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VIA ELECTRONIC FILING (www.regulations.gov)

May 15, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460
pruitt.scott@epa.gov
ATTN: Docket ID No. EPA-HQ-OA-2017-0190

Re: Evaluation of Existing Regulations, Request for Comment,
82 Fed. Reg. 17,793 (Apr. 13, 2017)

Dear Administrator Pruitt:

The National Biodiesel Board (NBB) appreciates the opportunity to submit comments on EPA's notice entitled "Evaluation of Existing Regulations," published at 82 Fed. Reg. 17,793 (Apr. 13, 2017). The notice was issued pursuant to Executive Order 13777, which requires an EPA task force to evaluate existing regulations and "make recommendations to the agency head regarding their repeal, replacement, or modification." The order is to be "implemented consistent with applicable law."

NBB is the national trade association representing the U.S. biodiesel and renewable diesel industry. Founded in 1992 by farmers that saw the value in promoting biofuels, NBB's membership is comprised of state, national and international feedstock and feedstock processor organizations, biodiesel suppliers, fuel marketers and distributors and technology providers. Biodiesel was the first commercial-scale advanced biofuel produced in the United States under the Renewable Fuel Standard (RFS) program, providing substantial added value to the economy, particularly the agricultural economy.

NBB appreciates EPA's efforts at implementing the RFS, and we have long worked with EPA to ensure a practical and workable program. While we would support efforts at streamlining regulatory requirements for biodiesel producers, as discussed further below, we view any calls to go against Congressional intent as being inappropriate under this Executive Order. Indeed, we believe EPA can, and should, revise existing regulations that could further the goals of Congress to promote advanced biofuels, such as U.S. biodiesel and renewable diesel.

- I. Renewable Fuel Standard Implementing Regulations (40 C.F.R. Part 80, Subpart M)
 - A. EPA should streamline regulatory requirements to promote the goals of the program.

In the Energy Independence and Security Act of 2007 (EISA), Congress sought “[t]o move the United States toward greater energy independence and security, [and] to increase the production of clean renewable fuels.” Pub. L. No. 110–140, 121 Stat. 1492 (2007). In so doing, Congress sought to improve the rural economy (where many renewable fuel facilities are located and from which much of the renewable biomass is produced), increase this nation’s energy independence and security through diversification of the fuel supply, and reduce greenhouse gas (GHG) emissions. S. Rep. No. 110-65 at 2-3 (2007). U.S. biodiesel and renewable diesel promotes each of these goals, and we believe the task force should consider potential revisions to the RFS implementing regulations that would continue to promote these goals, while reducing the burdens on biodiesel and renewable diesel producers. Each of the suggestions below is in line with Congressional goals and will reduce burdens currently existing in EPA’s implementation of the program.

- 1) EPA should add approved biomass-based diesel feedstocks to the fuel pathways in Table 1 of 40 C.F.R. §80.1426(f).

As part of changes to the RFS program regulations published on March 26, 2010, EPA specified the types of renewable fuels eligible to participate in the RFS program based on EPA’s lifecycle GHG emissions analysis through “approved fuel pathways.” These approved fuel pathways are listed in Table 1 to 40 C.F.R. §80.1426, and are based on three components: (1) fuel type; (2) feedstock; and (3) production process. Through these approved pathways, EPA identifies what type of Renewable Identification Number or RIN can be generated for that fuel, such as a “D4” RIN for biomass-based diesel.¹ For fuels, feedstocks or processes that have not been approved, EPA established a petition process under 40 C.F.R. §80.1416. EPA has done significant work in making these GHG emission lifecycle determinations, approving numerous “pathways” under Table 1 of 40 C.F.R. §80.1426(f). We appreciate EPA’s efforts at streamlining the petition process, which has often taken a substantial amount of time to complete, particularly due to the long delays associated with the OMB review process.

Based on its efforts at streamlining the petition process, which NBB supports, EPA has issued several notices for feedstocks that can be used to produce biomass-based diesel.² Through this process, EPA conducts an evaluation of the GHG emissions associated with the

¹ Congress defined biomass-based diesel as “renewable fuel that is biodiesel” and that has lifecycle GHG emissions “at least 50 percent less than the baseline lifecycle greenhouse gas emissions.” 42 U.S.C. §7545(o)(1)(D).

² For example, given the similarities in the feedstocks used and the production process, EPA properly considered its analysis for soybean oil when assessing other biodiesel feedstocks.

production and transport of a proposed new feedstock and seeks comment on that evaluation. Based on that evaluation, however, and unlike the feedstocks listed in Table 1, EPA still requires company-specific petitions before the feedstock is actually used. EPA believed that this process would expedite approvals of new feedstocks in lieu of making a regulatory change to Table 1 of 40 C.F.R. §80.1426(f).

EPA has used the streamlined process described above on four feedstocks that can be used for biodiesel – jatropha oil, cottonseed oil, carinata oil and pennycress oil. *See* 80 Fed. Reg. 61,406 (Oct. 13, 2015); 80 Fed. Reg. 41,033 (July 14, 2015); 80 Fed. Reg. 22,996 (Apr. 24, 2015); 80 Fed. Reg. 15,002 (Mar. 20, 2015). Because these feedstocks are not listed in Table 1, they may be disadvantaged due to the added burden on companies that may want to use them. While EPA can expedite the processing of these petitions, it still requires time and resources for the petitions to be completed. This is in addition to the time it generally takes to update the company’s RFS registration, which is typically the only action required for feedstocks added to Table 1. There is no added benefit by requiring producers that utilize a transesterification process to submit individual petitions to use these feedstocks.

Many biodiesel plants are multi-feedstock plants, which means they can use a variety of feedstocks. Allowing additional feedstocks provides those plants with flexibility to respond to the market and utilize the most cost-effective feedstocks. This diversification of feedstocks was sought by Congress and supports the security objectives of the RFS. S. Rep. No. 110-65 at 2. It “spread[s] economic benefits to rural communities across the country and reliev[es] pressure on corn commodity prices.” *Id.* at 3. Given that EPA found these feedstocks would likely meet the 50% reduction requirement and that EPA provided notice and comment, we believe EPA can reduce unnecessary burdens by adding these feedstocks to Table 1 of 40 C.F.R. §80.1426(f), rather than wait for a company-specific petition.³ Adding these feedstocks to Table 1 would further the policy outlined in Executive Order 13790 on Promoting Agriculture and Rural Prosperity in America, signed April 25, 2017.

This would require a simple change to “Pathway F” in the table as follows (additions in bold, underline). Note that we do not believe EPA has done a proper accounting of lifecycle emissions for co-processing and, thus, do not include “Pathway H” in this proposal.

³ EPA’s notices may include references to invasive species. While NBB does not generally take a position on whether any of the listed feedstocks are invasive, we question EPA’s authority to regulate feedstocks on these grounds, particularly in the face of insufficient information. Congress required EPA consider only “significant” indirect GHG emissions. 42 U.S.C. §7545(o)(1)(H).

	Fuel Type	Feedstock	Production process requirements	D-Code
F	Biodiesel, renewable diesel, jet fuel and heating oil	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; Non-food grade corn oil; Camelina sativa oil; <u>Jatropha oil;</u> <u>Cottonseed oil; Carinata oil;</u> <u>Pennyress oil.</u>	One of the following: Trans-Esterification Hydrotreating Excluding processes that co-process renewable biomass and petroleum.	4

- 2) EPA should revise the first prong of the definition of “heating oil” in 40 C.F.R. §80.1401

We believe EPA should revise the first prong of the definition of “heating oil” in 40 C.F.R. §80.1401. Such revision is necessary to clarify that biodiesel, at any blend level, is eligible to generate RINs as “heating oil.” This is necessary to reduce confusion and avoid potential additional burdens for different blend levels for which there is no benefit.

EPA currently defines “heating oil” under 40 C.F.R. §80.1401 as follows:

Heating oil means:

(1) A fuel meeting the definition of heating oil set forth in §80.2(ccc); or

(2) A fuel oil that is used to heat interior spaces of homes or buildings to control ambient climate for human comfort. The fuel oil must be liquid at 60 degrees Fahrenheit and 1 atmosphere of pressure, and contain no more than 2.5% mass solids.

EPA has clarified that heating oil under the first prong of the definition can be used for power generation/process heat, but not under the second prong of the definition. *See EPA, Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program Response to Comments*, EPA-420-R-13-010, at 13-14 (Sept. 2013).⁴ This acknowledged the

⁴ The second prong of the definition was intended to address new fuels entering the marketplace as a result of the RFS, not fuels commonly used for heating oil. At the time of the 2007 amendments to the RFS, biodiesel was one of the few (if not only) renewable fuels being considered as a replacement for heating oil. *See, e.g.,* Masoon Farivar, Dow Jones Newswires, *New tax break encourages use of biodiesel for home heating oil*, Jan. 4, 2005, http://journalstar.com/business/new-tax-break-encourages-use-of-biodiesel-for-home-heating/article_79b4eb81-b84d-5c15-bdbd-f05c37f70a8a.html; Bioheat Fact Sheet: Harvard Green Campus Initiative (2012), available at <http://www.tristatebiodiesel.com/download/bioheat-fact-sheet.pdf>; LECG, LLC, Statewide Feasibility Study for a Potential New York State Biodiesel Industry, Final Report 04-02

fact that biodiesel is commonly sold as heating oil for use “in furnaces, boilers, stationary diesel engines, and similar applications” in industrial settings, even though Congress used the term “home heating oil” in the statute.⁵ 77 Fed. Reg. 61,281, 61,285 (Oct. 9, 2012). EPA properly recognized that this is a general term to refer to a type of fuel, not a specific use.

But, EPA’s incorporation of the definition of heating oil in 40 C.F.R. §80.2(ccc) into the RFS regulations, which refers to #1, #2 and nonpetroleum diesel blends, is unduly limiting the ability of biodiesel to enter the heating oil market.⁶ This is because for biodiesel blends that do not fall under the strict definition of Section 80.2(ccc) there may be market confusion as to the requirements for its use; that is, whether certain blends only fall under the second prong of the definition, which is limited to heating for ambient climate only. With the change in the ASTM standard for “heating oil” (ASTM D396) it is clear that blends up to B20 now are treated the same as B5. Moreover, there is no reason to treat biodiesel blends differently simply because EPA is cross-referencing a definition in 40 C.F.R. §80.2(ccc). The biodiesel itself was always intended to be able to be used as a replacement for petroleum-based heating oil to generate RINs under the program, even when used for power generation and process heat. *See, e.g.*, 42 U.S.C. §7545(o)(5)(A)(ii) (providing for generation of appropriate amount of credits for biodiesel).

EPA’s current definition also raises questions as to the applicable requirements to generate RINs, where “renewable fuel oil” requires affidavits “from the final end user or users of the fuel oil as specified in §80.1451(b)(1)(ii)(T)(2).” 40 C.F.R. §80.1426(c)(7). Even if “biodiesel” is excluded from the affidavit requirement in some circumstances,⁷ biodiesel producers should not be required to trace the end use of the biodiesel which has been designated for use as transportation fuel, heating oil or jet fuel. This disparate treatment of higher biodiesel blends could impose additional requirements on parties downstream, creating regulatory burdens or creating incentives to restrict blending. This is counter to

Prepared for the New York State Energy and Research Development Authority, at 108-109 (June 2003) (EPA-HQ-OAR-2005-0161-0783).

⁵ EPA has revised §80.2(ccc), but did not indicate a change in the reference to “similar applications.” Such similar applications should include power generation, including turbines.

⁶ Section 80.2(ccc) provides: “Heating oil means any #1, #2, or non-petroleum diesel blend that is sold for use in furnaces, boilers, and similar applications and which is commonly or commercially known or sold as heating oil, fuel oil, and similar trade names, and that is not jet fuel, kerosene, or MVNRLM diesel fuel.” 40 C.F.R. §80.2(ccc) (2016).

⁷ Section 80.1451(b)(1)(ii)(T)(2) appears to exclude “biodiesel.” Other requirements, however, do not expressly exclude biodiesel and may apply if the biodiesel blend was required to meet the second prong. Section 80.1450(b)(1)(xi) requires affidavits for “fuel oil meeting paragraph (2) of the definition of heating oil in §80.1401” as part of a producer’s registration. *See also* 40 C.F.R. §80.1454(b)(8) (requiring retention of copies of all contracts “which describe the fuel oil under contract with each end user”). Section 80.1453(d) also refers to product transfer document requirements for “fuel oil meeting paragraph (2) of the definition of heating oil in §80.1401,” which differ from the requirements for “biodiesel.” The different terms used by EPA can cause regulatory and market confusion.

EPA's own determination that increased use in heating oil is a means of furthering Congress's goals under the RFS. 80 Fed. Reg. 77,420, 77,432 (Dec. 14, 2015).

This change would also further the goals of various state and local programs, which are looking to further incentivize biodiesel use in heating oil applications. It is undisputed that biodiesel use reduces emissions of toxic air pollutants and criteria pollutants, such as particulate matter. Promoting biodiesel use in these markets will provide substantial air quality and public health benefits.

Thus, EPA should make clear that all biodiesel blends, including B100, are eligible to generate RINs as heating oil under the first prong of the heating oil definition, even if that heating oil is to be used for power generation, and need not resort to the second prong of that definition, which could add regulatory burdens and limits use to heating only.

We believe this would require only a technical change to the definition to clarify EPA's intent. Such a change could include the following clarification.

Heating oil means:

(1) A fuel meeting the definition of heating oil set forth in §80.2(ccc), **which, for purposes of this subpart only, includes neat biodiesel or any biodiesel blend;** or

(2) A fuel oil that is used to heat interior spaces of homes or buildings to control ambient climate for human comfort. The fuel oil must be liquid at 60 degrees Fahrenheit and 1 atmosphere of pressure, and contain no more than 2.5% mass solids.

At a minimum, EPA should confirm that biodiesel blends up to B20 as well as blends of B80 or higher (including B100) qualify as heating oil under the first prong of the definition.

3) EPA should consider minor revisions to facilitate participation of smaller blenders and users of biodiesel.

The current RFS regulations allow biofuel producers limited ability to separate RINs. This ability is important for the biodiesel industry due to the numerous small jobbers, blenders and other users of biodiesel that cannot afford to become subject to the numerous requirements under the RFS program, such as registration, reporting and recordkeeping requirements. NBB has long supported giving biodiesel producers greater flexibility to transfer RINs in order to promote the production and sale of biofuels. *See, e.g.*, EPA-HQ-OAR-2012-0621-0069 at 17-20; EPA-HQ-OAR-2012-0401-0166 at 5-8. NBB continues to believe that the restrictions placed on the producers' ability to separate RINs

are unnecessary, have not contributed to the distortions in the market, and would not result in hoarding, if expanded.

EPA currently allows renewable fuel blenders who handle and blend less than 250,000 gallons of renewable fuel per year to delegate their RIN-related responsibilities to the party directly upstream from them who supplied the renewable fuel for blending. 40 C.F.R. §80.1440. Although NBB supported the increase to 250,000 gallons based on the experience in the early years of the program, we believe EPA should consider increasing the threshold to 500,000 gallons. The upward delegation allows small blenders to compete in the market. Small blenders are extremely important parties in providing rural areas their energy products. A further increase would better reflect increased demand for higher blend levels, and based on economics of scale, would allow biodiesel to compete better for these smaller markets. RFS compliance costs can outweigh the benefit of discretionary blending for smaller blenders, recommending a higher threshold that was more in line with companies that could bear the financial burden of compliance. Moreover, it is difficult to transfer a small amount of RINs, and it becomes more difficult for biodiesel producers to obtain the full value of their biodiesel, if they are forced to sell RINless biodiesel. Delegation also eases the administrative burdens associated with the program overall.

The only argument provided in support of a lower threshold is the unsupported fear that producers will “hoard” RINs. But, producers want to sell their fuel and have no incentive to “hoard” RINs, unlike other parties in the market that have no similar restrictions. Ensuring continuation of these markets allows for easier compliance with the RFS volume requirements, as the fuel can be used locally rather than shipped to obligated parties. As the volumes continue to increase, EPA should encourage parties to enter the market and, thus, provide alternatives to the substantial administrative requirements of participating in the RFS program. These other customers, while wanting the renewable fuel, are often reluctant to become RIN owners and become subject to numerous and technical requirements under EPA’s regulations.

NBB also has proposed additional revisions to increase the producers’ flexibility in transferring RINs and reiterates those here. EPA-HQ-OAR-2012-0621-0069 at 17-20. This includes (1) adjusting the quarterly true-up provisions to eliminate the arbitrary deadline placed on producers to move their biofuel and RINs, and (2) adjusting the number of assigned RINs that can be transferred based on the applicable equivalence value.

First, the quarterly true-up requirements are not necessary as producers have every incentive to monetize the RINs as quickly as possible as the RIN value goes toward operating costs. For producers, they can be eliminated altogether. Indeed, the RINs have a limited life, and it makes little sense for producers to hold onto assigned or separated RINs. Alternatively, EPA can instead impose a requirement to transfer any assigned RINs 90 days from generation. Requiring this true-up at the end of each quarter is an arbitrary deadline established by EPA. If hoarding is a valid concern, putting the producers on a clock to

transfer the RINs from generation serves the same purpose, but would not create the problems that arise at the end of each quarter for batch plants.

Second, NBB requests again that the 2.5 RIN limit for transferring of assigned RINs be adjusted to, at a minimum, reflect the applicable equivalence factor of the relevant fuel (*e.g.*, 3 RINs for biodiesel). This would reduce calculation errors and simplify transfer of biodiesel with “extra” RINs assigned. The 2.5 number is merely a relic of a prior statutory provision removed by EISA and of the RFS1 regulations. EPA provided no explanation why it believed the 2.5 number provided producers with sufficient flexibility, and it has affected the ability of producers to service smaller customers and local markets.

- B. EPA should cancel its approval of the CARBIO “alternative renewable biomass tracking program” pursuant to 40 C.F.R. §80.1454(h).

On January 27, 2015, EPA approved a plan submitted to EPA by the Camara Argentina de Biocombustibles (CARBIO) (also known as the Argentine Chamber of Biofuels), pursuant to 40 C.F.R. §80.1454(h), *available at* https://www.epa.gov/sites/production/files/2015-08/documents/carbio-decision-document-2015-01-27_1.pdf. This plan provides for an alternative renewable biomass tracking program under the RFS, which allows soy-based biodiesel producers in Argentina to bypass the requirements of 40 C.F.R. §80.1454(c)(1), which are intended to ensure the fuel is derived from renewable biomass.⁸ NBB has long been concerned with this plan and approval because of its lack of transparency. Aside from the lack of public notice and comment,⁹ the record supporting EPA’s decision lacks any assessment as to the validity of the approved methodology or effectiveness of the approved approach, which is contrary to the Information Quality Act. According to EPA, its determination was within its discretion. EPA’s approval is reviewable under Executive Order 13777 and should be revoked or voided because it authorizes a flawed program in Argentina at the expense of the environment and U.S. jobs.

The Information Quality Act was intended to ensure and maximize “the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies.” The public was not provided with data, information or the methods supporting EPA’s determination. EPA only provided a short explanation of the program. Because NBB challenged EPA’s decision in the U.S. Court of Appeals for the D.C. Circuit, it was able to obtain a copy of the administrative record, which was devoid of any analysis by EPA. Instead, EPA chose to rely on the statements by CARBIO, a clearly interested party.

⁸ The statute defines “renewable biomass” to include: “Planted 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.” 42 U.S.C. §7545(o)(1)(I).

⁹ While the D.C. Circuit upheld EPA’s procedures in this case despite the gaps and issues the public likely would have identified, *see NBB v. EPA*, 843 F.3d 1010 (D.C. Cir. 2016), there remains little to no information available to the public regarding the use of this program or its effectiveness. In other words, there are simply no means for the public to ensure it is operating as intended.

NBB continues to believe that there are serious flaws in the CARBIO plan, which the D.C. Circuit and EPA have left unaddressed. These include, among other things, (a) the limited ability of the plan to identify lands in production in 2007, (b) the limited ability to ensure the soybeans were grown on eligible lands, (c) the applicability of the land classifications used by CARBIO, (d) the objectivity of the party (CARBIO) identifying eligible lands, and (e) the lack of assurance that the biodiesel actually imported is covered by the program. NBB believes numerous elements of the approved plan make it ineffective to “achieve the level of quality assurance required under” the renewable biomass requirements in EPA’s RFS regulations. 40 C.F.R. §80.1454(h).

EPA has tried to downplay the significance of its decision despite the substantial increase in imports from Argentina, arguing that NBB could not establish harm to the U.S. biodiesel industry from its approval. This was an allegation easily rejected by the D.C. Circuit. The U.S. biodiesel industry remains substantially underutilized in lieu of imports, and EPA’s approval only gives additional advantages to foreign production (without providing assurance that significant land use changes are not occurring in Argentina).

We believe EPA has ample grounds and ability to withdraw its approval of the CARBIO program.

First, as EPA itself asserted, it may revoke or void the approval at any time it finds it is not being properly implemented or “simply is ineffective.” EPA Br., *NBB v. EPA*, No. 15-1072, at 22 (D.C. Cir. filed Feb. 11, 2016).

Second, NBB submitted a petition for reconsideration/rulemaking, asking EPA to reconsider its approval and allow the public an opportunity to review and comment. See Petition for Reconsideration and Request for Administrative Stay, Submitted to EPA on March 30, 2015 (Attach. A). This petition remains pending at EPA and should be granted.

Finally, even if EPA does not withdraw the approval, it must ensure transparency. CARBIO indicated it will “maintain an open communication policy” with respect to the program in its application to EPA. Yet, we are unable to find any information as to the approved lands, the parties that are currently participating, and the volumes being imported under the program. We believe EPA can easily provide this information to the public, which will better ensure the program is effective.

- C. EPA must reject calls to reduce RFS volume requirements, which are mandated by statute.

On April 24, 2017, EPA’s Office of Air and Radiation held a public meeting via conference call on its Evaluation of Existing Regulations under Executive Order 13777. During that call, the American Petroleum Institute (API) and the American Fuel & Petrochemical Manufacturers (AFPM) raised concerns regarding the RFS volumes. API referred to the “outdated RFS program,” and urged EPA to use its waiver authority. AFPM also referred to

the RFS as among those regulations that “are the most burdensome for our member companies.” But, as AFPM acknowledges, the RFS is statutorily mandated. Executive Order 13777 must be “implemented consistent with applicable law.” Thus, it is not appropriate to consider as part of a “regulatory reform” process since Congress’s directives and EPA’s limited authority to reduce those directives are set forth by statute.

NBB also notes that both API and AFPM focus on ethanol usage. The comments on the call did not reference any issue with increasing the biomass-based diesel requirement (nor have their comments in the past). Biomass-based diesel has filled the bulk of the advanced biofuel requirements under the RFS, and API/AFPM fail to acknowledge that the growth in the RFS should be in the advanced biofuel category moving forward. NBB does not agree that there is a “blendwall,” but, more importantly, does not agree that this is grounds *under the statute* to reduce the volumes. This is particularly true with respect to undermining the goals of Congress to move aggressively toward advanced biofuels. Virtually all U.S. production of biodiesel and renewable diesel qualifies as biomass-based diesel. 81 Fed. Reg. 89,746, 89,766 n.72 (Dec. 12, 2016). EPA can easily move more aggressively toward advanced biofuels, and support domestic production and jobs. In short, the investments in advanced biofuels that Congress sought has been deferred, waiting for cellulosic biofuels, even though home-grown biodiesel and renewable diesel is available to meet higher volumes, losing out on rural jobs and substantial economic benefits. Moving backwards would “eliminate jobs” and “inhibit job creation.”

EPA must also consider the benefits, and goals of the RFS. The biomass-based diesel program under the RFS has been a resounding success, checking off each of the goals Congress sought and then some. The RFS was expanded to support and prioritize advanced biofuels through a bipartisan effort and a bill signed into law by President Bush. Pub. L. No. 110-140 (2007). This was to diversify the fuel supply, improve the rural economy, and achieve air quality and other environmental benefits. EPA must implement the statute as Congress intended, not as requested by API/AFPM. Indeed, we urge EPA to stay on track in implementing the 2018 RFS and setting the 2019 biomass-based diesel volume.

II. EPA Must Reconsider Several Aspect of the Renewables Enhancement and Growth Support Proposed Rule.

NBB believes that the RFS should be a workable and practical program. The regulations are already extremely numerous and complex, and EPA should recognize that the industry has done much to ensure integrity of the program. On November 16, 2016, EPA issued a proposed rule entitled “Renewables Enhancement and Growth Support or “REGS” Rule. The REGS Rule included numerous proposed changes to the RFS regulations in an expressed effort to “reflect changes in the marketplace and to promote the growing use” of biofuels. 81 Fed. Reg. 80,828, 80,828 (Nov. 16, 2016). While there are several aspects of the proposal that the task force should recommend finalizing, which are discussed further

below, other aspects of the proposal should be withdrawn or reconsidered as they could increase the burdens on producers, rather than streamline the program.

- A. EPA should facilitate the RFS registration process under 40 C.F.R. §80.1450 not make it more onerous.

The REGS proposal included a number of “other regulatory changes, clarifications, and technical corrections” to the RFS regulations. 81 Fed. Reg. at 80,828. Many of these proposed changes appear to stem from implementation of the regulations in practice, where EPA was essentially imposing new requirements without notice and comment, or speculative concerns regarding potential enforcement. The industry has responded to the early cases of fraud with stronger due diligence and oversight, and EPA has already addressed many of the concerns raised through changes to the regulations, such as those made through the Quality Assurance Program rule (“QAP Rule”). EPA should not create confusion or impose undue burdens on an industry that is trying to comply with an already very complex program. Such burdens only create disincentives to small producers, potential new entrants, expansion and innovation. NBB also believes EPA could, in fact, address many of its concerns by providing more compliance assistance to the industry and more transparency.

1. EPA should not finalize various aspects of the REGS proposal regarding RFS facility registration requirements.

Among the biggest delays in expanding or providing for new production under the RFS program are the registration requirements. EPA requires all facilities to register, provide updates to EPA based on changes to the registration, and re-submit registration materials every three years. In the REGS proposal, EPA did look at ways to adjust the registration requirements, but many of them likely would only add to the delays and burdens on producers. In particular, EPA’s proposal to impose new requirements on third-party engineers will likely add substantial costs to an industry that is already bearing a significant amount of regulatory costs to comply with a program intended to promote biofuel production. NBB strongly believes EPA should not finalize those proposed changes.

Several of the proposed revisions would create more confusion, adding costs with little to no benefit. It is important to note that a biodiesel plant is typically a transesterification plant, although it can add on various types of equipment that could provide additional flexibility in feedstock use and to address various customer requirements. At the end of the day, however, it is still biodiesel, which must meet ASTM specification D6751. In addition, many biodiesel plants utilize a Quality Assurance Program (QAP), which provides for continuous monitoring of production. Other proposed revisions are unnecessary and would only add costs. NBB outlined its concerns in its comments to the REGS proposal (EPA-HQ-OAR-2016-0041-0300).

- First, NBB disagrees with requiring EPA “approval” of registrations, including updates, prior to generation of RINs.¹⁰ As noted above, EPA can hold up a facility’s registration for months, even if it is a simple change. Moreover, the REGS proposal did not explain what this “approval” may entail.
- Second, NBB disagrees with EPA’s proposed revisions to 40 C.F.R. §80.1450(b). Many of these proposed changes were not explained in the preamble. Moreover, several are likely to cause confusion and limit the flexibility of plants to utilize a variety of feedstocks and suppliers and to improve efficiencies and processes unrelated to the RFS.
- Third, NBB disagrees with EPA’s proposed changes to the certifications from responsible corporate officers as overly broad.
- Fourth, NBB disagrees with EPA’s proposal to require plans for “biogenic waste oils/fats/greases” similar to separated food waste plans. Not all “biogenic waste oils/fats/greases” are separated food waste but are “animal waste material and animal by-products. We are unaware of any benefit such a plan would provide with respect to biodiesel production, and these feedstocks are clearly renewable biomass under the RFS. Indeed, we believe it would be more beneficial to the program for EPA to clarify this phrase to better track industry terms.
- Fifth, we believe most commenters opposed the proposed revisions related to third-party engineers and the engineering reviews. These proposed changes included requiring third-party engineers to register with EPA and be subject to substantial conflict of interest provisions. This is despite the fact that the engineering review has limited purpose, the engineers must be licensed, and there is already a limited pool of qualified individuals that conduct these services. We believe the proposed changes would create unnecessary burdens, limit the available engineers,¹¹ and substantially increase costs to the program. EPA’s justification for these changes are insufficient to support such additional burdens, particularly with the QAP and other changes EPA has made to the regulations. We found or know of no other EPA program imposing such stringent requirements on third-party engineers or engineering reviews. As such, NBB strongly opposed these proposed changes and believe EPA should withdraw them from future consideration.

¹⁰ 81 Fed. Reg. at 80,929 (proposed §80.1426(c)(9)).

¹¹ EPA also requires professional engineers to conduct other services under the RFS, such as auditing plants under a QAP, but proposes to limit their ability to provide other services if they conduct engineering reviews. This affects the pool of knowledgeable and qualified engineers available, but also affects pricing.

2. EPA should streamline registration transfers based on ownership changes.

While the REGS proposal purported to clarify the requirements for transfers of an RFS facility registration in light of ownership changes, its proposal does not appear to facilitate such transfers. NBB urges EPA to reconsider these provisions to streamline registration transfers in the case of mere ownership changes. NBB points EPA to its Title V permit and NPDES permit programs. Both have provisions that allow for transfers of ownership that are simpler than those under the proposed REGS rule. *See* 40 C.F.R. §§71.7(d), 70.7(d), §122.61. Here, EPA can provide a similar process to transfer registration, and can include a certification from the proposed new owner that it does not plan any changes to the current registration, and, if it does, it will submit an updated registration to EPA.

- B. EPA should make clear that the biointermediates proposal does not apply to already approved biodiesel feedstocks.

NBB has serious concerns with EPA's biointermediate proposal in the REGS rule. NBB understands that EPA did not intend to bring biodiesel feedstocks under the umbrella of biointermediates, but the proposed regulatory language (and explanation) raises sufficient questions and may exclude viable biodiesel feedstocks that we believe EPA should withdraw and reconsider the proposal. The proposed requirements for so-called "biointermediate" producers would be extremely burdensome on biodiesel feedstock suppliers and would undermine the flexibility currently provided in the marketplace. NBB's comments provided suggestions on how to improve the proposal.

Although EPA has indicated it has numerous pending petitions that it believes would fall under the biointermediate provisions, they have provided the public with little, if any, information on these petitions to be able to evaluate the efficacy of the proposed provisions. We understand much of the interest in these provisions are to promote cellulosic feedstocks, and limiting them to those circumstances could avoid some of the confusion that may arise with respect to other fuels. Importantly, however, it should not include co-processing as, to our knowledge, EPA has not adequately conducted a lifecycle analysis for co-processing and has not justified why it believes it can apply the analysis it has done to these essentially new pathways.

- C. To the extent EPA has reviewed the RFS regulations as part of the REGS proposal, there are several proposed changes NBB supports and EPA should finalize those changes separate from the rest of the REGS proposal.

The REGS proposal also purports to make clarifications to the existing RFS implementing regulations. NBB believes several of these would be beneficial, could reduce burdens, and would promote biofuel use.

- RVO Reporting: NBB agrees that EPA should seek more information and provide more transparency on compliance with the Renewable Volume Obligations (RVOs) under the RFS program, and thus supported EPA's proposed changes related to the RVO reporting requirements. See generally discussion at 81 Fed. Reg. at 80,900. We believe these changes are necessary to ensure compliance, but also assist the market. The proposed changes are simply reporting requirements that would add minimal, if any, costs. EPA providing more transparency (subject to confidential business information) also does not add burdens to the regulated industry.
- Biofuels Used for Military Applications (proposed §80.1440(a)(2), (f), see 81 Fed. Reg. at 80,933): NBB also supported EPA's proposal to provide flexibilities for renewable fuel blending for military use. Biodiesel has long been used in military applications, and NBB appreciates the efforts the armed forces have taken to move toward increased use of renewable fuels. NBB supports providing benefits for these uses under the RFS, and the proposal to allow for upward delegation. NBB did ask EPA to clarify which provisions of 40 C.F.R. Part 80 it is intending to reference in proposed §80.1440(a)(2). These changes would allow more RINs to be available for compliance, thereby easing compliance.
- Separated Food Waste Plans: NBB also supported EPA's proposal to ease the requirements for separated food waste plans. As noted above, NBB is concerned with delayed operations as a result of onerous registration requirements. NBB, thus, supports eliminating the requirement that producers identify all expected feedstock suppliers in their separated food waste plans, which has created undue burdens in having to update registrations when there is a change to that plan. See 81 Fed. Reg. at 80,902-80,903. This will also reduce burdens on EPA that currently must process those registration updates. EPA should encourage waste collection, not impose undue burdens on producers that might limit their ability to seek additional feedstock sources.
- ASTM D6751 Reference: NBB supported EPA's proposal to update the ASTM D6751 reference for biodiesel in the RFS regulations at 40 C.F.R. §80.1468(b)(4), see 81 Fed. Reg. at 80,951. The ASTM standard has been updated since 2009, and is incorporated in various biodiesel programs, such as BQ-9000. The update would keep these programs consistent and avoid confusion in the industry. While compliance with the newer standard will comply with the earlier standard, there also may be market confusion if entities are using a different standard and still generating RINs.
- Changes to Bond Requirements: NBB also supported EPA's proposal to provide only for obtaining a third-party surety for RINs generated by foreign producers and importers to meet the bond requirements by removing the option to post a bond with the U.S. Treasury. 81 Fed. Reg. at 80,911.

III. EPA Should Look to Streamline Product Transfer Document Requirements for Biodiesel.

EPA's fuels regulations, including the RFS, includes various Product Transfer Document (PTD) requirements that must accompany a gallon of renewable fuel. For biodiesel, however, the PTDs now must contain numerous statements under a variety of requirements, which are superfluous in the case of biodiesel and largely unnecessary.

All biodiesel uses should be qualifying uses under the RFS program, and NBB agrees with EPA's general approach that a biodiesel producer should not be required to track downstream uses or be held accountable for the actions of parties downstream from the facility.

Biodiesel also is subject to PTD requirements under the ultra-low sulfur diesel fuel program in addition to the RFS 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.

Thus, NBB has recommended 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 would be happy to assist the EPA on more specifics to accomplish this goal.

IV. As EPA Considers its GHG Vehicle Regulations, It Should Reassess Both the Light-Duty and Medium/Heavy-Duty Vehicle Requirements to Include Incentives for Vehicles Using Higher Blends of Biodiesel.

EPA recently announced it was reconsidering its final determination of the mid-term evaluation of GHG standards for model year 2022-2025 light-duty vehicles. 82 Fed. Reg. 14,671 (Mar. 22, 2017). Pending at EPA is also a petition for reconsideration submitted by NBB on EPA's medium- and heavy-duty Phase 2 rule. *See* Letter from Anne Steckel, NBB, to Gina McCarthy, EPA Administrator, Dec. 23, 2016 (Attach. B). NBB submitted this petition because it believes EPA did not adequately respond to comments urging EPA to provide incentives to promote vehicles that can use alternative fuels, including higher biodiesel blends as Congress envisioned. Also, EPA has argued that "constraints" on use of biofuels

requires reductions in the RFS statutory volumes or supports limitations on the growth of advanced biofuels. While NBB disagreed, the incentives suggested by NBB (and supported by engine manufacturers such as PACCAR, *see* EPA-HQ-OAR-2014-0827-1204 at 24) would help remove those constraints while also serving to reduce GHG emissions associated with the transportation sector. Thus, as part of EPA's reconsideration, it should consider whether incentives for use of alternative fuels can ease the burdens on vehicle manufacturers, while also furthering the goals of the Clean Air Act. NBB attaches its comments for more information (Attach. C).

V. EPA Should Ensure Sufficient Resources to Provide Guidance and Compliance Assistance, Particularly with Respect to the RFS and for Smaller Entities.

The U.S. biodiesel industry, although growing, is still relatively new with a number of smaller facilities. NBB urges EPA to provide more guidance and focus on compliance assistance, while ensuring the integrity of the regulatory process.

EPA's revised RFS implementation regulations have been in place since 2010. Since then, however, EPA has acknowledged confusion in the market regarding several of the regulatory provisions, making various amendments. The biodiesel industry has taken substantial effort at understanding and complying with this set of regulatory requirements, which may not adequately address the complexities of the biodiesel industry.

Early on, EPA provided more guidance to the industry, such as updating its question and answer page. This practice, however, appears to have stopped with EPA making interpretations and "guidance" on a piecemeal, case-by-case basis. Such guidance can take many months where, in the meantime, facilities may be idled or new production put on hold. The biodiesel industry, still relatively young, remains in a period of expansion and growth in response to the RFS program. EPA also has previously been willing to speak to the industry and provide guidance, but lack of resources has limited these important and helpful outreach activities.

Indeed, to the extent EPA provides guidance, and such guidance is limited to interpretative rules, it should provide that guidance to the public as a whole. For example, EPA should not expand or restrict feedstocks it has approved outside the regulatory process, such as through its registration approval process. EPA cannot make such changes on a case-by-case basis without including the public. Nor should EPA wait to engage in an investigation or enforcement action to provide new interpretations of regulations. EPA has used the practice of "regulating via consent decree" to require companies to meet requirements that are more stringent than those established by regulations as part of settling an enforcement case. Examples of these extra requirements include mandating extra monitoring, reporting and imposing third-party audits on companies. When reviewing its enforcement discretion and penalty policy, EPA should adapt its approach to the facts of a particular case and recognize the economic constraints of a facility. Imposing large penalties on companies for relatively minor transgressions, even when the actions taken by the company have not

resulted in specific environmental harm and when those companies are taking every effort to come into compliance, does not serve any benefit.¹² This is particularly true for smaller facilities that do not have the same resources but also cannot afford to wait months for a response from EPA. NBB has taken substantial effort to ensure integrity in the RFS program, and its members take every effort to comply with regulatory requirements.

In short, given the complexity of the biodiesel industry, it will be more beneficial for EPA to provide additional, and timely, guidance. We understand EPA has limited resources and, thus, urge the Administration to ensure sufficient resources for compliance assistance. Congress sought to move this country toward advanced biofuels, and biodiesel is the first commercial-scale advanced biofuel produced in the United States. One of the great benefits of biodiesel is the diversity and flexibility it brings to the marketplace. EPA should continue to encourage those aspects and support its continued growth.

NBB appreciates the opportunity provide these comments to EPA. We believe we have had a very good working relationship with the staff at EPA and look forward to continuing that work. We remain available to answer any questions or discuss any of the issues noted above.

Sincerely,



Anne Steckel
Vice President of Federal Affairs
National Biodiesel Board

¹² For example, NBB has requested EPA reconsider several of its RFS regulations in recognition that a mere error could result in a technical violation and allow facilities to correct those errors.