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Via Electronic Filing (www.regulations.gov)

Air and Radiation Docket and Information Center
Environmental Protection Agency
Mail code: 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

ATTN: Docket ID No. EPA–HQ–OAR–2011–0135

Re: Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards, Nonroad Engine and Equipment Programs, and MARPOL Annex VI Implementation; Proposed Rule, 80 Fed. Reg. 8826 (Feb. 19, 2015), and Direct Final Rule, 80 Fed. Reg. 9078 (Feb. 19, 2015)

Dear Sir or Madam:

The National Biodiesel Board (NBB) appreciates the opportunity to offer comments on EPA's proposed and direct final rules entitled "Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards, Nonroad Engine and Equipment Programs, and MARPOL Annex VI Implementation," published at 80 Fed. Reg. 8826 and 80 Fed. Reg. 9078 (Feb. 19, 2015) (collectively referred to herein as the "Proposed Rule"). NBB is the national trade association representing the biodiesel industry as the coordinating body for research and development in the United States, founded in 1992. NBB is a comprehensive industry association which coordinates and interacts with a broad range of cooperators, including industry, government and academia. NBB's membership is comprised of state, national and international feedstock and feedstock processor organizations, biodiesel suppliers, fuel marketers and distributors and technology providers. The Proposed Rule purports to make "minor technical amendments," 80 Fed. Reg. at 9084, to correct "typographical errors in regulatory changes finalized in the Voluntary Quality Assurance Program rulemaking"[1] under the Renewable Fuel Standard (RFS2) program. *Id.* at 9078. NBB submits these comments, which EPA should consider adverse, with respect to EPA's proposed changes to the RFS2 product transfer document (PTD) requirements under 40 C.F.R. § 80.1453(a).[2]

[1] This rulemaking is referred to herein as the "QAP Rule." The final QAP Rule was published at 79 Fed. Reg. 42,078 (July 18, 2014).

[2] NBB supports the technical changes to 40 C.F.R. § 80.1426(c)(7) and 40 C.F.R. § 80.1471(d)(1) in the Proposed Rule. NBB does not take a position on the remainder of the proposed changes.

1. NBB Opposes EPA's Proposal to Require PTDs Upon Transfer of "Custody or Ownership" of Renewable Fuel.

In the Proposed Rule, EPA states that it is "clarifying the scope of § 80.1453 by adding an exemption to the PTD requirements for renewable fuels dispensed into motor vehicles and nonroad vehicles, engines, and equipment (to include jet engines and home heating units)." 80 Fed. Reg. at 9084. EPA asserts that it is making this clarification because "[w]hen we altered the scope of the PTD requirements at § 80.1453 to include both neat and blended renewable fuels, we did not intend to expand the scope of these PTD requirements to convey the information at § 80.1453 to the consumer of such fuels, *in most cases*." *Id.* (emphasis added). EPA raised concerns with respect to requiring "PTD language to convey information all the way down to consumers fueling at a retail station or homes receiving heating oil," which EPA found "has little benefit to the effectiveness of EPA's fuels programs and could be quite costly for retail stations and home heating oil distributors." *Id.* But, the regulatory language in the Proposed Rule, in fact, substantially expands the PTD requirements under the RFS2 program, adding unnecessary requirements that could be quite costly for producers and other parties along the supply chain. Such an expansion of these requirements to address an issue that EPA provides no evidence actually exists in practice cannot be consider a "minor technical amendment" and should not have been buried in a rule related to the Tier 3 gasoline regulations. To understand the need and intent behind these changes, further explanation by EPA is required. As such, NBB opposes the change and requests that EPA withdraw the direct final rule.[3] If EPA believes that such a "clarification" is necessary, then EPA should re-issue the proposal in a manner that complies with the requirements of the Clean Air Act.[4]

That EPA has significantly changed the PTD requirements is evident by merely looking at the proposed change in regulatory language as illustrated below.

Existing Regulation, in relevant part:

> (a) On each occasion when any party transfers ownership of neat and/or blended renewable fuels or separated RINs subject to this subpart, the transferor must provide to the transferee documents that include all of the following information, as applicable: . . .

Proposed "Technical" Amendments (additions in **bold, underline**):

> (a) On each occasion when any party transfers **custody or** ownership of neat and/or blended renewable fuels, **except when such fuel is dispensed into motor vehicles or nonroad vehicles, engines, or equipment**, or separated RINs subject to this subpart, the transferor must provide to the transferee documents that include all of the following information, as applicable: . . .

[3] Public comments on the QAP Rule expressly opposed applying PTD requirements on custody transfers. *See* EPA-HQ-OAR-2012-0621-0072 at 5. This change, therefore, could not be considered "noncontroversial."

[4] NBB notes that the title of the Proposed Rule does not specifically reference the RFS2 regulations, nor is it posted to the RFS2 regulatory page.

The addition of the term "custody" in this case is not a mere technical amendment, but would add a wholly new obligation on producers and other parties along the supply chain. While "ownership" has been delineated by EPA as transfer of *title* to the fuel, *custody* of the fuel may pass through several hands, such as common carriers, terminals, marketers, distributors, storage facilities, to name a few. EPA does not provide an explanation for why these added burdens are necessary, nor why the term "custody" is needed to address the limited concern that EPA purports to be addressing, *i.e.*, PTD requirements to the ultimate consumer of the transportation fuel from retail stations and home heating oil users.

EPA merely states that it is "amending the PTD requirements at § 80.1453(a) to make the scope of these requirements consistent with similar requirements in other fuels programs." 80 Fed. Reg. at 9084. But, the RFS2 program is different from these other fuel programs. These other programs address emission standards or limitations on the fuel content or characteristics, and someone with custody could alter the fuel itself, affecting compliance with these standards or limitations. *See, e.g.*, 76 Fed. Reg. 44,406, 44,418 (July 25, 2011) ("EPA proposed to include on PTDs language indicating the amount of ethanol in the blend and the summertime RVP standards applicable to the blend *so that downstream marketers can properly label E15 fuel and avoid commingling fuels that could result in RVP and other violations*.") (emphasis added). Here, the purpose of the PTDs is not to ensure compliance with emissions standards or limitations, but to track RINs associated with that fuel, such as ensuring assigned RINs flow with *ownership* of the fuel, and to protect against non-conforming downstream uses. Only the owner of the fuel can hold assigned RINs or can determine its ultimate use. For example, EPA's requirements to retire RINs for spillage or disposal of renewable fuel only applies to the "owner of the renewable fuel." 40 C.F.R. § 80.1432(b). Thus, tracking the custody of the fuel does not have the same implications under the RFS program as it may for these other fuel programs.[5] EPA cannot simply follow its approach in these other programs without fully considering the goal of the RFS to promote renewable fuel use, the potential implications on renewable fuel producers and their customers, or any differences in the distribution system for renewable fuels.[6]

Because § 80.1453(a) applies to "any party," rather than "any person," there is a question as to whether the problem purportedly identified by EPA even exists. Because EPA does not define the term "party" under the RFS2 program, EPA's purported "minor technical amendment," now potentially raises questions as to the scope of § 80.1453(a).[7] Many persons can have "custody" of renewable fuel who are not registered with EPA, and EPA's apparently broader reading of the term "party" here could potentially increase the number of regulated

[5] NBB takes no position on the appropriateness of PTD requirements under these other programs or with the exemption as it applies to these other programs, except to the extent NBB believes EPA should ensure that the PTD requirements as they apply to renewable fuel producers should be streamlined to the extent possible. *See* Section 2.

[6] EPA references the gasoline detergent and E15 programs, but these PTD requirements do not apply to renewable fuel producers. The PTD requirements for detergents at § 80.158 apply to "each occasion when any gasoline refiner, importer, reseller, distributor, carrier, retailer, wholesale purchaser-consumer, oxygenate blender, detergent manufacturer, distributor, carrier, or blender, transfers custody or title to any gasoline, detergent, or detergent-additized PRC." 40 C.F.R. § 80.158. The PTD requirements referenced by EPA in § 80.1503 apply to any person that "transfers custody or title to any gasoline-ethanol blend *downstream of an oxygenate blending facility*." 40 C.F.R. §80.1503(b)(1) (emphasis added).

[7] EPA uses the term differently throughout the RFS2 program, sometimes appearing to limit the term to persons participating in the program and, in other cases, expanding it to include other persons. Previously, EPA has not appeared, however, to define it broadly to include any person.

entities under the program dramatically. Thus, NBB opposes the proposed change. While EPA must withdraw the direct final rule with respect to the proposed changes to § 80.1453(a), NBB also believes EPA should not require PTDs for transfers of "custody" of renewable fuel in any final rule.

While NBB does not necessarily oppose an exemption for transfers of PTD requirements to the ultimate consumers of the fuel,[8] NBB also believes EPA may be required to issue a new proposal that adequately notices and explains the proposed changes. In the Proposed Rule, EPA says its intent was *not* to expand the scope of the PTD requirements to convey the information at § 80.1453 to consumers *in most cases*. The only examples EPA provides, however, are related to transfers to consumers filling up at retail stations or to homes receiving heating oil. The language used by EPA, however, appears broader than these instances, and EPA does not explain when it believes the information should be conveyed to consumers.[9] Given the lack of explanation provided, NBB does not believe EPA has adequately explored the potential implications of its proposal or explained the basis for its rule, particularly the addition of the term "custody," as further discussed above. This is contrary to the requirements under the Clean Air Act. 42 U.S.C. § 7607(d)(3) (requiring statement of basis and purpose for proposed rules, including a summary of "(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule"). Thus, to the extent EPA continues to believe the language or exemption is appropriate, it should re-propose the rule to ensure the public has 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 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)).

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

Rather than impose new burdens on renewable fuel producers as it has proposed, EPA should review the PTD requirements and reduce those burdens. In our comments to the QAP rule we urged EPA to do the following, and we maintain that position today:

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

[8] The diesel sulfur PTD requirements may apply to biodiesel producers, and these requirements do not apply "when such fuel is dispensed into motor vehicles or nonroad equipment, locomotives, marine diesel engines or C3 vessels." 40 C.F.R. § 80.590(a).

[9] *Compare proposed* 40 C.F.R. § 80.1453(a) (exempting PTD requirements "when such fuel is dispensed into motor vehicles or nonroad vehicles, engines, or equipment"), *with* 40 C.F.R. §§ 80.158, 80.1503(b)(1) (including exemption for transfers to "the ultimate consumer"); *id* § 80.1651 (exempting gasoline sulfur PTD requirements "when gasoline is sold or dispensed for use in motor vehicles at a retail outlet or wholesale purchaser-consumer facility").

downstream uses or be held accountable for the actions of parties downstream from the facility.

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

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

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

In addition, since downstream uses does not invalidate the RIN, there is no need for much of the language being proposed. With the exporter RVO now being triggered upon export, the fuel also does not need to be designated for use "in the 48 U.S. contiguous states and Hawaii." The last sentence in the proposed new language also may cause more confusion, as to when the RVO for non-qualifying uses is triggered. For example, the first sentence does not necessarily cover neat biodiesel that is intended for use in *blending* into transportation fuel, heating oil or jet fuel. Thus, EPA should clarify and simplify the required statements.

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

NBB April 18, 2013 Comments on QAP Proposed Rule, at 57-58 (EPA-HQ-OAR-2012-0621-0069).

3. NBB Believes EPA Must Respond to the Concerns Raised in its Request for Reconsideration or Clarification of the Final QAP Rule Prior to Deleting the Reference to 40 C.F.R. § 80.1433 Under the RFS2 Regulations.

The Proposed Rule would also remove "the extraneous reference to § 80.1433 in § 80.1453," promulgated as part of the final QAP Rule. 80 Fed. Reg. at 9084. Section 80.1433 would have required retirement of RINs by parties that re-designate a renewable fuel under the program for invalid downstream uses. *See* 78 Fed. Reg. 12,158, 12,195 (Feb. 21, 2013). This approach was intended "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," *replacing* the requirements under 40 C.F.R. § 80.1429(f).[10] As EPA explained, this "places the burden of ensuring an appropriate number of RINs are retired on a party in the fuel distribution business, rather than an end user." *Id.* In the Proposed Rule, EPA indicates that "[a]fter careful consideration of the public comments received, we chose not to finalize the proposed § 80.1433 requirements." 80 Fed. Reg. at 9084. EPA also states that it is "publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment." *Id.* at 9078. But, NBB submitted a Petition for Reconsideration or Clarification to EPA of the final QAP Rule on September 16, 2014. Among other things, NBB expressly raised concerns regarding inconsistent statements in EPA's preamble regarding treatment of non-conforming downstream uses, leaving the public confused as to the basis of its final rule. 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). EPA failed to do so with respect to how it is now treating nonconforming downstream uses, and it has not provided any further explanation for its purported change in the Proposed Rule here.[11]

In its comments on the QAP Rule, NBB agreed that renewable fuel producers should not be required to trace the biodiesel produced to its ultimate use and supported clarifying that properly generated RINs remain valid regardless of actions occurring downstream from the producer. Under the final QAP Rule, this can be established by designating their fuel for use in or as transportation fuel, jet fuel, or heating oil on PTDs prior to transfer of the RINs.[12]

To the extent downstream uses are relevant to the RFS program, the RFS2 regulations properly have placed any burden of addressing improper uses on the downstream parties, as opposed to the renewable fuel producer. *See* 40 C.F.R. § 80.1129(e) ("Any obligated party that

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[10] Section 80.1429(f) provided: "Any party that uses a renewable fuel in any application that is not transportation fuel, heating oil, or jet fuel, or designates a renewable fuel for use as something other than transportation fuel, heating oil, or jet fuel, must retire any RINs received with that renewable fuel and report the retired RINs in the applicable reports under § 80.1451." 40 C.F.R. § 80.1429(f) (July 1, 2013). This provision was removed by the final QAP Rule. *See* 79 Fed. Reg. at 42,115.

[11] When the grounds for a petition for reconsideration have been met, Section 307(d)(7)(B) of the Clean Air Act requires EPA to "provide the same procedural rights as would have been afforded" in the first instance. 42 U.S.C. § 7607(d)(7)(B). A direct final rule does not provide those same procedural rights. While EPA has issued a proposed rule along with the direct final rule to allow for comment, it has not provided sufficient information for the public to understand the basis for its proposed change in order to meaningfully comment. Thus, NBB does not construe this response to adequately resolve its rights under the reconsideration process. To the extent EPA refuses to convene reconsideration proceedings, NBB has rights to seek judicial review of such refusal. *Id.*

[12] *See*, *supra* Section 2.

uses a renewable fuel in a boiler or heater must retire any RINs associated with that volume of renewable fuel and report the retired RINs in the applicable reports under §80.1152."); 75 Fed. Reg. 14,670, 14,724 (Mar. 26, 2010) ("Under RFS1, RINs associated with renewable fuels used in nonroad vehicles and engines downstream of the renewable fuel producer were required to be retired by the party who owned the renewable fuel at the time of blending."); *see also* 40 C.F.R. § 80.1429(f) (July 1, 2013). In the proposal for the QAP Rule, EPA proposed to tighten the regulations with respect to non-conforming downstream uses, not to eliminate them altogether. 78 Fed. Reg. at 12,195. In fact, its proposal to remove and reserve § 80.1429(f) was predicated on adding § 80.1433. *Id.* Because § 80.1429(f) was removed based on EPA's decision to establish § 80.1433, as EPA again stated in the final QAP Rule, 79 Fed. Reg. at 42,106, we do not believe a simple technical amendment deleting the reference to § 80.1433 is sufficient to reconcile EPA's stated intent in the QAP Rule for addressing potentially invalid downstream uses with its final action. While EPA has now purportedly confirmed that it intended not to finalize § 80.1433, it provides no explanation as to whether it intended that RINs not be retired based on downstream activities or its rationale for removing all of these provisions, simply referring to its review of public comments. Thus, the questions raised in NBB's petition for reconsideration remain.

4. EPA Should Address All of the Issues Raised on the QAP Rule.

Although NBB does not oppose the other technical amendments proposed by EPA in the Proposed Rule regarding the final QAP Rule, it believes that EPA should have addressed all of its concerns with the final QAP Rule. The direct final rule was intended "to expedite the regulatory process to allow the modifications to take effect as soon as possible." 80 Fed. Reg. at 9078. We agree that the purely technical amendments to 40 C.F.R. § 80.1426(c)(7) and 40 C.F.R. § 80.1471(d)(1) may have been appropriate through a direct final rule, particularly where EPA's final rule included discrepancies in timing as to when a party must act. But, EPA should consider and address all the concerns that have been raised by the public with respect to the final QAP Rule.

In particular, EPA should consider the concerns associated with provisions that are interrelated together in one setting to understand the potential implications in context, rather than piecemeal or through add-ons to changes to unrelated programs. The proposed amendments to 40 C.F.R. § 80.1453, which were not purely technical, provide an illustration as to why the importance of the issues raised should not be overlooked by treating them as mere "technical" amendments. While NBB does not necessarily object to requiring designation on PTDs upon transfer of the fuel, it does object to requiring the designation on the PTD as a prerequisite to generating RINs under 40 C.F.R. § 80.1426(a). *See* NBB April 18, 2013 Comments on QAP Proposed Rule, at 25-26 (EPA-HQ-OAR-2012-0621-0069). This is unnecessary and, due to the potentially impractical nature of the requirement, can create confusion in the industry. As explained in its petition for reconsideration, EPA failed to respond to NBB's comments on this issue. Thus, the PTD requirements, as amended by the QAP Rule, have broader implications, and EPA should ensure that it has fully addressed the concerns of the public and consider these issues as a whole and in the context of the RFS2 program.

Thus, NBB again requests that EPA reconsider or provide clarifications to the issues it raised in its petition for reconsideration of the final QAP Rule. The petition is incorporated by referenced and attached as an Exhibit to these comments.

* * *

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

Respectfully submitted,

Anne Steckel
Vice-President, Federal Affairs
National Biodiesel Board

Enclosure

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September 16, 2014

Via Electronic and First Class Mail

The Honorable Gina McCarthy
Administrator
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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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