



Richard Moskowitz  
General Counsel

American  
Fuel & Petrochemical  
Manufacturers

1667 K Street, NW  
Suite 700  
Washington, DC  
20006

202.457.0480 office  
202.552.8474 direct  
202.457.0486 fax  
Rmoskowitz@afpm.org

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Washington, DC 20460

Via [www.regulations.gov](http://www.regulations.gov)

Re: Supplemental Comments on Proposed 2018 Renewable Fuel Standards  
Docket No. EPA-HQ-OAR-2017-0091

To Whom It May Concern:

The American Fuel & Petrochemical Manufacturers (AFPM) is filing these supplemental comments to request that the Environmental Protection Agency (EPA) comply with its legal duty to evaluate the appropriate point of obligation in connection with its promulgation of annual renewable fuel standards (RFS) and to request that EPA revise the applicability of the cellulosic waiver credit to ensure that the credits count not only towards compliance with the cellulosic biofuel requirement, but also the advanced biofuel and total renewable fuel mandates. Both these issues are important to reduce the costs of complying with RFS mandates and to improve the implementation of the program.

### **A. Point of Obligation**

EPA has an annual duty to examine the point of obligation as a constraint on the nation's ability to achieve the RFS volumetric requirements set forth in the Energy Independence and Security Act of 2007 (EISA). This issue was raised in AFPM's and other obligated parties' petitions for rulemaking, and in a brief filed in litigation challenging aspects of EPA's 2014-2016 RFS rulemaking. We are attaching relevant documents from both matters in order to support our request that EPA comply with the Agency's statutory duty to examine this issue in connection with this RFS rulemaking.<sup>1</sup>

AFPM believes EPA should change the definition of obligated party at 40 CFR 80.1406 as follows:

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<sup>1</sup> See AFPM Petition for Rulemaking to Change the RFS Point of Obligation, Docket No. EPA-HQ-OAR-2016-0544-0004 (August 4, 2016) (hereinafter "AFPM Petition"). This document is attached as an appendix to these comments. We also attach as an appendix a copy of the brief filed with the D.C. Circuit in connection with litigation concerning the 2014-2016 RFS implementation rules. This brief more fully addresses EPA's legal duty to examine the point of obligation in connection with RFS annual rulemakings.



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An obligated party is the entity that holds title to the gasoline or diesel fuel, immediately prior to the sale from the Bulk transfer/terminal system (as defined by IRS regulations) to a wholesaler, retailer or ultimate consumer and is required to report any federal excise tax liability on IRS Form 720 – Quarterly Federal Excise Tax Return. An obligated party also includes the entity that is the enterer (as defined by IRS Regulations in 40 CFR §48.4081-1) of the gasoline or diesel fuel into the U.S. outside of the bulk transfer/terminal system and is required to report any federal excise tax liability on its Form 720.<sup>2</sup>

Our petition for rulemaking and those filed by other obligated parties demonstrate that moving the point of obligation would minimize the cost of complying with the RFS, enhance flexibility, promote a level playing field, reduce speculation in the Renewable Identification Number (RIN) market, and maintain the existing system of fuel distribution and blending.

As noted above, AFPM and obligated parties challenged EPA’s failure to consider moving the point of obligation as part of the 2014-2016 RFS implementation rule in litigation brought before the U.S. Court of Appeals for the D.C. Circuit.<sup>3</sup> The obligated parties pointed out in their brief that pursuant to Clean Air Act (CAA) section 211(o)(3)(B)(i)-(ii), EPA’s consideration of the point of obligation is a “required element” of the annual RFS rulemaking.<sup>4</sup> That is, the plain language of the statute requires that EPA establish three required elements in promulgating annual renewable fuel obligations, one of which is a determination as to who are the “appropriate” obligated parties that must comply with the RFS.

The mandatory nature of EPA’s duty under CAA section 211(o)(3)(B)(ii) to consider the point of obligation is reinforced by other RFS provisions that separately require EPA to consider the point of obligation in its programmatic regulations.<sup>5</sup> But EPA’s mandatory duty to consider the point of obligation for annual standards is *not* satisfied by the fact that it previously determined the point of obligation when it promulgated regulations to implement the RFS program in 2010. Instead, EPA must consider, each year, whether it has correctly determined the appropriate obligated parties among those identified in the statute (refineries, blenders, and importers) and whether to continue to exempt bulk purchasers of hydrocarbons that blend renewable fuel from complying with renewable fuel volumetric obligations.

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<sup>2</sup> AFPM Petition at 5.

<sup>3</sup> See *Americans for Clean Energy v. EPA*, (D.C. Cir. July 28, 2017).

<sup>4</sup> See *Americans for Clean Energy v. EPA* (No. 16-1005), Obligated Party Petitioners’ Final Opening Brief Regarding EPA’s Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule, at 20-22.

<sup>5</sup> See 42 U.S.C. § 7545(o)(2)(A)(iii)(I).



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In *Americans for Clean Energy*, the D.C. Circuit did not reach the merits of whether EPA must consider the point of obligation annually. Instead, the court remanded the 2016 rule to EPA on other grounds and instructed EPA to consider the issue:

With the Final Rule back before the agency, EPA will have an opportunity to address the Obligated Party Petitioners' arguments regarding the point of obligation.<sup>6</sup>

Whether the Agency believes it needs to solicit specific comment on this issue is a matter for the Agency's discretion, but EPA cannot avoid a mandatory statutory duty on procedural grounds. Thus, the final rule must address this element of the RFS program.

Changing the point of obligation will help alleviate the severe economic harm that many refiners face because of the current definition of obligated party, which penalizes merchant refiners and enriches bulk purchasers of hydrocarbons that blend fuel but may have no corresponding compliance obligation under the RFS.

#### **B. Cellulosic Waiver Credit (CWC)**

For the 2016 RFS compliance year, obligated parties purchased 33 million CWCs to address a substantial shortfall in cellulosic production from that projected by EPA and included in the 2014-2016 RFS rule.<sup>7</sup> EPA required obligated parties to purchase such credits even though this effectively penalized them for the failure of another industry (*i.e.*, cellulosic biofuel producers) to produce qualified renewable fuel in the quantities they – and EPA – projected to be available. In addition to paying a penalty for phantom fuels that an unrelated industry failed to produce, these obligated parties also were required to purchase advanced RINs corresponding to the cellulosic shortfall.

To address this inequity, EPA should revise its treatment of CWCs to ensure that the credits count not only towards the cellulosic biofuel requirement, but also the advanced biofuel and total renewable fuel mandates. Unlike cellulosic biofuel RINs that may be used for compliance with advanced biofuel and total renewable fuel volume obligations, CWCs can *only* be used to comply with the annual cellulosic biofuel obligation.<sup>8</sup>

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<sup>6</sup> *Id.* at 84.

<sup>7</sup> Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017; Final Rule, 80 Fed. Reg. 77420 (Dec. 20, 2015). In addition to purchasing more than 30 million CWCs, obligated parties also declared cellulosic deficits of approximately 4.45 million RINs, which must be reconciled in 2017. See <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/cellulosic-waiver-credits-purchased-annually>.

<sup>8</sup> Cellulosic biofuel waiver credits may only be used to meet an obligated party's cellulosic biofuel renewable volume obligation (RVO). 40 CFR §80.1456(c)(4).



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Therefore, an obligated party that purchases a CWC must also purchase an advanced biofuel RIN to meet its obligations under the RFS. This artificial limitation is not required by the CAA, which authorizes the Administrator to adopt *appropriate* provisions “to assist market liquidity and transparency, to provide appropriate certainty for obligated parties and renewable fuel producers, and to limit any potential use of cellulosic biofuel credits to reduce the use of other renewable fuels . . .”<sup>9</sup> As such, EPA has statutory authority to change the CWC requirements to improve the operation of the RFS and to remove the unjust penalty assessed against obligated parties that purchase CWCs. Moreover, this change would reduce pressure on the RIN market and provide an important consumer protection mechanism, ultimately leading to an improvement in RFS program implementation.<sup>10</sup> Allowing CWCs to be used for compliance with the advanced and total renewable fuel standards is even more important given the Department of Commerce’s preliminary decision in the biodiesel countervailing duty investigation and the lack of other advanced biofuels needed to fill the void created by the cellulosic production shortfalls.<sup>11</sup>

Expansion of the CWC makes logical sense due to the nested nature of these biofuels requirements and EPA’s methodology for calculating the volumes of advanced and total renewable fuel that are projected to be in the marketplace. EPA relies on its estimate of cellulosic biofuel production in calculating not only the cellulosic obligation, but also the advanced and total RFS obligations. In other words, the amount of cellulosic biofuel serves to increase EPA’s advanced and total renewable fuel mandates. In 2016, cellulosic biofuel production fell short of EPA’s standard and obligated parties purchased CWCs to comply; however, this cellulosic production shortfall remained a component of the nested categories and the failure to allow the purchased CWCs to count towards compliance with other renewable fuel requirements placed additional pressure on the advanced biofuel RIN market. Simply stated, preventing CWCs from being used to comply with the advanced and total nested categories is illogical, since the advanced and total biofuel mandates are promulgated based on the assumption that cellulosic biofuel mandated would be available for compliance with these nested categories.

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<sup>9</sup> CAA 211(o)(7)(D)(iii)

<sup>10</sup> In addition to serving as a compliance mechanism when cellulosic biofuel shortfalls occur, the CWC serves as a critically-important consumer protection mechanism. Congress recognized that cellulosic biofuel production was virtually non-existent at the time EISA was enacted. As such, it created several consumer protection mechanisms, including the CWC. The CWC functions as a price cap on the amount obligated parties (and ultimately consumers) are forced to pay for cellulosic biofuel. This can easily be seen by imagining a cellulosic biofuel market where no CWCs are provided. If there were a serious shortfall in cellulosic biofuel production (below mandated annual levels), a company that produces cellulosic biofuel would be able to effectively charge whatever the company pleased for cellulosic biofuel, *e.g.*, \$100 per gallon. In the absence of competition from alternative sources of cellulosic biofuel or the availability of the CWCs, obligated parties would be legally compelled to purchase these gallons (at virtually any price), resulting in excessive costs to obligated parties and consumers.

<sup>11</sup> See <https://www.commerce.gov/news/press-releases/2017/08/us-department-commerce-issues-affirmative-preliminary-countervailing-1>



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To address these concerns, EPA should amend 40 CFR 80.1456(c)(4) as follows:

(4) Cellulosic biofuel waiver credits may ~~only~~ be used to meet an obligated party's cellulosic biofuel RVO, advanced biofuel RVO, and renewable fuel RVO.

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For the reasons set forth herein and in the documents attached and incorporated by reference, the obligated parties represented by AFPM request that EPA move the point of obligation in this annual RFS rulemaking, and revise regulations implementing the cellulosic waiver credit to ensure that the credit is allowed to be used for compliance with advanced biofuel and total renewable fuel requirements.

Should you have questions concerning these issues, please contact the undersigned.

Respectfully submitted,

Richard Moskowitz  
General Counsel