit and make clear that the affidavit must be under oath. Such an approach would allow the EPA to go under the covers of the affidavit statements to ensure that all potential conflicts of interests are disclosed." 79 Fed. Reg. at 42,097. EPA responded that the affidavit requirement "is an important piece of registration and potentially valuable if we have to pursue actions arising from alleged conflicts of interest." *Id.* But, EPA does not explain why the current provisions requiring a simple affidavit are sufficient to ensure compliance. Moreover, the final QAP Rule does not appear to consider whether other registration, recordkeeping or reporting provisions similarly should be expanded to other information needed for EPA to confirm compliance. In order to ensure the requirements have any teeth, they must be enforceable.

Third, EPA did not respond to comments that it should address potential conflicts of interest that may arise with respect to relationships between auditors and other RIN owners. *See* NBB Comments at 38-39. EPA has agreed that "by interpreting conflict of interest more broadly, we will raise the standard of independence in the QAP program to a higher level than that seen in other portions of the EPA regulations, especially considering the importance of maintaining an effective QAP." 79 Fed. Reg. at 42,093. But, the final QAP Rule only addresses potential conflicts of interest with renewable fuel producers and obligated parties. Relationships with other RIN owners also could lead to a potential conflict of interest that "may inhibit an auditor's ability to effectively implement a QAP." 79 Fed. Reg. at 42,092. This is because such conflicts can create "an incentive to ignore potential issues because they have a financial interest in whether RINs are valid." *Id.* "[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 (emphasis added). EPA also has recognized that auditors have access to confidential business information from RIN generators that can lead to speculation. 79 Fed. Reg. at 42,092. Nonetheless, EPA limited the expansion of the provisions to obligated parties, providing no explanation as to why it was not addressing these other potential and recognized conflicts.

Finally, in the final QAP Rule, EPA included a new restriction that the third-party auditor avoid the "appearance" of conflict. This provision is intended to address whether there should be additional restrictions on the types of services third-party auditors could provide under the RFS2 program. 79 Fed. Reg. at 42,093. While EPA sought comment generally on this issue, 78 Fed. Reg. at 12,187, 12,190, it did not propose to prohibit a broader (and somewhat ambiguous) "appearance" of conflict. NBB believes the regulation should be corrected to draw clear lines as to what services an auditor may or may not provide. Such services should also not necessarily be limited to those provided to producers. Reconsideration is warranted to give the public an opportunity to consider and meaningfully comment on what additional services to other parties under the RFS2 (such as attesting to compliance) also presents an "appearance" of conflict that are not addressed in the final QAP Rule.

3. Further clarification as to when updates to an auditor's registration are necessary versus updates to QAPs.

The final QAP Rule requires auditors to register with EPA and renew their registration on an annual basis. It also requires updates to the auditor's registration. 79 Fed. Reg. at 42,116 (new 40 C.F.R. § 80.1450(g)(9)). The provisions for updating an *auditor's* registration, however, refer to the *producer's* registration and the *producer's* facility. There are also references to the need to update a producer's QAP. But, the regulations already provide for "revisions of a QAP" when changes are made to a producer's facility with no reference to how these revisions interact with the required registration updates. *Id.* at 42,121 (new 40 C.F.R. § 80.1469(f)). This also raises questions as to timing, as it is unclear whether the QAP must be submitted with registration updates, annually or only when changes are made at a facility that is audited. *Compare* new 40 C.F.R. § 80.1450(g)(9) *with* new 40 C.F.R. § 80.1469(e), (f). NBB's comments noted the inconsistencies with these provisions, which were not addressed by EPA in the final QAP Rule. Moreover, while the final QAP Rule does provide that the auditor's registration renewal process is automatic unless it received a notice of deficiency, which avoid gaps in coverage, EPA did not make a similar clarification as to the annual approval of QAPs.

First, it is unclear why certain of the provisions regarding updating an auditor's registration information are tied to activities at a production facility. New Section 80.1450(g)(9) provides as follows:

> (9) Registration updates—(i) Any independent third-party auditor who makes *changes to its quality assurance plan(s)* that will allow it to audit new renewable fuel production facilities, as defined in § 80.1401 that *is not reflected in the producer's registration information* on file with the EPA must update its registration information *and submit a copy of an updated QAP* on file with the EPA at least 60 days *prior to producing the new type of renewable fuel*.
>
> (ii) Any independent third-party auditor *who makes any other changes to a QAP* that will affect the third-party auditor's registration information *but will not affect the renewable fuel category for which the producer is registered* per paragraph (b) of this section must update its registration information 7 days prior to the change.
>
> (iii) Independent third-party auditors must *update their QAPs* at least 60 days prior to verifying RINs generated by a renewable fuel facility *uses a new pathway*.
>
> (iv) Independent third-party auditors must *update their QAPs* at least 60 days prior to verifying RINs generated by any renewable fuel facility not identified in their existing registration.

79 Fed. Reg. at 42,116 (new 40 C.F.R. § 80.1450(g)(9)) (emphasis added). It is unclear how a producer's registration relates to the need for the auditor to update its registration under clause (i), or more important why such update is tied to the facility's production of renewable fuel. The QAP is voluntary and totally unrelated to a producer's ability to produce fuel under the RFS2 program. With respect to clause (ii), it is unclear how any changes to a QAP will affect the renewable fuel category for which *a producer* is registered. Clause (iii) makes no grammatical sense, and it is unclear how it is intended to be different than clause (i). NBB does not take issue with whether updates to a registration are necessary, but the provisions are not clear and can create confusion. The update requirements also could be simplified to require a registration update whenever the information required under Section 80.1450(g)(1)-(8) becomes incomplete, is determined to be inaccurate, or when a QAP requires revision under Section 80.1469(f).[18] EPA could still retain a specific provision requiring updates anytime an auditor signs a new facility to its audit program to ensure the appropriate affidavits are on file with EPA 60 days prior to verifying any RINs, as other changes may not require a 60-day lead time. But, the provision, as currently written, is confusing and may not address key pieces of information required as part of an auditor's registration, such as new facilities becoming subject to an audit and the auditor's independence.

Second, while referring to "registration updates," each of the provisions under Section 80.1450(g)(9) references updates or changes to the QAPs. But, elsewhere in Section 80.1469(e) and (f) EPA provides for the annual submission of QAPs and revision of QAPs. NBB noted that the proposed rule was unclear as to how the QAP annual approval process was different from the requirement that the auditor undergo an annual renewal registration.

The requirement to revise a QAP does not cross-reference the need to update an auditor's registration, although it appears that some of the triggers for such updates are similar to the triggers for a revised QAP. A revised QAP must be submitted to EPA when:

> any of the following changes occur at a production facility audited by a third-party independent auditor and the auditor does not possess an appropriate pathway-specific QAP that encompasses the changes:
>
> (i) Change in feedstock.
>
> (ii) Change in type of fuel produced.
>
> (iii) Change in facility operations or equipment that may impact the capability of the QAP to verify that RINs are validly generated.

79 Fed. Reg. at 42,121 (new 40 C.F.R. § 80.1469(f)). While EPA outlines timing for "registration updates," there are no similar deadlines under 40 C.F.R. § 80.1469(f) and no cross-reference to the deadlines in Section 80.1450(g)(9). The final QAP Rule does not address these questions and, thus, the provisions remain confusing, requiring, at a minimum, clarification from EPA as to how these provisions are intended to interact with each other.

[18] The annual registration renewals do require updated information, but certain changes should be brought to EPA's attention as soon as possible.

Finally, EPA has indicated that an approved QAP is necessary for the verification of any RINs, but that a QAP is only valid for one year. NBB commented that EPA should provide sufficient time before a QAP expires to review and approve the QAPs to ensure no gaps in coverage for the participating parties or that EPA should provide a type of "permit shield" for RINs being verified pending EPA's approval.[19] NBB Comments at 43-44. EPA agreed that the registration renewal process should not cause a gap in coverage, allowing registrations to be automatically renewed unless EPA issues the auditor a deficiency. 79 Fed. Reg. at 42,097. But EPA did not respond to similar comments regarding the QAP approval process. EPA should clarify that this is the same for the QAP approval process (so long as the QAP has not changed and it still covers the activities at the facility).

D. EPA Did Not Adequately Respond to Comments Regarding the Administrative Process for the Identification and Treatment of "Potentially Invalid RINs."

EPA finalized a self-implementing administrative process for the replacement of RINs determined to be invalid, *i.e.*, potentially invalid RINs. These provisions are largely as proposed except EPA indicated it was extending the time to provide notification to EPA of potentially invalid RINs from 24 hours to five days, and clarified that QAP-verified RINs found invalid may be replaced by any type of RIN, so long as it is of the same D code (in other words, the replacement RIN should be valid, but need not also be a QAP-verified RIN). 79 Fed. Reg. at 42,085. As an initial matter, NBB notes that there appear to be conflicting provisions with respect to when an auditor must report a RIN that it believes may have been invalidly generated. Section 80.1471(d)(1) requires that the auditor provide notification to EPA and the producer that generated the RIN "within the next business day."[20] 79 Fed. Reg. at 42,122 (new 40 C.F.R. § 80.1471(d)(1)). Section 80.1474(b)(3) requires notification within five business days. *Id.* at 42,124 (new 40 C.F.R. § 80.1474(b)(3)). EPA does not explain the distinction, if any, between these two provisions. It is possible that this was also a mere oversight, but a technical amendment may be necessary to remove 40 C.F.R. § 80.1471(d) to avoid any confusion between the varying requirements in these provisions.

More important, however, is that EPA failed to adequately respond to comments that RIN replacement may not be necessary for every "potentially invalid RIN." NBB commented that the administrative process does not adequately distinguish between clear cases of fraud, which should be enforced, and inadvertent errors, which should be corrected. NBB Comments at 37. These concerns are exacerbated by the revisions to 40 C.F.R. § 80.1426(a), which could result in a mere paperwork violation rendering a RIN invalid. NBB Comments at 25-26. EPA has recognized that there are several errors that, through no fault of the producer, may result in the generation of invalid RINs. 77 Fed. Reg. 1320, 1344-1345 (Jan. 9, 2012). EPA has provided a process to correct such RINs in the regulations, *see* 40 C.F.R. § 80.1431(c), and through guidance. In response, EPA merely stated that "the RIN generator has 30 days upon identification or notification of a PIR to take a corrective action, *which still includes the remedial*

[19] NBB does not dispute that RINs cannot be verified for a new pathway until a new pathway-specific QAP is approved by EPA. However, EPA should clarify, when a QAP has not changed, that any delay in EPA's approval of the QAP does not affect the facilities being audited.

[20] As noted above, the QAP provisions should be clear to also include any importer that must also be subject to the QAP requirements for a RIN associated with imported renewable fuel to be verified.

actions currently available to industry." 79 Fed. Reg. at 42,086 (emphasis added). But, the regulations only provide for two corrective actions, which are both retirement of RINs, when a potentially invalid RIN is reported by the RIN generator, and the regulations do not consider that certain remedial actions require reporting to EPA and *waiting for EPA to inform the party as to the proper action to take. See, e.g.,* NBB Comments at 11-12. Responses from the support line do not always occur on a timely basis, but can include remedial actions that do not require RIN retirement.

The preamble also purports to make a distinction between a "'potential' problem" from a "confirmed" one. 79 Fed. Reg. at 42,086. It states that "[w]hen an auditor or the EPA determines that a PIR is invalid, the RIN generator will be notified directly," which will trigger the process of retiring a valid RIN. *Id.* Again, this ignores the provisions for when the RIN generator identifies potentially invalid RINs, which requires corrective action within 30 days for "potentially" invalid RINs. Moreover, in cases where the auditor reports the potentially invalid RIN, the regulations presume invalidity, and the process places all the burden on the producer to show the RIN is not invalid. While providing for self-reports for generators, these provisions do not provide the same flexibility that currently exists. Thus, the regulations, as written, may still raise questions as far as retirement obligations and timing for corrective actions and reporting of invalidity to customers. EPA's response to comments does not address these concerns.

In addition, EPA did not respond to NBB's comments urging EPA to revise 40 C.F.R. § 80.1426(a)(1) so that paperwork violations do not render a RIN invalid. The statute only requires that the fuel be derived from renewable biomass and meet the lifecycle greenhouse gas reduction requirements. Missed deadlines, data entry errors, and other actions that technically may not be in compliance with the regulations do not make the gallon of fuel suddenly no longer eligible under the program. But, EPA continues to require compliance with all the applicable requirements of the RFS2 regulations to generate a RIN under 40 C.F.R. § 80.1426(a)(1). EPA does not directly address these comments, but merely restates its rationale from the proposal:

> [I]n 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, we are amending § 80.1426 to state that RINs may only be generated for fuel that the producer has demonstrated, pursuant to all applicable recordkeeping requirements of § 80.1454, was produced in accordance with the applicable pathway listed in Table 1 to § 80.1426(f) or a petition approved by the EPA pursuant to § 80.1416. Furthermore, RIN generation is only appropriate for renewable fuels that carry the appropriate designation on their product transfer documents, according to the new provisions of § 80.1453(a)(12).[21]

[21] It should also be noted that the regulatory requirements are not all related to the generation of the RIN itself, and may occur days to months after the RIN is actually generated. For example, facilities may generate RINs upon production, but do not designate the fuel on product transfer documents until shipment. EPA has long allowed producers flexibility to define batches, and these provisions raise questions as to when RINs can be generated.

But, the QAP is voluntary, and EPA does not explain why such requirements are needed for a voluntary program. Moreover, EPA does not explain why the potential penalties for failing to comply with the regulations or the desire of the facility to obtain verified RINs are not sufficient incentives for the parties to comply with the regulations. Finally, EPA does not explain why clause (iii), which requires compliance with the registration requirements, the recordkeeping requirements and "all other applicable requirements of this subpart M," is still necessary. Indeed, EPA continues to provide new interpretations of its regulations through the support line (rather than guidance or the regulatory process), making such a broad provision lacking in notice to the producer as to what specific obligations are required to generate a RIN. Given the strict requirements of RIN replacement, inadvertent non-compliance with these requirements should not render a RIN invalid. Thus, further explanation and clarification of these provisions is warranted.

III. CONCLUSION

For the foregoing reasons, EPA should reconsider or clarify the QAP Rule with respect to the provisions related to the retirement of RINs due to export or non-qualifying downstream uses, the application of the QAP to foreign produced biofuels, the independence of the third-party auditor conducting QAPs, and the administrative process for dealing with potentially invalid RINs. The public did not have adequate opportunity to comment on these significant changes, and EPA failed to adequately respond to comments making the final determinations are arbitrary and capricious and otherwise not in accordance with the Clean Air Act. Even if EPA determines that the public had an opportunity to comment on these objections, NBB requests that EPA treat this petition as a petition for rulemaking and initiate new proceedings to make amendments to these provisions.

* * *

We appreciate the agency's consideration of these important issues, and look forward to working with you to resolve them.

Please do not hesitate to contact the undersigned if you have any questions regarding this petition.

Respectfully submitted,

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