



April 18, 2013

**COMMENTS OF THE
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
AND THE AMERICAN PETROLEUM INSTITUTE**

**RFS RENEWABLE IDENTIFICATION NUMBER (RIN)
QUALITY ASSURANCE PLANS**

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

INTRODUCTION

The American Fuel & Petrochemical Manufacturers (AFPM)¹ and the American Petroleum Institute (API)² submit these comments in response to the Environmental Protection Agency's (EPA or Agency) proposed rule entitled *RFS Renewable Identification Number (RIN) Quality Assurance Program*.³ As obligated parties under the Renewable Fuels Standard (RFS), AFPM and API members are directly impacted by the Proposed Rule. Obligated parties have been the victims of fraud in the biodiesel industry and unjustly subjected to EPA civil penalties as a result of crimes perpetuated by third parties.⁴

¹ AFPM is a trade association representing high-tech American manufacturers of virtually the entire U.S. supply of gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of products vital to everyday life.

² API is the national trade association representing all segments of the U.S. oil and natural gas industry. Its more than 500 members – including large integrated companies, exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms – provide most of the nation's energy. Since 2000, the industry has invested over \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

³ 78 *Federal Register* 12158 (February 21, 2013) (hereinafter the "Proposed Rule").

⁴ Refiners acquire RINs on the open market. Often these RINs will have changed hands numerous times and it is incredibly difficult for refiners as a third party purchaser to assure that the RINs purchased are valid for compliance. Unlike other EPA programs, obligated parties under the RFS generally do not produce the biofuels that must be blended into domestic transportation fuels and in many cases are not directly involved in the blending of biofuels and the creation and separation of the RINs used for compliance.

We believe the RFS is totally unworkable, not reflective of both the current and future energy and technical landscape and should be repealed. However, the petroleum industry supports the efforts of the Administration to improve the integrity of the Renewable Fuel Standard (RFS) program. We are disappointed that EPA chose to punish refiners who were the victims of fraud committed by biodiesel producers. The discovery of more than 140 million fraudulent biodiesel Renewable Identification Numbers (RINs) led AFPM and API to reach out to EPA, renewable fuel producers, and petroleum marketers in an effort to address this problem. Aside from the unfairness of penalizing individual refiners that purchased RINs from EPA-registered biodiesel producers, the biodiesel fraud has created a RIN liquidity problem for many small biofuel producers.

Refiners quickly realized that providing an alternative to the strict liability buyer beware program that was built upon the concept of creating an affirmative defense around some level of prescribed due diligence would help restore RIN liquidity. We are encouraged that EPA now understands the need to develop an alternative to the “buyer beware” system of liability.

With that background in mind, we generally support EPA’s step forward to promulgate a rule that establishes an affirmative defense to liability stemming from invalid RINs. Refiners endorse many aspects of the Agency’s proposal, including:

- The Regulatory Solution to Potential Liability – AFPM and API members are pleased that the Agency recognizes the need for a regulatory solution that provides innocent purchasers with an affirmative defense to potential liability stemming from fraudulent biofuel producers. We support the connection between the execution of due diligence activities and the provision of an affirmative defense for verified RINs, provided that the obligated party did not cause the RIN to be invalid.
- Voluntary Program – Participants have the option to use the verification program as needed. As a consequence, there will be both “verified” and “unverified” RINs in the marketplace. The voluntary nature of the program will provide obligated parties with the tools needed to ensure their compliance with RFS obligations, while minimizing due diligence costs, which can be avoided in cases where obligated parties acquire RINs from trusted producers.
- Performance Standards – The use of objective due diligence performance standards will create competition in the RIN verification market and will ensure that the appropriate amount of due diligence needed to reduce the risk of invalid RIN generation is conducted in a cost effective manner by independent, EPA-approved auditors.

While we support the overall concept of creating an affirmative defense to invalid RIN liability in exchange for conducting appropriate due diligence of biofuel production facilities, we have concerns with the proposed implementation of EPA’s quality assurance program (QAP), which we discuss in more detail below.

DISCUSSION

Obligated parties using “verified” RINs for compliance would be eligible to assert an “affirmative defense” to EPA enforcement actions. The affirmative defense would provide legal certainty for obligated parties who purchase verified RINs, provided that the obligated parties did not have *actual* knowledge of the RINs’ invalidity at the time of purchase and did not otherwise cause the invalidity. While EPA has an interest in ensuring that each RFS regulatory requirement is met, the scope of this program must focus on minimizing the risk for invalid RIN generation. This program should not be viewed as a substitute for EPA’s own enforcement efforts to ensure that biofuel producers comply with the RFS. The temptation to create a third-party audit of the entire biofuel supply chain for full compliance with the RFS regulations will result in an overly expensive, complex, and burdensome due diligence program that fails to restore RIN liquidity.

A. Elements of a QAP

EPA’s stated purpose for the Proposed Rule is to “promote greater liquidity in the RIN market in a way that assures reasonable oversight of the validity of RIN generation and assures use of the required renewable fuel volumes.”⁵ Yet the proposed components of an acceptable QAP go far beyond this stated purpose.

The Proposed Rule would create a third-party audit of each regulatory requirement governing the generation and transfer of RINs. The due diligence requirements envisioned under the Proposed Rule exceed what is necessary to reduce the risk of invalidly generated RINs and could significantly increase the costs of the QAP, potentially resulting in low participation and a failed effort to restore RIN liquidity.

The due diligence activities identified in the proposed QAP include many data elements that provide little or no additional risk reduction. For example, a quarterly requirement to review an annual report provides no incremental risk reduction and simply adds costs.⁶ The requirement to count the number of employees also provides very little, if any, incremental risk reduction.⁷ Similarly, ethanol and biodiesel product quality is an important issue to fuel distributors and ultimately consumers, and should be a priority for EPA’s enforcement division. However, the problem of off-spec biodiesel and ethanol is beyond the scope of a program that is intended to reduce the risk of invalidly generated RINs. As such, this additional QAP requirement serves as an example of EPA’s attempt to transfer its fuel quality enforcement responsibilities to the third

⁵ Proposed Rule at 12160.

⁶ The requirement to review attestation reports adds cost with no corresponding risk reduction benefit. Since the attestation report is an annual requirement, verifying its accuracy monthly simply duplicates the attestation procedure and does not seem to be appropriate.

⁷ Given the wide variability in production automation, worker skill and experience, and production process complexity, the workforce size QAP element is rather subjective and provides no information on whether the production process generated the type and quantity of fuel necessary to support the quantity of RINs generated.

party. We believe that EPA must take a step back and consider promulgating due diligence elements that provide an appreciable reduction in the risk of invalid RIN generation.

A credible audit program would be built around a biofuel producer site visit to verify the existence and operability of the equipment on-site and gain an understanding of equipment capacity and the level of energy consumption that corresponds to various production levels. A follow-up site visit should be required annually. A requirement for the renewable fuel producer to notify the QAP provider of any facility modifications also should be included.

There needs to be an audit component that examines feedstock receipts. These receipts are necessary to verify, through a proper mass balance, the amount of renewable fuel produced and to ensure that the RIN code matches the type of renewable fuel that is produced. We note that there is no need to audit each feedstock receipt, but rather a statistically valid sample of feedstock receipts should be audited.

An audit of monthly utility bills should enable a comparison of the energy consumed with the amount of biofuel produced during that month and could be evaluated periodically against the facility's energy requirements for various production levels as determined during the initial site visit.

Bills of lading representing the transport of renewable fuel from the production site should be reviewed and compared to the feedstock receipts. While all bills of lading should be provided to the third party auditor, only a statistically significant number of bills of lading should be verified.

Additional QAP due diligence elements in excess of those described above will add cost to the QAP program, while providing little additional assurance against invalid RINs. Obsessive overdesign of the QAP translates into higher implementation costs than necessary to carry out the stated goal of promoting RIN liquidity. Overly rigorous due diligence requirements are not necessary to reduce the risk of invalid RIN generation. Indeed, high QAP costs will not improve RIN liquidity and could inhibit broad participation. Unnecessary provisions may be perceived by EPA as critical for ironclad assurance; however, reasonable costs are necessary to promote the widespread use of the QAPs. A high-cost QAP will not provide benefits for biofuel producers or obligated parties.

B. Voluntary Program

We strongly oppose the imposition of strict liability under the “buyer beware” program for obligated parties that purchase RINs from EPA-registered biofuel producers. As already stated, we support the voluntary nature of this program. It is not necessary, and potentially counterproductive, to require participation in the program. Renewable fuel producers and obligated parties need to be able to participate in the program as they deem necessary for their business needs. Mandating biofuel producer participation is unnecessary and potentially overly-burdensome for some producers. This is especially true of biofuel production facilities that are wholly owned by obligated parties, but also of producers that are well known or for other reasons and trusted by a particular obligated party.

Voluntary participation in the program also applies to the obligated parties, which should not be required to purchase verified RINs in any volume or proportion of their Renewable Volume Obligation. EPA should be encouraging participation in the program by establishing a cost effective program that is beneficial to the marketplace.

The Final Rule should be consistent with the Agency's letter to Congressman Green where the Agency was clear that while some program elements were under consideration, the program itself "would be fully voluntary additions to the existing program. The existing program elements would remain in place for market participants who obtain RINs that are not validated under the QAP."⁸

While we strongly support the voluntary nature of the program, we believe that defenses to liability should still be available under certain fact dependent circumstances. The Agency proposes to restrict the affirmative defense to parties using verified RINs:

Since the quality assurance program would be voluntary, parties could still purchase RINs not verified by an EPA-approved QAP and transfer or use these unverified RINs, but they could not assert an affirmative defense if the RINs were found to be invalid, regardless of their level of good faith or any independent due diligence they perform prior to purchase.⁹

We believe that this statement violates the fundamental principles of due process and does not accurately reflect the Agency's intent. For example, if an obligated party conducts its own due diligence at a level that meets or exceeds the Agency's proscribed due diligence, that party should be able to avoid liability under the Clean Air Act. We recommend that the Agency make clear that under certain fact-dependent circumstances an obligated party may avoid liability stemming from the use of an unverified RINs that are determined to be invalid.

A revision to proposed section 80.1473 is necessary to allow the option to defend against liability in the case of an unverified RIN that is determined to be invalid. This option has existed for years and it should be permitted to continue to ensure that the QAP program remains voluntary.

C. Obligation to Replace RINs

1. Obligated Parties Should Not be Required to Replace Verified RINs.

Obligated parties that purchase verified RINs in the open market should have no obligation to replace those RINs should EPA subsequently determine that they are invalid. While the Proposed Rule recognizes this possibility, it does not provide the assurance that obligated parties will be shielded from this potential liability.

⁸ Letter from Gina McCarthy to Congressman Gene Green (August 14, 2012).

⁹ Proposed Rule at 12176.

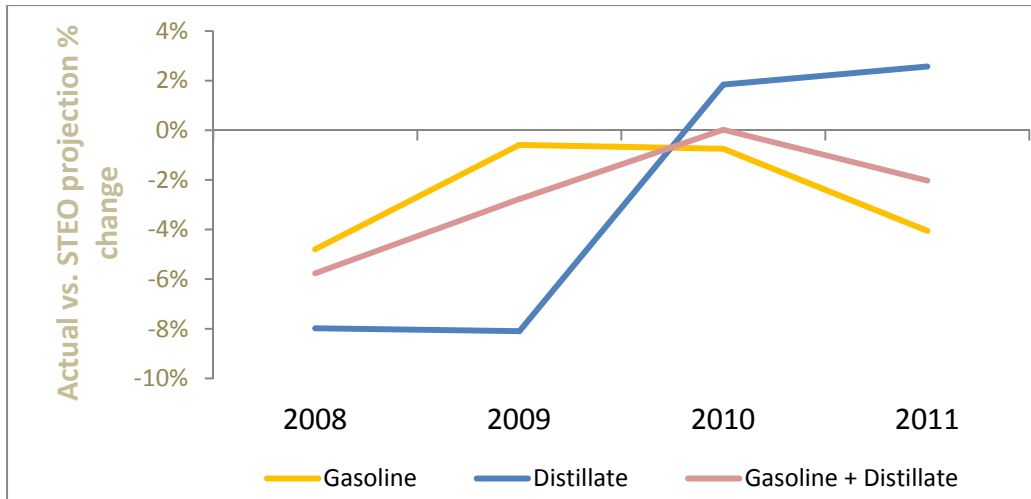
EPA asserts that the requirement to replace RINs is needed to ensure the annual national RFS volumes are met. Yet, the fact remains that it is not possible to go back in time and induce additional biofuel production for a prior year. For this reason it is impossible to “keep the program whole” and EPA’s insistence on RIN replacement would not achieve that goal.

We believe that the RIN verification process will reduce the risk of invalid RINs significantly. By ensuring that a generated RIN is an appropriate representation of renewable fuel, an effective and efficient verification program supports the goals of the RFS program and minimizes the potential for a significant number of invalid RINs. The liability stemming from RIN invalidity should be limited to the party or parties that caused the invalidity to occur. Requiring RIN replacement or civil penalties for a verified RIN should be limited to renewable fuel producers, RIN generators, auditors, and parties that otherwise caused RINs to become invalid. Requiring obligated parties to replace verified RINs undermines the value of the affirmative defense and may not solve the RIN liquidity problem. Obligated parties who have purchased verified RINs without actual knowledge of invalidity should not be required to re-purchase RINs to replace any verified RINs that EPA subsequently has determined to be invalid.

Nonetheless, EPA continues to insist upon the replacement of RINs. QAP A and QAP B place the ultimate obligation to replace RINs on the QAP provider and the obligated party respectively. Both QAPs are expected to significantly reduce the risk for invalid RINs, and the more stringent requirements under QAP A do not appear to materially increase the assurance of a RIN’s validity beyond what is provided by QAP B. If EPA continues to insist upon RIN replacement, it is appropriate to put QAP providers in the line of parties obligated to replace invalid RINs under both QAP A and QAP B.

2. Limited Exception Threshold

We support the concept of a limited threshold exemption as a means to ameliorate the due process and equity problems associated with having an innocent purchaser replace invalid RINs. We support a two percent threshold (2%) as consistent with the inherent variability in forecasting fuel demand, such as the variability in EIA’s October Short Term Outlook (STEO) projection vs. actual demand, which is implicit in the RFS annual percentage standards. EPA’s comparison of projected versus actual obligated volumes reveal an inherent variability in the RFS of approximately two percent:



EPA proposes to apply the limited threshold exception to only the first two years of the program. EPA must apply this percentage exception to all years starting with 2013; the variability inherent in the EIA outlook and the RFS will continue as long as the RFS program does, as the EPA’s analysis in the Proposed Rule and the data above suggest.

EPA proposes to use a five year look-back period in conjunction with a percentage cap. As stated earlier, it is not possible to go back in time and induce additional production; we question the rationale behind requiring a 2013 RIN be replaced when found to be invalid in 2017. EPA should limit the requirement to replace RINs to the current and previous year only. The financial burden for a RIN auditor to hold this liability on a balance sheet for five years potentially adds significant cost to the program. This two year limitation should also apply to obligated parties under QAP B. EPA should be able to conclude enforcement investigations within this timeframe.

3. RIN Replacement Measures

The QAP provider must demonstrate to EPA that it has the wherewithal to cover RIN replacement obligations. EPA’s role is to review and ensure the mechanism is effective. While we do not support the proposed requirement for verified RINs to be replaced by an Obligated Party, the alternative replacement mechanisms discussed in the Proposed Rule could have significant market liquidity consequences. EPA discusses several mechanisms that rely upon documented financial assets to procure RINs, or the requirement to hold actual RINs in inventory for potential use if invalid RINs are discovered. Any mechanism employed that holds RINs (such as a RIN bank) is an artificial restriction on the supply of RINs that could lead to a shortage of RINs and potential RIN price volatility. Given the difficulty of achieving the aggressive biofuel mandates, EPA should promote RIN supplies for compliance not promote RIN banking, hoarding, or other market supply constraints. Again civil penalties provide an adequate deterrent and requirements to replace invalid RINs will simply overheat the market in a future year.

Refiners recommend that traditional financial assurance instruments should be the sole allowable replacement mechanism for A-RIN replacement. RIN banks and escrow accounts

would reduce the volume of RINs in circulation, which is unacceptable. Holding RINs will keep them out of circulation for some period and this will put undue burden on the whole RIN availability process, affect market liquidity, disrupt the supply of RINs and potentially jeopardize the ability of Obligated Parties to meet their annual RVOs. QAP A RINs should be excluded from any replacement mechanism by the obligated parties, since QAP A verifiers should replace those RINs directly to the EPA and obligated parties would not be involved.

EPA proposes that “parties that retire valid RINs to replace invalid RINs would be required to match the renewable fuel category and the QAP category of both the valid and the invalid RINs.”¹⁰ AFPM and API believe that valid replacement RINs need not be of the same verification category as the RIN that was determined to be invalid, but should have the same D code. This approach would provide the maximum flexibility and could minimize the negative impact on RIN liquidity.

D. Monitoring Frequency

This section of our comments provides feedback on EPA’s proposed data sampling, on-site audits, and continuous monitoring.

1. Statistically Significant Sampling

In implementing the QAP, there is a need to distinguish between data collection and data verification. Random statistical sampling has been a primary feature of the RFG Survey Association and has worked well. Spot checks have been the basis of attest engagements since 1995. EPA should make clear that audit requirements are based on an analysis of a statistically significant representative sample for relevant data elements. For example, for attest procedures, sample size guidelines are presented in 40 CFR § 80.127 and the RFGSA relies upon random sampling methodology with probability proportional to size. Random checks with a sufficient frequency will balance effectiveness, complexity and cost for all participants.

2. On-Site Audits

Both proposed QAPs call for quarterly audits during the first year. Quarterly site visits are excessive, especially given the other data collected under the program, including data provided by independent third parties. Frequent audits will add significant costs to the due diligence program and could compromise the success of the program. AFPM and API recommend one on-site audit, unless other data collected indicates a potential problem with the biofuel producer.

While a certain frequency of audits may be desirable at the beginning of the program, this frequency can be reduced later in the program as biofuel producers establish an acceptable history of performance. Similarly, if verified RINs are later deemed to be invalid, the frequency of audits should increase for a prescribed period of time until the QAP auditor has suitable assurance that the biofuel producers’ procedures will not have the issue recur. We also

¹⁰ Proposed Rule at 12179.

note that auditors may choose to increase the frequencies of their audits should they feel it is necessary to reduce the auditor's potential liability under the QAP.

3. Ongoing/Continuous Monitoring

The monitoring frequencies imposed upon the QAP providers are excessive and can make the system unworkable because of the inflated costs associated with the process. Ongoing monitoring is a prime example of overly rigorous due diligence requirements. The EPA should more clearly define "ongoing." While continuous monitoring promotes a high level of assurance (and uses the private sector to enforce EPA's regulations), it is much more robust (and expensive) than what is necessary to provide RIN integrity. We do not object to continuous monitoring as one means to conduct due diligence, but it should not be required in a QAP.

E. RIN Invalidity - Notification Requirements

Companies should be able to assert an affirmative defense, without onerous limitations or red-tape restrictions that can leave a party subject to a violation when holding or submitting a QAP verified RIN. This includes the requirement to notify EPA within one business day of identifying an invalidly generated RIN.

The Proposed Rule would require RIN owners to notify EPA of the existence of invalid RINs within one business day.¹¹ Such notification should not be taken lightly. The consequences of such a notification could potentially result in blocking trade of all RINs generated by the producer at issue until the matter is investigated and resolved. This may have significant consequences for a small producer whose RINs are in question if the investigation of a prematurely-formed allegation takes time to flesh out, even if the findings ultimately vindicate the producer. Lingering uncertainty also will undermine RIN liquidity in the market generally. Further, RIN owners may face liability to biofuel producers if the allegations turn out to be erroneous. One day is far too short a time frame in which to gather the facts necessary to make this determination and obtain the appropriate corporate approvals required for the filing of such notice. Moreover, it is exceedingly difficult to determine the exact time in which sufficient knowledge of RIN invalidity was acquired. Finally, the standard for such notification is unclear: Is a RIN owner obligated to make notification based on hearing rumors in the market about which they have no direct knowledge? AFPM and API propose that any such notification be required within 10 business days of a RIN owner acquiring actual knowledge of invalid RINs. A shorter window of time is problematic and can cause excessive and unnecessary notifications to EPA for any small issue, as small as a typographical error or delayed paperwork, based on the fear of losing the ability to assert an affirmative defense.

The Proposed Rule fails to specify the consequences of failing to notify EPA within the allotted time, making it difficult to provide comment on this issue. The Final Rule should clearly define what the effects are related to a late notification, if any.

¹¹ See Proposed Rule at 12182-83, *proposed to be codified at*: 40 CFR § 80.1473.

F. Applicability to Foreign Biofuel Producers (Imports)

AFPM and API agree that the proposed quality assurance program (QAP) and affirmative defense mechanisms should apply to foreign-produced renewable fuel and associated RINs generation. Very few foreign renewable fuel producers generate RINs prior to import. As a result, the RINs associated with foreign-produced renewable fuel are typically generated by separate importing entities. The division of control and responsibilities between foreign producers and importer generators with respect to the components of the QAP (feedstock, production, RIN generation) presents unique challenges.¹² Therefore, we provide the following recommendations:

First, we recommend that foreign renewable fuel producers be provided the opportunity to be audited periodically by any registered third-party auditor to verify the QAP Feedstock-Related and Production Process-Related Components to their operations, as outlined in Sections IV and V of the preamble. Upon successful completion of the third-party audit, any RIN generating importer should be able to rely upon this evaluation as a means to verify the authenticity of the renewable fuel and satisfy the requirements for the first two components of a QAP.

Second, we recommend that a RIN-generating importer wanting to generate A-RINs or B-RINs should be able to choose to have any registered third party auditor evaluate its own importer-specific QAP RIN-Generation-Related Component to their operations, as outlined in Sections IV and V of the preamble. Upon successful completion of the RIN Generation component of the QAP, the RIN generating importer should be able to generate A-RINs or B-RINs. They should also obtain an affirmative defense limited to the renewable fuel itself if the corresponding foreign renewable fuel producer providing the renewable fuel has also successfully completed a third party evaluation for the first two components of the QAP.

We believe that the QAP should be made available to both foreign producers and RIN-generating importers for operations directly under their respective control because these entities usually operate independently. Furthermore, each entity may decide independently whether, or not, to participate in the QAP. Finally, RIN-generating importers and foreign producers should be able to be audited by different registered third-party auditors, and not necessarily by the same auditor, in order for the importer to generate A-RINs or B-RINs.

G. Exports/RIN Retirement

The Proposed Rule mentions several benefits to EPA for implementing certain exporter provisions; including enabling EPA to track biofuel exports, with intent of ensuring exported renewable fuel is not included in meeting the RFS requirements. This aspect of the proposal greatly expands the scope of the QAP verification program and is not necessary to prevent

¹² AFPM and API members do not support expanding QAP elements to RIN separation activities which occur downstream from the biofuel producers.

invalidly generated RINs and address RIN liquidity. It is EPA's responsibility to investigate and enforce export violations and this obligation should not be transferred to RIN auditors.

Exports of biofuels are outside the RFS program, and the proposed regulatory clarifications to the RVO obligation incurred by exporters are a reasonable approach EPA is taking to protect the integrity of the RFS.

It is appropriate for companies that have an RVO solely based on biofuel exports to meet RIN obligations on a periodic basis throughout the year. EPA should require the immediate retirement of RINs by biofuel exporters (that have an RVO solely based on exports) when the biofuel has RINs attached at the time it is acquired. These same biofuel exporters (with RVO obligations solely based on exports) should be required to retire RINs within 30 days if the physical biofuels were purchased without RINs attached. In addition, these parties should not be afforded the ability to carry a deficit from a prior year.

H. Downstream Invalidation of RINs

No part of the Proposed Rule demonstrates the problems of expanding the scope of the verification program beyond production more than the discussion of downstream activities that could violate other RFS requirements.

EPA proposes to require renewable fuel producers to designate the intended use of the fuel. EPA states in Section VIII(B)(1) of the Proposed Rule that parties that in fact knew that the fuel would likely be used in a non-qualifying manner would be in violation of the regulation and subject to penalties. This requirement to know the likely use of a product means a seller must have knowledge of the purchasers' intention. Given that the initial purchaser may not be related to the end-user and that the fuel may change hands several times, this requirement is not practical. EPA proposes to consider the seller in violation if a non-qualifying use was "likely." EPA should not require biofuel producers or other sellers to investigate the likely use of the fuel, or otherwise track product's final use when sold.

EPA requested comment on a new requirement to track RINs through the system to ensure proper RIN separation, such as the provision to ensure exported biofuel does not generate RINs.¹³ RIN separation violations are RFS violations, but they do not affect the validity of the RIN. This program should encompass elements that ensure a RIN is validly generated. Tracking of RINs to ensure proper separation should be outside the scope of the program and we are opposed to EPA placing its own obligation of enforcing the RFS regulations on QAP providers. This new requirement would not improve RIN liquidity nor help the small biofuel producer market their RINs.

EPA proposes to add RIN Separation Violations to the list of acts prohibited under the RFS program at 40 CFR § 80.1460(h). AFPM and API support this proposed provision.

¹³ These comments address other RIN separation issues in Section I, *infra*.

EPA proposes to confirm the treatment of improperly separated RINs allowing improperly separated RINs to remain valid, while maintaining that the act of improper separation is prohibited. AFPM and API support this approach and recommend that this concept be memorialized in the regulatory text at 40 CFR § 80.1460 by adding the following language: “No prohibited act in this Subpart M committed by a party other than the RIN generator will invalidate otherwise validly generated RINs.”

RIN separation violations are RFS violations, but they should not affect the validity of the RIN. Any element of this rulemaking requiring the tracking of RINs beyond the point of generation should not be finalized. This program should ensure RINs are validly generated, and the tracking of RINs to ensure proper separation or proper use should be outside the scope of the QAP program.

I. EPA Must Close the Biodiesel Loophole for RIN Separation

One of the primary reasons that fraud occurred was that only one party (*i.e.*, the biodiesel producer) was involved in the generation, separation, and sale of RINs. Including independent third parties in the transaction creates a powerful deterrent to fraud.

AFPM and API support an RFS regulatory amendment that prohibits biodiesel producers from separating RINs. As part of a Final Rule, EPA should revise 40 CFR § 80.1429 to make clear that a biodiesel producer may not separate RINs unless that biodiesel producer also is an obligated party and then only to the extent that the quantity of RINs separated is less than or equal to its RVO under the RFS. Currently, RFS allows RIN separation in the isolated cases where neat biodiesel is used in transportation. In the marketplace, this scenario is extremely rare, yet the separation provision is widely exercised and has been abused. AFPM and API opposed allowing biofuel producers to separate RINs in the RFS1 and RFS2 regulatory proposals. In the known cases of invalid RINs, biodiesel producers generated RINs on biodiesel that was not produced, separated those RINs, and sold them into the marketplace. Preventing biodiesel producers from separating RINs would have prevented the 140 million fraudulent biodiesel RINs and will eliminate this avenue for invalid RINs in the future.

In the RFS2 regulations, 40 CFR 80.1429(b)(4) allows a biomass-based diesel producer to separate RINs for neat fuels that are designated and used as transportation fuel, heating oil, or jet fuel. Allowing biodiesel producers to separate RINs removes a significant protection against the creation of RINs that have no corresponding link to “wet gallons” of biodiesel. In the known cases of invalid RINs, biodiesel producers generated RINs without actually producing any physical biodiesel and sold the RINs into the marketplace. The RIN purchasers did not suspect the fraudulent generation of the RINs due to the fact that biodiesel producers are allowed to separate RINs and sell them apart from the physical volume of biodiesel and because the RINs were generated by an EPA-registered biofuel producer. Preventing biodiesel producers from separating RINs will eliminate this avenue for fraud.

In the Preamble to the RFS 1 regulation, EPA stated: “Our program basically requires RINs to be transferred with renewable fuel until the point at which the renewable fuel is

purchased by an obligated party or is blended into gasoline or diesel fuel by a blender.”¹⁴ EPA needs to return to this principle in the case of biomass-based diesel RINs.

There is no harm from requiring the biodiesel RIN to remain attached to the biodiesel gallon until the biodiesel is acquired by an obligated party, blended at a 20% or lower ratio with diesel fuel or consumed in an approved manner. In the extremely rare case where biodiesel is actually used as a neat fuel, the RIN should only be separated by an independent party downstream from the original producer. By requiring all biodiesel RINs to remain attached when sold by the producer, EPA can provide the RIN marketplace with additional confidence that the biodiesel associated with the RIN was actually produced, distributed and used.

To implement this significant risk reduction measure, we suggest the following modifications to 40 CFR § 80.1429(b)(4):

(4) Any party that ~~produces, imports, owns, sells, or~~ uses a volume of neat renewable fuel, or a blend of renewable fuel and diesel fuel, must separate any RINs that have been assigned to that volume of neat renewable fuel or that blend if:

(i) The ~~party designates the~~ neat renewable fuel or blend was designated by the producer or any party downstream of the producer as transportation fuel, heating oil, or jet fuel; and

(ii) The neat renewable fuel or blend is used without further blending, in the designated form, as transportation fuel, heating oil, or jet fuel.

J. Product Transfer Document (PTD) Requirements

AFPM and API oppose EPA’s proposed requirement for PTDs to include specific information on the blend level and designation of the fuel uses intended by the transferor.¹⁵ These proposed PTD modifications will be very costly, impractical and unnecessary.¹⁶

EPA is proposing that the “Name and blend level of all blending components in a product containing renewable fuel” be included on PTDs when ownership of neat or blended renewable fuel is transferred (§80.1453(a)(5)). Some blended renewable fuel is shipped on fungible distribution systems. In a fungible system, a seller may not always know the level of blend components in a blend he sells. For instance, a seller originates some volume of diesel fuel onto a fungible common carrier pipeline. This diesel has some percentage of biodiesel blended in it, as is allowed by ASTM D975 and the common carrier’s product specification. Being a fungible pipeline, the particular batch the seller originated may or may not be the same molecules he eventually sells. For EPA’s proposed PTD labeling to be accomplished, it would require that pipelines no longer allow fungible shipments of diesel; rather, pipelines would have to begin shipping distinct, segregated products based on their renewable fuel content. Further, this

¹⁴ 72 *Federal Register* at 23937 (May 1, 2007).

¹⁵ See Proposed Rule at 12211, *proposed to be codified at* 40 CFR § 80.1453(a)(5) and (a)(12).

¹⁶ Indeed the Proposed Rule does not attempt to calculate the costs and benefits associated with the proposed PTD modifications.

proposal requires all blending components to be named and quantified. The only blending components that matter are the renewable components, and not the petroleum components. We suggest that §80.1453(a)(5) read “Name of all renewable blending components in the product containing renewable fuel.” It would then be up to the buyer to determine how much renewable fuel was in the product in those relatively few cases when the amount is meaningful (for example, when the product is being exported or put to a use other than transportation fuel, heating oil, or jet fuel).

In §80.1453(a)(12), EPA proposes language that is to appear on title transfer PTDs that clearly and accurately identifies the renewable fuel and its intended use(s). The bulk of each 50+ word quoted note is the seller notifying the buyer of its regulatory obligations. This verbiage is excessive. Identification of the blend component is already required in the proposed §80.1453(a)(5). Unless notified by the seller, such renewable fuel should be presumed by the buyer to be, as the verbose notes say, “designated and intended for use as transportation fuel 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 C.F.R §80.1460(g), unless the requirements in §80.1433 are met,” and the seller should not have to state that on each and every title transfer product transfer document. We suggest that §80.1453(a)(12) state that “The owner of neat or blended renewable fuel must assume, unless otherwise notified in writing by the party from whom they acquired it, that neat or blended renewable fuel is intended for use as transportation fuel, heating oil, or jet fuel in the 48 U.S. contiguous states and Hawaii. Designation or use by the owner of such neat or blended renewable fuel for any other purpose, without meeting the requirements of §80.1433, is a violation of §80.1460(g).”

Due to the complexities inherent in a fungible distribution system, requiring the notation of biodiesel concentration by percentage, or volume in gallons, is unworkable.

K. Communicating Verified RINs to Obligated Parties

To ensure that the benefits of RIN verification translate into actual RIN liquidity it is critical to revise EMTS to reflect the verification status of RINs. EMTS revisions should be implemented expeditiously and no later than the effective date of the final rule. EMTS should clearly identify QAP A and QAP B RINs and keep the system updated daily.

There is, however, a need for an interim communications system. To the extent that EPA envisions some type of verification program existing between now and the effective date of the final rule, some type of electronic bulletin board is necessary to communicate RIN verification status to obligated parties. We suggest that EPA work with approved auditors to implement a single, web-based, interim communication tool that provides obligated parties with the information needed to facilitate their purchase of verified RINs prior to appropriate changes in EMTS. The development of multiple, auditor specific “dashboards” undermines the goal of ensuring RIN liquidity by making it exceedingly difficult for obligated parties to view RIN verification status. Indeed, some auditors only allow access to their dashboards if the obligated party subscribes to their services.

L. Treatment of 2013 RINs Prior to Effective Date of Final Rule

While we continue to question the fairness and constitutionality of EPA's decision to hold obligated parties responsible for invalid RINs that were fraudulently sold by biodiesel producers and are aware of no other government program that penalizes the victims of fraud in this manner, we appreciate the efforts taken by OECA to mitigate the harm caused by this policy decision. Specifically, we support EPA's *Second Interim Enforcement Response Policy*. We note, however, that the policy for 2012 RINs is limited to biomass-based diesel and would request that the same treatment be applied to other RINs that may be invalid. With respect to 2013 RINs, while the policy extends to all types of "verified" RINs, obligated parties have no way to determine which RINs are verified under a QAP meeting the requirement of the Proposed Rule. We therefore suggest that the Interim Enforcement Response Policy be revised to provide the same treatment to all RINs generated in 2013 prior to the effective date of a final rule and modifications are made to EMTS to facilitate the use of verified RINs.

EPA intends to allow an early start of the program. RINs generated after January 1, 2013, and before the effective date of this RFS RIN QAP rule, can be verified "through an informal 'pre-registration' process."¹⁷ EPA states that this informal verification process will be different before and after the final rule because the Agency "cannot formally register an auditor or approve a QAP until the rule is in effect...."¹⁸ This alternative approach creates uncertainty and therefore may not accomplish EPA's goal of ensuring RIN liquidity. The alternative approach leaves obligated parties unsure of how EPA can allow the retroactive verification of RINs pursuant to a procedure that is not in total alignment with the final rule.

This will not signify a final Agency decision or approval of any auditor or QAP and EPA will not be legally bound by this initial evaluation. It would instead be guidance to an auditor as to whether EPA has any concerns about its registration and QAP plan and whether they appear to be consistent with the requirements in the proposed regulations.... Auditors would not be required to submit their QAPs to EPA for such guidance, and EPA's guidance or feedback to the auditors would confer no legal rights or privileges to the auditors, or to the production facilities and RINs they review.¹⁹

There are many qualifications here. The Agency seems to be distancing itself from a program prior to the final rule. It is important to provide clarification now because these qualifications are providing uncertainties.

¹⁷ See Proposed Rule at 12167.

¹⁸ Proposed Rule at 12167.

¹⁹ Proposed Rule at 12168.

It is unclear how the proposed approach will work. EPA's position appears to be that some RINs might be covered, providing all the QAP requirements have been met. However, if the final rule differs from the proposal, RINs may not be covered. Since we are already well into 2013, this provides very little of the benefit that EPA promised. Also, since EMTS won't be modified until late into 2013, the purchaser of separated RINs will have no way of knowing they are covered. EPA needs to fulfill its promises to obligated parties by providing an affirmative defense on all 2013 RINs generated prior to the effective date of the final rule.

The petroleum industry expected new regulations to be effective by January 1, 2013. We are disappointed that the program was not formally proposed and promulgated in 2012. At this point, the due diligence criteria in a Quality Assurance Plan (QAP) have not been finalized, auditors have been "pre-approved" (but not unconditionally approved) by EPA, and EMTS has not been revised; these deficiencies handicap quick effectiveness of a solution. Based upon these circumstances, we believe that EPA should move forward with the QAP program, but should extend its *Second Interim Enforcement Policy* to all 2013 RINs under the same conditions that apply to the 2010-2012 RINs.

M. Auditor Requirements

1. Auditor Requirements - One of the most important requirements for audit integrity is assuring that the auditor responsible for QAP implementation is truly independent from the biofuel producers being audited. The regulations outlining the criteria for auditor independence must be broadened. RIN auditors should avoid even the appearance of a conflict of interest, as potential connections to biofuel producers undermine the foundation of an effective audit program and should be disallowed.

Auditors also must be familiar with biofuel production operations and possess the necessary professional expertise and credentials evidencing such expertise. They should be required to maintain Errors and Omissions insurance. To further assure independence and auditor integrity, auditors should not be allowed to buy, sell or trade RINs.

2. Public Information - We support a requirement to make auditor registration information publicly available; however, simply making this information available does not obviate the need for EPA to verify the information provided in each auditor's registration application. We believe that the requirements applicable to foreign auditors and domestic auditors should be identical.

3. Auditor Reporting - For the reasons enumerated in section E, *supra*, we believe that a 24-hour reporting requirement is inappropriate and does not provide sufficient time for complete investigation.

4. EMTS Interface - We believe that auditors should be given sufficient access to EMTS to allow them to report verified RINs through the system.²⁰

²⁰ Revisions to EMTS that are required to communicate the status of verified RINs to obligated parties are discussed in Section K, *infra*.

5. Auditor RIN Generation – We do not believe that QAP auditors should act as agents and generate RINs for biofuel producers. RIN generation is the responsibility of the biofuel producer and setting up a separate mechanism for the generation of verified RINs adds an unnecessary layer of complexity and is not needed to reduce the risk of fraudulently generated RINs.

6. Auditor Reporting – Auditors must stand behind the quality of their audits. To best ensure accountability, the failure to comply with the regulatory requirements applicable to auditors should constitute a violation of the Clean Air Act. We further support the auditors' submission of quarterly reports, as proposed.²¹

7. Audit Failures - If any biofuel producer fails an audit, they will be unable to generate verified RINs from the date of the failed audit until the biofuel producer subsequently passes an on-site audit attested to by an EPA-approved auditor. At that point, the audit/monitoring frequency should revert to the more robust requirements applicable during the first year of a program.

N. Treatment of Confidential Business Information

In Section VIII.C of the preamble, EPA proposes to disclose aggregated RFS Report Information reported to the EPA under 40 CFR 80.1452(b) by renewable fuel producers and importers. EPA's rationale to release this Confidential Business Information (CBI) is that this information is already available through other public outlets. AFPM and API disagree with this conclusion and are unaware that information related to volume of denaturant, amount of fuel produced and RINs generated on a corporate and/or facility level basis is publicly available and widely known.

Furthermore, this production volume information is expressly the type of information that EPA has already determined warrants confidential treatment. In determining that production volume information should be considered CBI for greenhouse gas reporting for suppliers of petroleum products (40 CFR 98.390 – Subpart MM) EPA stated:

Disclosure of these data would likely cause substantial harm to the competitive positions of businesses reporting these data. Releasing these data could be detrimental to the operational and marketing strategies of the reporting parties. For example:

1. The disclosure of annual production quantities of products (i.e., quantities sold and/or delivered), used in conjunction with other publicly available data related to capacity (e.g., EIA publishes facility-level capacity data for refineries), could provide insight to a firm's operational strengths and weaknesses. Competitors could determine at what percent capacity a firm is operating, which can

²¹ See Proposed Rule at 12191, *proposed to be codified at*: 40 CFR § 80.1451(g)(1)(i).

reveal information on the financial and competitive strength of the firm. For example, it could reveal that a manufacturer is operating well below capacity and likely experiencing financial difficulties. Having such information could allow competitors to narrow the competition by adjusting their prices to the further detriment of the reporting company, or to formulate other competitive strategies or corporate acquisition strategies to the detriment of the reporting company. Having information on the percent of capacity at which a firm is operating could also reveal whether a manufacturer has existing capacity available to take on new customers in a growing market or is already at their maximum production and would need to invest capital to expand capacity in order to produce more. Having such information could give competitors insights to make competitive decisions on expanding their own production rates or altering their pricing strategies to the detriment of the reporting company.

2. The disclosure of annual production quantities and compositions — in particular, products sold or delivered — provides insight into a firm's market strength and position. Competitors could use production quantity data (i.e., quantities sold and/or delivered) to gain a competitive advantage over a firm by better approximating a firm's market share. For example, annual production data may reveal whether a firm is experiencing rapid growth or decline in market share. The data may also reveal the reporting supplier's customer base and marketing strategies. It might enable firms to determine which of their competitors won a contract/new customer for which they competed. This could substantially harm the firm's competitive position because the information could enable competitors to devise strategies to steal specific customers or even key employees. Changes in the mix of products produced could reveal marketing strategies. In many cases, an accurate estimate of the market position of a firm is difficult to procure, and the disclosure of such information through the GHG Reporting Rule could harm the competitive position of reporting parties.
3. Disclosure of facility-level production/ throughput quantities and product compositions could give competitors insight into a firm's local and regional market conditions and expansion plans, enabling competitors to devise strategies to prevent expansion and to steal market share in specific locations. In general, competitors do not currently have access to actual facility production rates or other information (i.e., financial information) that could allow them to assess competition and market conditions in regional detail, because publicly available financial and economic information is released at the corporate level rather than the facility level.

4. Information about production quantities and product composition may allow competitors to reasonably infer the types and approximate amounts of feedstocks or raw materials consumed. This may enable competitors to devise strategies to compete for resources. If in addition to production quantities, raw materials consumption data reported under the GHG Reporting Rule were also released, competitors could use the combination to expose sensitive information such as operating efficiencies (amount of product produced per unit of raw material consumed) and allow competitors to infer production costs and pricing structures.²²

While EPA's analysis for GHG reporting purposes focused on annual release of actual production volume information, reporting this information on a more frequent basis would only serve to exacerbate these harms.

O. Miscellaneous Issues

In this section, we respond to some of the specific questions set forth in the preamble to the Proposed Rule.

RIN Transfer Date: AFPM and API are pleased to see the addition of an alternative method of reporting buy and sell transactions in EMTS and support the EPA-proposed amendments to § 80.1452(d).

Should RINs remain valid when fuel is redesignated for non-qualifying use by a downstream party? Yes, the RINs should remain valid and the redesignating party should have to retire an equivalent volume of the same D code RINs within 30 days of the non-qualifying use.

Should the definition of renewable diesel be limited? EPA proposes a definition for renewable diesel.²³ While we agree that this term should be defined, we note that triglycerides are not hydrocarbons and therefore are not "drop in" fuels that would qualify as renewable diesel.

Registration requirements for producers who blend or use renewable fuels for qualifying purposes: We support EPA's proposed requirements for parties that use renewable fuels as a blendstock or additive or sell the renewable fuel to another party who will use it as a blendstock or additive.²⁴

Reporting and recordkeeping requirements for fuels not likely to be used for qualifying purposes: The Proposed Rule would require parties that designate renewable fuels for an application that is

²² 75 *Federal Register* 39094, 39124, 39144 (July 7, 2010).

²³ See Proposed Rule at 12206, *proposed to be codified at*: 40 CFR § 80.1401.

²⁴ See Proposed Rule at 12194-97.

not transportation fuel, heating oil or jet fuel to retire RINs within 10 business days of this designation.²⁵ We support this proposed regulatory provision.

Fuel used for ocean-going vessels: ECA fuel is intended for use in ocean-going vessels. Therefore renewable fuel blended into ECA fuel does not qualify as a transportation use. EPA states that RINs that have been generated for any renewable fuel that is used in Motor Vehicle Nonroad Locomotive Marine (MVNRLM) diesel that is then blended to produce Emission Control Area (ECA) marine fuel remain valid.²⁶ We support EPA's common sense solution to the fact that "trivial" quantities of renewable fuel are blended into ECA marine fuel and its determination that the RINs associated with this fuel would remain valid.

Given the complexity and regulatory burden that would be involved in tracking trivial quantities of MVNRLM that may be used in ECA fuel, the RFS regulations appropriate treat all properly generated RINs for renewable fuel blended into MVNRLM as valid, regardless of the possible downstream blending of MVNRLM with ECA fuel.²⁷

P. Proposed Corrections to the Regulatory Provisions

AFPM and API recommend the following technical corrections to the proposed regulatory text:

80.1460

Proposed 80.1460(h)(6) refers to "paragraphs (i)(1-5) in this section." Proposed paragraph (i) includes three subparagraphs, not five:

(i) Independent third-party auditor violations. No person shall do any of the following:

(1) Fail to fully and competently implement a QAP approved under § 80.1469.

(2) Fail to notify appropriate parties of potentially invalid RINs under § 80.1474(b).

(3) Identify a RIN as verified in accordance with § 80.1471(e) that is invalid under § 80.1431.

80.1470(c)(4)(ii)

The proposed equation needs brackets for clarification when there is multiplication, addition and subtraction:

$$RRC_y = 0.02 \times ARINVER_y + RRC_{y-1} - ARINREP_{y-1}$$

Perhaps the intent is the following:

²⁵ See Proposed Rule at 12208, *proposed to be codified at:* 40 CFR § 80.1433.

²⁶ Proposed Rule at 12196.

²⁷ *Id.*

$$RRC_y = [0.02 \times ARINVER_y] + RRC_{y-1} - ARINREP_{y-1}$$

CONCLUSIONS

While we have serious concerns with the structure and workability of the RFS as a program generally and before it should be repealed by Congress, the RIN system and EMTS must work for our refining members to know that they will be able to comply with the RFS without being punished for being the victims of fraud. EPA's proposal is a constructive step, but should be revised to balance effectiveness, complexity and cost for all participants. Small biofuel producers will have an improved opportunity to compete in the RIN market if the Agency balances the costs of verification with the benefit of reducing the risk of future invalid RINs. At present, the uncertainty in the market for biodiesel RINs is particularly harmful to small biodiesel producers that are unfamiliar to obligated parties looking for certainty in their RIN purchases. We reiterate our appreciation of the Agency's staff for recognizing the need to address rampant fraud in the biodiesel industry and their willingness to propose a regulatory solution. Regardless of one's position on the RFS, there is widespread agreement that the current system needs to be fixed to avoid the perpetuation of fraud and increased costs. An efficient and cost-effective solution that avoids unnecessary complexity is needed. High cost and complexity could jeopardize the goal of ensuring RIN liquidity.

We generally support the concept of providing an affirmative defense to liability where an appropriate amount of due diligence has been performed. We have serious concerns as to EPA's perspective on what constitutes adequate due diligence and believe that both proposed QAPs go well beyond what is necessary to reduce the risk of fraudulently produced RINs. EPA's desire to have third parties replace its role of inspection and enforcement is understandable, but inappropriate. EPA should embrace QAPs that greatly reduce the risk of invalid RIN generation – not completely eliminate all risk. The Proposed Rule goes too far, is too onerous, too expensive and is designed not to minimize risk and restore market liquidity, but instead to provide a third party police force for assuring compliance with every element of the RFS.

Refiners appreciate the opportunity to comment and propose that EPA address the following issues in the final rule:

- The elements of a QAP should be balanced with the objective of restoring RIN liquidity;
- Statistically significant sampling would reduce program complexity and cost as opposed to unnecessary comprehensive verification of collected information;
- Obligated Parties should be able to establish a defense to liability from invalid unverified RINs in addition to QAP A and QAP B RINs;
- The biodiesel RIN separation loophole must be closed;
- EMTS must be modified expeditiously to communicate verification status to all parties;
- Given the timing of this rule, the *Second Interim Enforcement Response Policy* should be revised to apply to all RINs generated in 2013;
- Facility-level renewable fuel production volume and RIN generation should be treated as CBI; and

- RIN-generating importers should be able to rely on the audits performed at foreign renewable fuel production facilities.

We appreciate the opportunity to provide these comments. Please do not hesitate to contact Tim Hogan, AFPM at (202) 552-8462; or Patrick Kelly, API at (202) 682-8192.

Sincerely,



Richard S. Moskowitz
General Counsel
American Fuel & Petrochemical Manufacturers



Robert L. Greco, III
Group Director
API Downstream & Industry Operations