

Charles T. Drevna  
President



National Petrochemical & Refiners Association

1667 K Street, NW  
Suite 700  
Washington, DC  
20006

202.457.0480 voice  
202.457.0486 fax  
cdrevna@npra.org

Filed Electronically

August 11, 2011

Administrator Lisa Jackson  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

Subject: Docket EPA-HQ-OAR-2010-0133 - Comments on EPA's proposal for 2012 RFS RVOs and biomass-based diesel volume for 2013

Dear Administrator Jackson:

NPRA, the National Petrochemical & Refiners Association, is pleased to provide comments on the Agency's proposal for 2012 RFS RVOs and biomass-based diesel volume for 2013 (76 FR 38844; 7/1/11). NPRA represents high-tech American manufacturers—fueling and building America's future. NPRA members produce virtually all refined petroleum products and petrochemicals manufactured in the United States, serving the American people responsibly and effectively. These manufacturers provide jobs, directly and indirectly, to 2 million Americans, economic and national security, and thousands of vital products to families and businesses throughout the United States.

NPRA appreciates the opportunity to submit suggestions on this proposal. Our members have been RFS obligated parties since implementation of RFS1 in September 2007.

We support the prudent development and use of biofuels to diversify our nation's transportation and nonroad fuels portfolio.

NPRA members are forced to confront the real world, rather than the fictional world of unrealistic and unattainable predictions on biofuels production, whether by EPA or biofuel promoters. In January 2011, President Obama signed Executive Order 13563, which states: federal regulation "must promote predictability and reduce uncertainty." NPRA members as obligated parties are concerned that the volumes in EPA's proposal for 2012 RVOs are based on very optimistic projections rather than actual production volumes or U.S. Energy Information Administration (EIA) forecast. As a result, the proposed rule provides little certainty to obligated parties and appears to conflict with this Executive Order.

NPRA sincerely hopes that EPA will substantially revise this proposal and publish realistic and economically achievable biofuel volume standards in the final rule that are based on sound market analysis.

### Cellulosic biofuels

EPA proposes a range for the cellulosic biofuel volume in 2012 of between 3 and 15 million ethanol-equivalent gallons. This proposal comes on top of a mandate of 6 million ethanol-equivalent gallons for 2011. Based on the latest information available, to date – six months into 2011 – there have been no cellulosic biofuels produced or used in the United States, ethanol-equivalent or not.

The Clean Air Act directs EPA to project the amount expected to be sold or introduced into commerce based on credible facts, not based on press releases, hopes or wishes. No cellulosic biofuel RINs have been generated for the 12-month period of July 2010 – June 2011. This fact should suggest caution when selecting the regulatory volume for 2012.

EPA should not be cheerleader for cellulosic biofuels, because an unrealistically high mandate imposes unreasonable burdens on RFS obligated parties. In 2011, EPA's unrealistic cellulosic biofuels mandate will in effect be no more than a tax on American manufacturers and, ultimately, consumers. RFS obligated parties will have to buy up to 6 million cellulosic biofuel waiver credits from EPA at \$1.13/gallon-RIN in 2011 – this is a \$6.78 million tax that NPRA's members must pay due to EPA's misguided optimism regarding cellulosic biofuels production this year.

### Biomass-based diesel

The Agency proposes 1.28 billion gallons as the biomass-based diesel volume for 2013. It would be prudent to consider an increase above the statutory minimum of 1.0 billion gallons only after it has been demonstrated that 1.0 billion gallons can be produced and blended.

It is unlikely that the regulatory 800 million gallons will be available in 2011. EIA publishes monthly biodiesel data in its "Monthly Energy Report (DOE/EIA-0035(2011/07))."<sup>1</sup> The July 2011 issue (released on July 27, 2011) shows that U.S. biodiesel production for 2009 was 506 million gallons; in 2010 it dropped to 311 million gallons; and that biodiesel consumption, which generates the D4 RIN credits, was much lower than production. It is unrealistic to expect domestic biodiesel blending volume to increase significantly this year to meet the regulatory volume of 800 million gallons, increase again in 2012 to meet the proposed regulatory volume of 1.0 billion gallons, and increase again to meet the proposed

---

<sup>1</sup> Available at [http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10\\_8.pdf](http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10_8.pdf)

regulatory volume of 1.28 billion gallons in 2013. These annual steps are much too large for an industry that produced 311 million gallons in 2010.

The federal tax credit for biodiesel is set to expire at the end of 2011. Congress previously allowed the biodiesel tax credit to lapse – a lapse that shut down most of the nation’s biodiesel manufacturing capacity. This unsettled tax policy creates considerable uncertainty for the future of the nation’s biodiesel industry and the availability of biomass-based diesel for NPRA members to blend in 2012 and 2013. NPRA urges caution in setting the 2012 and 2013 biomass-based diesel volumes.

#### NPRA/API petition for 2011

In February 2011, NPRA and the American Petroleum Institute petitioned EPA to reconsider the RFS volumes for 2011. This petition addressed three topics:

- Cellulosic biofuels
- Advance biofuels
- Delayed RINs

NPRA appreciates the opportunity to clarify the reasons for submitting this petition and urges EPA to grant the petition. There is new information that was not available in 2010 when the Agency selected the RFS regulatory volumes for 2011. This new information is more than adequate to justify the requested reconsideration.

So far, there is only a single cellulosic biofuel production facility that is registered and currently eligible to generate cellulosic biofuel RINs – Range Fuels. This facility is not in operation. EPA is aware that no cellulosic biofuel RINs have been generated for the 12-month period of July 2010 – June 2011.

EIA reports that imports of ethanol from Brazil were 5 million gallons in 2009, zero in 2010, and zero so far in 2011. It is very doubtful that many millions of gallons of this product will be imported during the remainder of 2011. Therefore, it will not be available in sufficient quantities to help meet the advanced biofuel requirement.

Excess biomass-based diesel is unlikely because it is questionable that the regulatory 800 million gallons will be available in 2011. EIA’s biodiesel monthly production data make it unrealistic to expect domestic biodiesel supply to increase significantly this year to meet the regulatory volume of 800 million gallons, much less also provide excess supplies for compliance with the advanced biofuel requirement.

NPRA urges the Agency to avoid allowing the use of “delayed RINs” in the future.

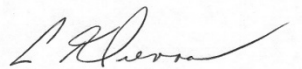
Conclusions

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

- reduce the regulatory volumes for cellulosic and advanced biofuels and the total RFS in 2011;
- reduce the proposed regulatory volumes of biomass-based diesel in 2012 and 2013;
- lower the proposed levels for advanced biofuels in 2012 (2 billion gallons) and the total RFS (15.2 billion gallons) consistent with the reduced volumes of cellulosic biofuels and biomass-based diesel; and
- select a regulatory value for cellulosic biofuel for 2012 that reflects actual supply in 2011.

Specific comments are available in the attachment.

Sincerely,



Charles T. Drevna  
President

Attachment

cc: Docket EPA-HQ-OAR-2010-0133  
Margo Oge  
Paul Machiele

**COMMENTS OF THE  
NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION  
ON THE PROPOSED RULE  
FOR 2012 RENEWABLE FUEL STANDARDS  
AND BIOMASS-BASED DIESEL VOLUME FOR 2013**

**Docket ID No. EPA-HQ-OAR-2010-0133**

**76 FR 38844 (7/1/11)**

**INTRODUCTION**

The Association recognizes that to meet energy demand, all economically viable energy sources will be needed. With implementation of the Renewable Fuel Standard, biofuels are becoming an increasingly significant part of the transportation fuel mix. NPRA supports the prudent development and use of biofuels to diversify our nation's transportation and nonroad fuels portfolio.

NPRA recognizes the need for a feasible RFS rule. NPRA members have been obligated parties since the implementation of RFS1 in September 2007. The RFS2 rule is significantly more complex. It is important that the annual standards set by EPA are based on realistic assessments of actual instead of ambitious projected biofuels production volumes. In January 2011, President Obama signed Executive Order 13563 which states: federal regulation "must promote predictability and reduce uncertainty."<sup>1</sup> Based on 2011 EMTS RIN activities, NPRA members as obligated parties are concerned that the volumes in the EPA 2012 RFS standards proposal are based on very optimistic projections rather than actual production volumes or an EIA forecast. As a result, the proposed rule provides little certainty to obligated parties and appears to conflict with the above mentioned Executive Order. We appreciate the opportunity to comment and trust that the EPA will address the concerns of the obligated parties and publish realistic and economically achievable biofuel volume standards in the final rule that are based on sound market analysis.

NPRA's comments address:

- Cellulosic biofuel volume for 2012,
- Biomass-based diesel volume for 2012,
- Advanced biofuel volume for 2012,
- Proposed percentage standards for 2012,
- Biomass-based diesel volume for 2013,
- NPRA/API petition for 2011 volumes, and
- Technical amendments.

---

<sup>1</sup> Improving Regulation and Regulatory Review, Section 1 (1/18/11).

## **CELLULOSIC BIOFUEL VOLUME FOR 2012**

The Agency proposes a range for the cellulosic biofuel volume of 2012, 3.55 – 15.7 million ethanol-equivalent gallons, and will select a single value in the final rule by November 30, 2011.

We are concerned EPA is following the same process used to set the 2011 standard. Specifically, the Agency had selected 6.6 million gallons (6.0 million ethanol-equivalent gallons)<sup>2</sup> versus the EIA projection of 3.94 million gallons<sup>3</sup> for 2011. EPA's volume was substantially higher than EIA's. The Agency's regulatory volume should be realistic, not aspirational. The Clean Air Act directs EPA to project the amount expected to be sold or introduced into commerce, not a hope or wish. NPRA urges the Agency to select a regulatory value for 2012 that reflects actual production in 2011.

Based on the data in the EMTS, EPA is aware that no cellulosic biofuel RINs have been generated for the 12-month period of July 2010 – June 2011. This fact should suggest caution when selecting the regulatory volume for 2012.

When EPA selects an unrealistic cellulosic biofuels mandate, this is in effect no more than a tax on American manufacturers and, ultimately, consumers. For example, RFS obligated parties will have to buy up to 6.0 million cellulosic biofuel waiver credits from EPA at \$1.13/gallon-RIN for 2011; this is a \$6.78 million tax that obligated parties (including NPRA's members) must pay due to EPA's misguided optimism regarding cellulosic biofuels production this year. There is also no recourse for a rebate for obligated parties if 6.0 million ethanol-equivalent gallons are substantially higher than actual cellulosic biofuel supply in 2011.

NPRA asks the Agency to consider the following suggestion. If cellulosic production falls short of the RVO for year 20XX, EPA would wave the shortfall in February 20XX + 1, thereby eliminating the need for obligated parties to purchase excess cellulosic credits when they submit their compliance report for year 20XX on February 28th. EPA would continue to provide obligated parties the option of complying with their respective cellulosic RVOs for year 20XX with the purchase of cellulosic credits and/or with cellulosic RINs. This approach would be consistent with EPA's direction to provide incentives for market investment and growth, under the Agency's interpretation of the Energy Independence and Security Act (EISA). That is, this approach would continue to provide cellulosic producers assurance of a market, based upon the projected volume to be made available, while eliminating the unjustified cost to obligated parties only after it was clear that the obligation could not be achieved.

---

<sup>2</sup> 75 Fed. Reg. at 76,790 (12/9/10)

<sup>3</sup> As required by EISA, EIA's letter, dated October 20, 2010, provided EPA with an estimate of the volume of cellulosic biofuel expected to be sold in the U.S. in 2011.

## **BIOMASS-BASED DIESEL VOLUME FOR 2012**

EPA proposes the statutory volume for biomass-based diesel for 2012 of 1.0 billion gallons.

The RFS2 regulations at 80.1449 require each registered renewable fuel producer or importer to submit a Production Outlook Report by March 31, 2011. This must include forecasts of production or imports for the next five years. This requirement was intended to inform the Agency for determining the regulatory volumes for next year. EPA's proposal for 2012 does not include a reliance on this data. The Agency should have included a summary of these submissions for biomass-based diesel in this proposal.

EIA publishes monthly biodiesel data in its "Monthly Energy Report (DOE/EIA-0035(2011/07))."<sup>4</sup> The July 2011 issue (released on July 27, 2011) shows that U.S. biodiesel production for 2009 was 506 million gallons and for 2010 had dropped to 311 million gallons. It is unreasonable to hope that supplies will increase substantially to meet 1.0 billion gallons in 2012.

Although the potential supply of D4 RINs is linked to biodiesel production, the D4 RIN credits supply during a given year (for meeting obligations) is ultimately determined by the blending of the qualified biomass based diesel (biodiesel and renewable diesel) into diesel fuel (i.e., biodiesel consumption). In that regard, the ability to significantly increase D4 RIN credits supply today and in the future will also be limited by the diesel product terminal's ability to quickly expand the capability to blend more biodiesel into the national diesel market volumes.

EIA reports diesel consumption (on-highway and nonroad):<sup>5</sup>

### EIA, DIESEL CONSUMPTION (billions of gallons)

2008	52.7
2009	48.7
2010	49.6

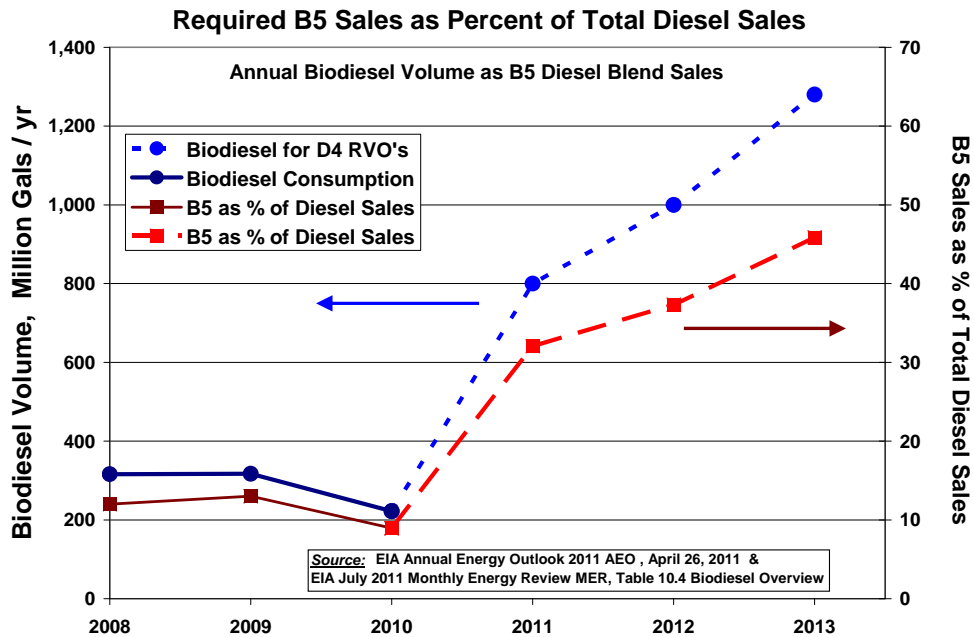
This represents a large market for biomass-based diesel. However, it will be a challenge to significantly increase terminal blending capabilities.

Although some of the newer vehicles are now designed to handle blends up to B20 (20% biodiesel), the diesel fuel properties under the colder seasons as well as the vast majority of vehicles on the road will essentially limit the biodiesel diesel blend market to B5 diesel blends. Therefore, the capability to generate D4 RIN credits will likely be determined by the B5 (5% biodiesel blends) blending capacity in the U.S. diesel fuel distribution terminals. Assuming that biodiesel is blended as B5, the following chart shows the relationship between biodiesel

<sup>4</sup> Available at [http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10\\_8.pdf](http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10_8.pdf)

<sup>5</sup> EIA's Annual Energy Outlook 2011, Reference Case, Table 11, Liquid Fuels Supply and Disposition.

consumption and B5 blending requirements as a percent of diesel sales. B5 was 8-12% of the diesel supply through 2010. However, based on current and proposed D4 RIN obligations, B5 blending will need to more than double in 2011 alone, and then to more than triple by 2013. This necessary large expansion in B5 blending capability in the marketplace appears unrealistic and unachievable. It will require the numerous installations of more storage tanks (possibly heated for biodiesel) as well as the installation of biodiesel receiving and blending capacity at the diesel fuel distribution terminals throughout the U.S. markets.



The federal tax credit for biodiesel will expire at the end of 2011. It is not known if this will be extended by Congress. This uncertainty is a reason not to rely too much on the Production Outlook Reports which may have been based on the assumption of an extension.

### **ADVANCED BIOFUEL VOLUME FOR 2012**

EPA should reduce the regulatory volume for advanced biofuels in 2012 to reflect the very large reduction in the cellulosic biofuel requirement. EPA proposes to reduce the cellulosic biofuel requirement from the statutory level of 500 million gallons in 2012 to less than 16 million ethanol-equivalent gallons. However, the Agency should not promulgate 2.0 billion gallons for the advanced biofuels RVO in 2012 (the statutory level). EPA will reduce cellulosic biofuels in 2012 by well over 400 million gallons and should reduce the advanced biofuels RVO by the same value.



EPA believes that hundreds of millions of gallons of sugarcane ethanol will be imported from Brazil in 2012<sup>6</sup> and will facilitate compliance with the proposed advanced biofuels requirement, 2.0 billion gallons. EIA reports that imports of ethanol from Brazil were 5 million gallons in 2009, zero in 2010, and zero for January - April 2011. In addition, EPA's "RFS2 EMTS Informational Data" shows that there have not been any Advanced Biofuel RINs created by importers for January - June 2011. Therefore, sugarcane ethanol (an advanced biofuel candidate) imports have not been a significant supply option for 2011. Considering these facts, it is unrealistic to assume that hundreds of millions of gallons of this advanced biofuel will be available next year when setting the advanced biofuel volume for 2012.

In fact, the U.S. has been exporting ethanol to Brazil. According to EIA, between February and April 2011, 93 million gallons of ethanol were shipped from the U.S. to Brazil. In addition, Brazil's government has recently changed government oversight of their domestic ethanol production industry from sugarcane so as to give priority to blending into Brazil's own transportation fuel instead of more exports of ethanol or sugar. Therefore, any annual swings of sugarcane and ethanol production will occur in Brazil's ethanol exports which makes Brazil sugarcane ethanol an unpredictable export supply for any U.S. Advanced Biofuel mandated volume. Therefore, EPA should not believe or assume that any Brazilian ethanol will be available when establishing Advanced Biofuel requirements in 2012.

EPA should also not assume there will be excess volumes of biomass-based diesel available or able to be blended to meet the Advanced Biofuel volume, above the volume be required to meet the biomass-based diesel volume. In fact, as discussed above, EPA should reduce the biomass-based diesel RVO below 1.0 billion gallons in 2012. However, the Agency should not promulgate 2.0 billion gallons for the advanced biofuels RVO in 2012 (the statutory level) if the biomass-based diesel RVO for 2012 is less than 1.0 billion gallons and the cellulosic biofuels RVO is significantly reduced. EPA should reduce advanced biofuels RVO by an appropriate value that reflects the reduction in biomass-based diesel and cellulosic biofuels.

When the Agency reduces the advanced biofuels obligation for 2012, it must also reduce the total renewable fuel RVO by the same amount. The implicit mandate for conventional biofuels, 13.2 billion gallons in 2012, should be maintained at this statutory level and not increased.

### **PROPOSED PERCENTAGE STANDARDS FOR 2012**

The Agency calculated preliminary RFS percentage standards for 2012:

Cellulosic biofuel	0.002 – 0.010%
Biomass-based diesel	0.91%
Advanced biofuel	1.21%
Renewable fuel	9.21%

---

<sup>6</sup> 76 Fed. Reg. at 38,854

These values were based on the following assumptions:<sup>7</sup>

49-state, excluding Alaska

gasoline consumption = 139.98 bg

diesel consumption = 44.47 bg

renewable fuel blended into gasoline consumption = 14.16 bg

renewable fuel blended into diesel consumption = 0.83 bg

gasoline production from 13 exempt small refineries = 3.27 bg

diesel production from 13 exempt small refineries = 1.23 bg

We understand that these assumptions will be revised. The regulatory percentages for 2012 in the final rule will be calculated using new EIA projections for these input parameters.

### **BIOMASS-BASED DIESEL VOLUME FOR 2013**

The Agency proposes 1.28 billion gallons as the biomass-based diesel volume for 2013 stating “With the limited information available on the current and historical operation of the RFS program, we believe it would be prudent for 2013 to consider only moderate increases above the statutory minimum of 1.0 billion gallons.” (76 FR 38861) NPRA disagrees. Twenty-eight percent is not a “moderate” increase. It would be prudent to consider an increase above the statutory minimum of 1.0 billion gallons only after it has been demonstrated that 1.0 billion gallons can be produced and blended.

It is unlikely that the regulatory 800 million gallons will be available in 2011. EIA publishes monthly biodiesel data in its “Monthly Energy Report (DOE/EIA-0035(2011/07)).”<sup>8</sup> The July 2011 issue (released on July 27, 2011) shows that U.S. biodiesel production for 2009 was 506 million gallons and for 2010 had dropped to 311 million gallons, and that biodiesel consumption which generates the D4 RIN credits was even much lower than production. It is unrealistic to expect domestic biodiesel blending volume to increase significantly this year to meet the regulatory volume of 800 million gallons, increase again in 2012 to meet the proposed regulatory volume of 1.0 billion gallons, and increase again to meet the proposed regulatory volume of 1.28 billion gallons in 2013. These annual steps are much too large for an industry that produced 311 million gallons in 2010.

EISA requires EPA to take the costs to consumers into account in extending the biomass-based diesel mandate. In addition to the cost premium of biodiesel over diesel jumping by an extra \$2.00 per gallon since the middle of 2010, the federal tax credit of \$1.00 per gallon for biodiesel is set to expire at the end of 2011. This creates much financial uncertainty for planning. The on/off nature of this tax provision makes it very difficult to project production levels for 2013. NPRA urges practicality and caution, not wild optimism, in setting the 2013 standard for biomass-based diesel.

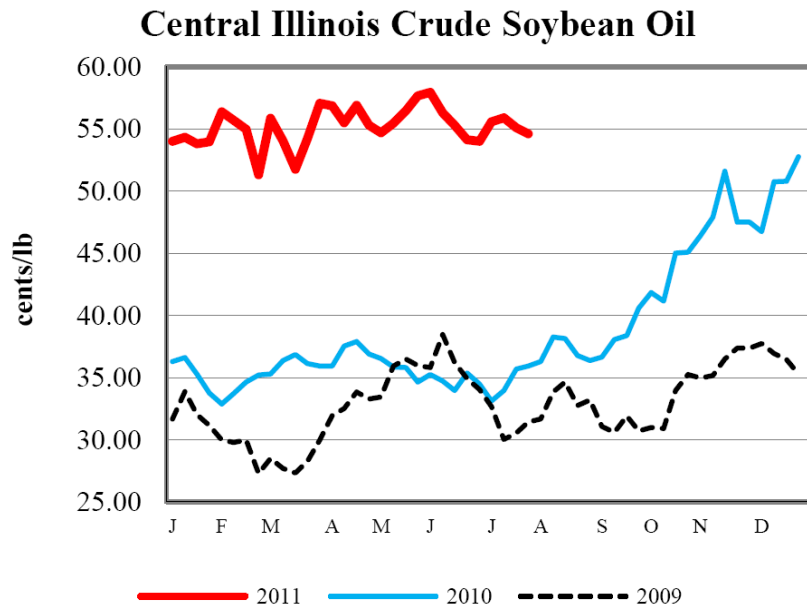
---

<sup>7</sup> “Calculation of the 2012 Renewable Fuel Standards for Gasoline and Diesel,” memorandum from Christine Brunner, June 10, 2011, EPA-HQ-OAR-2005-0161-3241. These values were used to derive the denominator (164.96 billion gallons).

<sup>8</sup> Available at [http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10\\_8.pdf](http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10_8.pdf)

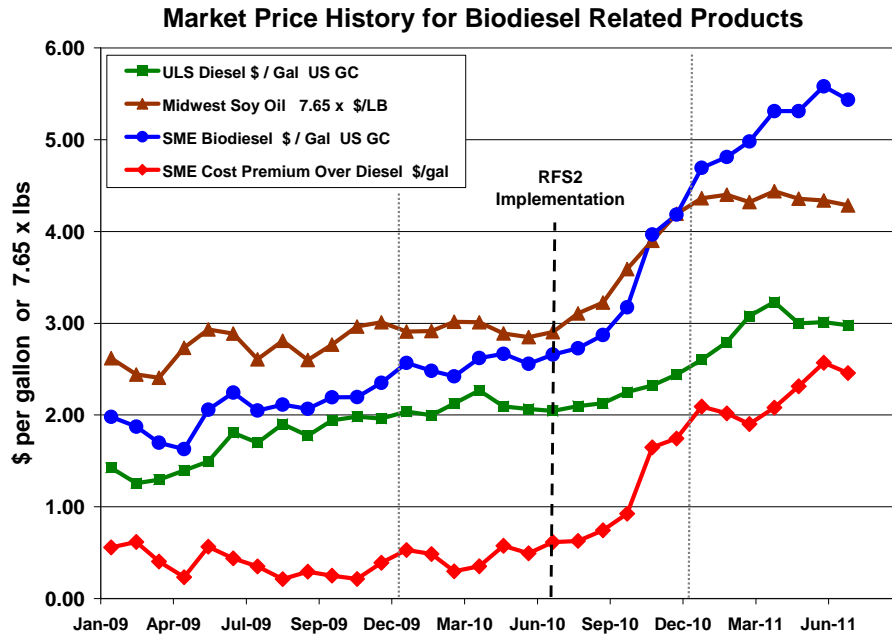
The statutory value for advanced biofuels in 2013 is 2.75 billion gallons. There is no harm to the biomass-based diesel industry if the biomass-based diesel requirement is 1.0 billion gallons in 2013 because additional biomass-based diesel can be used to meet the advanced biofuel requirement. EPA should not be picking winners and losers by selecting 1.28 billion gallons for biomass-based diesel in 2013. EPA should let the market decide what advanced biofuels will be selected to meet the large advanced biofuels RVO in 2013.

Market cost analysis shows that all the components in the supply chain for D4 RIN credits have increased substantially since the first half of 2010 which has significantly increased the biodiesel market cost premium over diesel by a factor of five to about \$2.50 per gallon as well as the increasing market cost of D4 RIN credits by at least a factor of four since the RFS2 implementation in July 2010. As one example, the market cost of soybean oil used as feedstock to make SME (soybean oil methyl ester) biodiesel has nearly doubled since 2009 and early 2010 as illustrated in the following USDA chart.

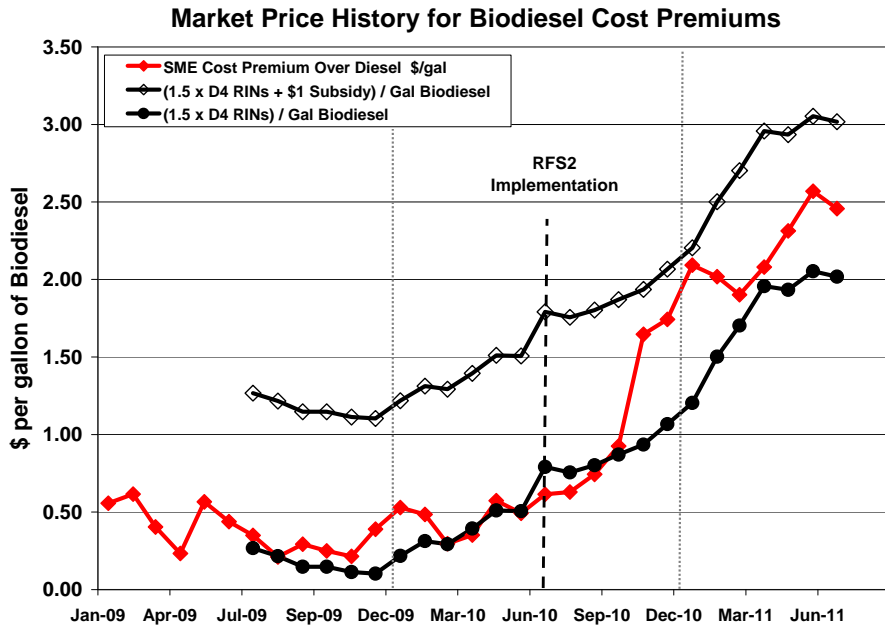


Source: National Weekly Ag Energy Round-Up, Fri, Jul 29, 2011, USDA Livestock & Grain Market News

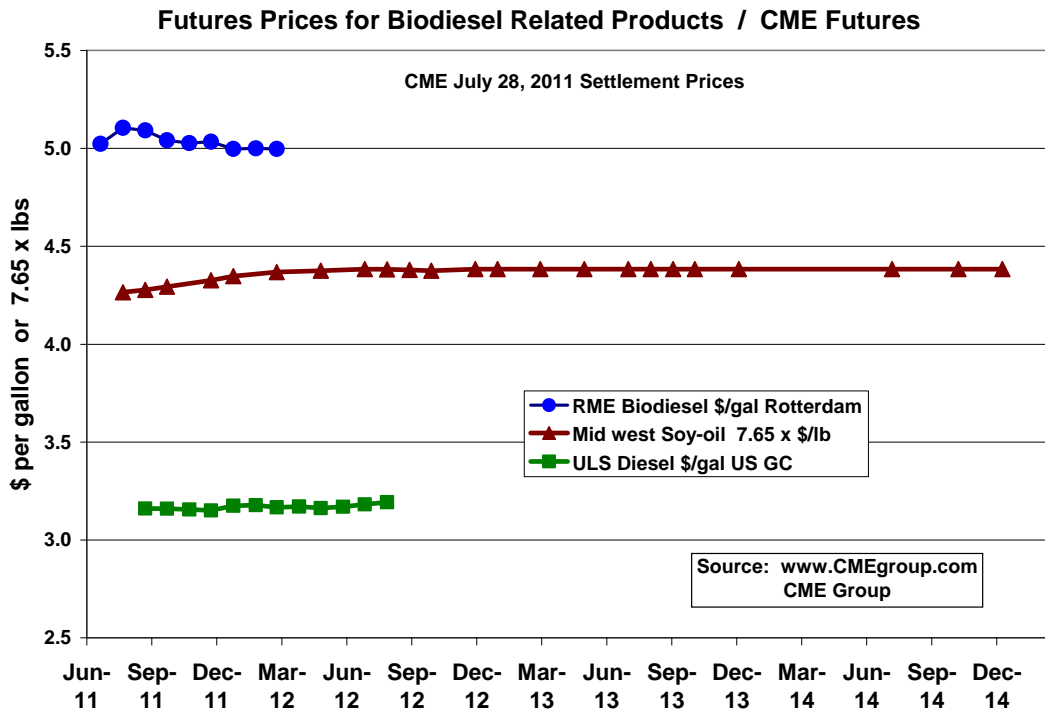
Also, since the implementation of RFS2 in July 2010, as illustrated in the following chart, the higher soybean oil costs and the higher biodiesel demand created by the increased RFS2 D4 RIN credit obligations have driven the market cost of SME biodiesel to increase to about \$5.50 per gallon resulting in a biodiesel cost premium over diesel market cost to about \$2.50 per gallon which is a factor of five increase since the implementation of RFS2 in July 2010.



The combined cost of government subsidies (\$1/gallon) and the market cost of the biodiesel D4 RIN credits represent the net cost of the biodiesel mandate to diesel consumers and taxpayers. As a result of the large regulatory demand increase for biodiesel D4 RIN credits created in RFS2, the effective market cost of the biodiesel credits plus government subsidies has increased substantially during the past year and has maintained a market cost that is even higher than the cost increase of SME biodiesel premium over diesel fuel product as illustrated in the following chart. The market value of the D4 RIN credits plus the government subsidy has increased to about \$3.00 per gallon of SME biodiesel which is about \$0.50 over the market cost premium of SME biodiesel over diesel. This added incentive over SME cost premiums likely reflects the shortage of D4 RIN credits due to the constrained B5 blending capability in the U.S. diesel terminals as illustrated in the prior biodiesel volume discussion. If the biodiesel tax credit is not extended past 2011, the effective cost of the D4 RINs might have to rise by an equal amount to replace the lost government subsidy.



As illustrated in the following chart with the future prices from the CME Group (a futures market exchange), the futures market expects no major reduction in either soybean oil market cost or biodiesel market cost, compared to diesel market costs. Soybean oil futures suggest continue market price increases. Since there are no futures trading for SME biodiesel in the U.S., the chart uses the futures for the RME (rapeseed methyl ester) biodiesel traded in Rotterdam fuel markets but which is still linked to the global biodiesel markets. As reflected in comparison with the prior market history chart, the RME biodiesel market normally sells at a discount to the SME biodiesel markets in the U.S. markets which is now the high cost biofuel in the global markets, but shows that biodiesel is projected to continue above \$5 per gallon in the foreseeable future, and thereby maintain its current high market cost premium to diesel fuel.



In addition, EPA projected biofuel costs in 2022:

	<u>\$/gallon</u>	<u>RIA Table</u>
Sugarcane ethanol from Brazil with tax and tariff <sup>9</sup>	2.08	4.1-34
Sugarcane ethanol from the Caribbean with tax	1.54	4.1-34
Biodiesel soy oil	2.73	4.1-41

EPA should select the statutory minimum, 1.0 billion gallons, for 2013.

The Agency is reviewing biofuel pathways. EPA should allow approved biofuels to compete with biomass-based diesel for the advanced biofuel volume requirement. In addition, EPA is reviewing and will review biofuel applications that may also compete in 2013.

There are likely to be advanced biofuels available in 2013 that are less expensive than soy biodiesel. EPA should provide the regulatory flexibility to allow the market to deliver the least-cost mix of advanced biofuels. NPRA recommends that the Agency select 1.0 billion gallons as the biomass-based diesel RVO for 2013.

<sup>9</sup> Although it will expire at the end of 2011, EPA assumed that the import tariff for ethanol would be extended by Congress.

## **NPRA/API PETITION FOR 2011 VOLUMES**

In February 2011, NPRA and API petitioned EPA to reconsider the RFS volumes for 2011. This petition addressed three topics:

- cellulosic biofuels,
- advance biofuels, and
- delayed RINs.

NPRA appreciates the opportunity to clarify the reasons for submitting this petition and urges EPA to grant the petition.

EPA is proposing to deny the API and NPRA petition for reconsideration of the Final Rule on Regulation of Fuels and Fuel Additives: 2011 Renewable Fuels Standard<sup>10</sup> (“Final Rule”) for several reasons. First, EPA claims that certain elements of the API and NPRA’s petition do not meet the Clean Air Act (“CAA”) requirements for reconsideration.<sup>11</sup> Second, EPA claims that the agency’s process for determining the cellulosic biofuel standard for 2011 was not flawed and that API and NPRA’s petition for reconsideration does not accurately describe the requirements of the CAA. EPA believes it is not constrained by the requirement that the annual cellulosic biofuel requirement be “based on” projections determined by EIA. Finally, EPA argues that the CAA allows the Agency to merely make a “reasonable” projection of cellulosic biofuel requirements that EPA may take into account the objective of “promoting the growth of the use of cellulosic biofuel” in setting the regulatory standard for annual cellulosic biofuel volumes. We believe EPA is wrong on all counts and that the reasons the Agency articulated for proposing to deny the petition for reconsideration are not grounded in the CAA. EPA should therefore grant the February 7, 2011 Petition for Reconsideration (“2011 Petition”) filed by API and NPRA.

First, we address the legal concerns of the Agency. Then we present new information that was not available in 2010 when EPA made its regulatory decisions for 2011. This new information is more than adequate to justify the requested reconsideration. Third, we ask that the Agency not allow the use of delayed RINs in the future.

### **A. EPA’s Final Rule is Based on Information And Analysis That Was Not Available During the Public Comment Period.**

The 2011 Petition is based on objections that were both impracticable to raise during the time period allowed for public comment on the 2011 cellulosic biofuel volume requirement and on grounds “arising after” the period for public comment. A simple recounting of the timeline for EPA’s consideration of this matter proves the point. EPA’s Notice of Proposed Rulemaking for the Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards<sup>12</sup> (“2010 Proposed Rule”) was published in the Federal Register on July 20, 2010. This notice provided for a 30 day comment period closing on August 19, 2010. While the notice stated that EPA

---

<sup>10</sup> 75 Fed. Reg. at 76,790 (December 9, 2010)

<sup>11</sup> CAA section 307(d)(7)(B)

<sup>12</sup> 75 Fed. Reg. at 42,238 (July 20, 2010)

intended to rely on additional information not presented in the 2010 Proposed Rule<sup>13</sup>, in fact, such information was not available to API and NPRA or any other commenter until well after the close of the comment period. Production Outlook Reports for EPA's determination of cellulosic biofuel levels for 2011 were not due to EPA until September 1, 2010 and were never released to the public. EIA estimates concerning the projected volume of cellulosic biofuel production for 2011 were not provided to EPA until October 20, 2010.<sup>14</sup> Thus, information which is of central relevance to EPA's Final Rule was not available to API and NPRA until well after the period allowed for public comment for the 2010 Proposed Rule closed (the EIA projections) or not at all (the Production Outlook Reports). The requirements of CAA Section 307(d)(7)(B) are therefore met.

No amount of posturing or argument by EPA can get around the fact that API, NPRA and other commenters lacked the ability to raise objections to the data on which EPA's determination was based, EPA's analysis of this data, and the Agency's overall determination on how it intended to interpret CAA requirements affecting the level of the 2011 cellulosic biofuel requirements. For example, in the Final Rule, EPA makes several summary observations concerning EIA's projections of cellulosic biofuel production estimates for 2011. The Agency states, for example, that "[w]e have considered EIA's projection of cellulosic biofuel production for 2011 . . . and we believe that it represents a volume that the industry is unlikely to fall below."<sup>15</sup> Such "analysis" and assessment of the EIA projections were not available in the 2010 Proposed Rule for the 2011 RVOs. Moreover, such analysis is entirely different from EPA's treatment of EIA projections in setting the 2010 cellulosic biofuel standard. In that action, EPA indicated that "EIA provided us with a projection on October 29, 2009 of 5.04 million gallons (6.5 million ethanol-equivalent gallons) of cellulosic biofuel production for 2010. While our company-by-company assessment varies from EIA's . . . we nevertheless believe that 5 million gallons . . . represents a reasonable, yet achievable level for the cellulosic standard for 2010."<sup>16</sup> EPA offers no detail or explanation as to why EIA's projections for 2010 were considered reasonable, but EIA's projections for 2011 must be viewed as a minimum level of production in 2011.

EPA similarly does not provide any analysis of how other data was assessed and used by the Agency. Again, neither API nor NPRA had access to Production Outlook Reports on which EPA relied in its projection of 2011 cellulosic biofuel production and the Agency offers no information on how to assess or critique the information contained in the reports. Although EPA attempts to downplay the importance of Production Outlook Reports for 2011 in the Final Rule, this is to no avail. Clearly, EPA both received and utilized the reports in its final determination.<sup>17</sup> Therefore, even though API, NPRA and other commenters may have known

---

<sup>13</sup> In specific, EPA stated that it would "examine EIA's projected volumes and other available data including the Production Outlook Reports required under § 80.1449 . . ."

<sup>14</sup> 75 Fed. Reg. at 76,796

<sup>15</sup> 75 Fed. Reg. at 76,797

<sup>16</sup> 75 Fed. Reg. 14,669 and 14,675 (March 26, 2009).

<sup>17</sup> EPA stated that the reports were of "limited value for the development of the biofuel volume projections that we used to set the standards for 2011." 75 Fed. Reg. at 76,794. Still, by the Agency's own admission, such reports were part of its determination of the final standards for cellulosic biofuel requirements for 2011. EPA did not state that the reports were of "no value." Nor did EPA disclaim any



that EPA would utilize EIA estimates of 2011 cellulosic biofuel production and Production Outlook Reports in some fashion, neither the raw empirical information or EPA's interpretation of this information was available during the period for public comment. Thus, in both cases, vital information that directly informed EPA's determination of the 2011 cellulosic biofuel standard was simply not available. It was therefore not only "impracticable" to raise an objection to such information, it was in fact impossible.

### **B. API and NPRA Did Not Waive Any Right to Object to EPA's 2011 Determination of Cellulosic Biofuel Levels**

EPA claims that, by not submitting comments regarding the 2010 RFS Notice of Proposed Rulemaking for the 2011 RVOs or by not raising its objections to EPA's reliance on Production Outlook Reports and EIA projections with regard to the Proposed Rule, API and NPRA have somehow foregone any ability to raise this issue in a petition for reconsideration of the Final Rule. This reasoning is both illogical and inapposite the requirements of CAA section 307(d)(7)(B).

First, as outlined above, API and NPRA could not have known how, or to what extent, EPA would rely, or not rely, on either the EIA projections or Production Outlook Reports for 2011 during the time period for public comment. Such information simply did not exist. The public comment period closed on August 19, 2010 and the EIA projections are dated October 20, 2010. The Agency has not released the Production Outlook Reports. EPA did not otherwise indicate how it would evaluate EIA's new projections. EPA simply indicated that it would "examine EIA's projected volumes and other available data including the Production Outlook Reports . . ."<sup>18</sup> Based on EPA's treatment of this information with regard to the 2010 cellulosic biofuel requirement, moreover, API and NPRA might have expected that EPA would consider the EIA projection to be reasonable. In the present notice, EPA appears to be suggesting that public commenters are somehow obligated to project how EPA will react, in the future, to empirical information that is not part of the public record and to provide comments on the same. This clearly cannot be required under the guise of implementing the requirements of CAA section 307(d)(7)(B).

In the alternative, EPA appears to be suggesting that API, NPRA and other commenters were obligated to provide specific comments on EPA's methodology for determining all future cellulosic standards on the basis of the 2009 Notice of Proposed Rulemaking for Regulations of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program<sup>19</sup> ("2009 Proposed Rule") or the 2010 Proposed Rule for 2011 RVOs. Such is also not required by CAA section 307(d)(7)(B). In fact, in the case of the 2009 Proposed Rule, it was not clear that EPA would in fact conduct notice and comment rulemaking, or during what timeframe this process would be employed. EPA stated only that "Once the RFS2 program is implemented, we *expect* to conduct a notice-and-comment rulemaking process each year in order to determine the appropriate standards applicable in the following year." (Emphasis added). Nothing in the 2009 Proposed

---

reliance, as it could have, based upon the submission of a limited number of reports.

<sup>18</sup> 75 Fed. Reg. at 42,240

<sup>19</sup> 74 Fed. Reg. 24,904 (May 26, 2009)

Rule informed the public on how EPA might or might not consider the required EIA annual estimates during any public notice and comment process or what weight or level of deference EPA might extend to such estimates. EPA also did not indicate *when* such a notice and comment process would be employed, or whether EIA could be required to supply estimates in a timeframe that could better facilitate the public comment process. EPA’s quoted language from that rule does not indicate otherwise.

With regard to the 2010 Proposed Rule for 2011 RVOs, EPA indicated only that it would “complete its evaluation” of the 2011 cellulosic biofuel standard based on comments received, Production Outlook Reports, the EIA estimate and other information that becomes available.<sup>20</sup> EPA did not provide any more detail upon which meaningful comment could be submitted. EPA did not offer – as it does now in the proposed denial of the petition for reconsideration – any legal interpretation of the relevant CAA statutory language requiring that the projected level of cellulosic biofuel production be “based on” the EIA estimate. EPA also did not indicate why it would choose to alter its assessment of EIA data from being a reasonable projection (the position the Agency took with regard to the 2010 cellulosic biofuel level) to an assessment that such data should not be used to set the level since such data may be characterized as being of “high certainty” (the position it took with regard to the 2011 cellulosic biofuel level). In addition, nowhere did EPA claim in the 2009 Proposed Rule or the 2010 Proposed Rule – as it does now – that the language of CAA section 211(o)(2)(7)(D) is “ambiguous.” Thus, it was again impossible for API or NPRA to comment on the interpretation that EPA adopted in the Final Rule now offers and expands upon in this proposed rule.<sup>21</sup>

### **C. EPA Misrepresents and Misinterprets Arguments Made in Petition for Reconsideration**

In this proposed rule, EPA misstates, with no citation, arguments that were contained in API and NPRA’s petition for reconsideration. The Agency first claims that the 2011 Petition indicated that EPA “cannot consider or rely upon other information in establishing the annual cellulosic biofuel standard.”<sup>22</sup> In addition, EPA proposed to deny the petition “with respect to the contention that EPA must rely exclusively on the EIA projections in establishing the annual cellulosic biofuel volumes.”<sup>23</sup> But the 2011 Petition makes no such statements. Instead, the petition clearly states that EPA’s statutory duty is to set the level that “EPA reasonably projects will actually be achieved.”<sup>24</sup> API and NPRA further stated that “[a]dopting a projection that is highly unlikely to be reached is inconsistent with EPA’s statutory mandate.”<sup>25</sup> API and NPRA also complained that EPA “appears to have construed the ‘based on’ clause of CAA § 211(o)(3)(A) as requiring only that EPA give ‘consideration’ to the EIA estimate.”<sup>26</sup> EPA’s

---

<sup>20</sup> 75 Fed. Reg. at 42,240

<sup>21</sup> EPA cites as authority for its interpretation *Nuclear Energy Institute v. EPA*, 373 F. 2d 1251, 1269 (D.C. Cir. 2004). EPA did not previously cite this precedent.

<sup>22</sup> 76 Fed. Reg. at 38,880

<sup>23</sup> 76 Fed. Reg. at 38,880

<sup>24</sup> 2011 Petition at 3.

<sup>25</sup> 2011 Petition at 7.

<sup>26</sup> *Id.*

proposed denial of the 2011 Petition therefore relies on a faulty and inaccurate reading of the petition.

In the 2011 Petition, API and NPRA clearly state that EPA lacked a reasonable basis for departing from EIA's estimate of cellulosic biofuel production volumes for 2011. In fact, this argument provides the header for Section II. B. of the petition. API and NPRA did not state that EPA "cannot consider" other information in setting standard as EPA now claims. Nor did API and NPRA argue that EPA "rely exclusively" on the EIA estimate. Instead, the petition clearly presented arguments that EPA must base its cellulosic biofuel requirements on reasonable information and not "unlikely" scenarios and that EPA has a duty to explain why the agency rejected EIA's expert advice in the matter of projected production volumes. EPA cannot reject a petition for reconsideration based on arguments that were not raised in the petition as it clearly attempts to do in this notice.<sup>27</sup>

#### **D. Cellulosic Biofuel Requirements Must be "Based on" EIA Estimates**

The 2011 Petition clearly indicated that EPA must have a reasonable basis for establishing the cellulosic biofuel requirement and for departing from expert opinion. In this regard, the petition cited EIA's role as "the Nation's premier source of energy information" and the primary Federal Government authority on energy statistics and analysis."<sup>28</sup> API and NPRA therefore argued that given EIA's estimate of 3.94 million gallons of cellulosic biofuel production in 2011 EPA should explain how its 67% higher estimate was "based on" the EIA estimate. We would first note that this request aligns with the Administration's own policies on the use of scientific and technological information by departments and agencies of government. The December 2010 Memorandum on Scientific Integrity clearly states that "it is important that policymakers involve science and technology experts where appropriate and that the scientific and technological information and process relied upon in policymaking be of the highest integrity."<sup>29</sup>

EPA's Proposed Rule, however, attempts to bat away both Administration policy and the CAA by simply stating that it is "EPA, not EIA, that is to make the determination of projected cellulosic biofuel volumes."<sup>30</sup> As pointed out above, API and NPRA never said otherwise in the petition for reconsideration. But, more importantly, this simple observation by EPA does not address in any manner the Administrator's duty under the CAA to reduce the applicable volume of cellulosic biofuel "based on" the EIA projected production volume. The issue is not whether the EPA Administrator is empowered to make a decision concerning the level of annual cellulosic biofuel requirements, but how this decision is made and how EPA implements the statutory requirement that the decision be "based on" EIA's annual estimates.

---

<sup>27</sup> "Accordingly, EPA proposes to deny the petition with respect to the contention that EPA must rely exclusively on the EIA projections in establishing the annual cellulosic biofuel volumes." 76 Fed. Reg. 38,880

<sup>28</sup> 2011 Petition at 6

<sup>29</sup> Memorandum For the Heads of Executive Departments and Agencies, John P. Holden, Assistant to the President for Science and Technology and Director of the Office of Science and Technology Policy, December 17, 2010 at 1.

<sup>30</sup> 76 Fed. Reg. at 38,880

EPA never addresses this fundamental issue in proposing to deny the 2011 Petition. Instead, EPA claims that it “looked at all available information” and then decided on the 2011 cellulosic biofuel requirement because the requirement to base its decision on EIA data was somehow ambiguous. Contrary to the “based on” requirement, however, there is no statutory support for this interpretation of CAA section 211(o)(7)(B) offered for the first time in the present notice. In fact, the statute is decidedly unambiguous with respect to the information that EPA is required to review. Congress directed both EIA to provide such information in CAA section 211(o)(3)(A) and for the EPA Administrator to make its determination “based on” this information in CAA section 211(o)(7)(D). Such explicit direction to EPA is not ambiguous and EPA cannot disregard this statutory scheme without an adequate explanation of why the EIA estimate is in error and why EPA considers EIA’s estimate less credible than the agency’s own assessment of cellulosic biofuel production. Yet that is exactly what EPA did with respect to the Final Rule. As cited in the petition for reconsideration, EPA indicated that its projected cellulosic biofuel production was based on its own, less certain estimates of projected production.

EPA also made no effort to determine the basis of its “certainty” versus that utilized by a sister agency of government – or to compare the basis upon which each agency apparently drew different conclusions when looking at the same production capacity for cellulosic biofuel. Indeed, it is truly remarkable that EPA, when discussing the differences in volume estimates between itself and EIA, states that “[w]e *believe* the difference reflects EIA’s intention to estimate volumes that each company has a high certainty of reaching in 2011.”<sup>31</sup> (Emphasis added). EPA clearly had the time, opportunity and means with which to *determine* why such a crucial difference existed between its own assessments and those of EIA. It is inconceivable that EPA could not firmly establish, simply by contacting EIA, on what basis the agency rendered its assessment of projected production of cellulosic biofuel. Instead, by not making the slightest attempt to determine the basis of an interagency difference in estimates, and then by finalizing projected cellulosic volume requirements that were 67% higher, EPA acted in an arbitrary and capricious manner.

#### **E. EPA Cannot Base Cellulosic Biofuel Requirements on Non-Statutory Factors**

For cellulosic biofuels in 2011, the Agency selected 6.6 million gallons (6.0 million ethanol-equivalent gallons)<sup>32</sup> versus the EIA projection of 3.94 million gallons.<sup>33</sup> EPA’s volume is substantially higher than EIA’s. The Agency’s regulatory volume should be realistic, not aspirational. The Clean Air Act directs EPA to project the amount expected to be sold or introduced into commerce, not a hope or wish.

In the Final Rule, EPA stated that “we explored the 2011 volumes for individual companies as projected by EIA to determine not only what volumes might be anticipated, *but*

---

<sup>31</sup> 75 Fed. Reg. at 76,796

<sup>32</sup> 75 Fed. Reg. at 76,790

<sup>33</sup> As required by EISA, EIA’s letter, dated October 20, 2010, provided EPA with an estimate of the volume of cellulosic biofuel expected to be sold in the U.S. in 2011.

*more importantly*, what volumes were *potentially available*.”<sup>34</sup> (Emphasis added). In this regard, EPA cited the efforts the agency undertook to develop additional information on cellulosic biofuel production capacity and to project volumes. EPA also asserted that the CAA does not require the agency to be “100% accurate” in its projections, but only that the Agency make reasonable projections. Finally, EPA claimed that this reasonable approach would be in pursuit of “achieving Congress’ goal of promoting the growth of the use of cellulosic biofuel, taking into account the interests of both the obligated parties and the producers of cellulosic biofuels.”<sup>35</sup> EPA’s efforts in this matter are essentially made out of whole cloth. Not only does the Agency shunt aside analysis that is required by statute, but EPA attempts to redraft the CAA and impose additional statutory procedures and requirements for implementing cellulosic biofuel requirements that do not exist. The Agency’s final determinations with regard to 2011 cellulosic biofuel levels are thus fatally flawed and must be reconsidered.

In effect, in the Final Rule EPA elevates “goals” that are not expressed in the statute<sup>36</sup> above substantive requirements that are actually contained in the CAA. As cited above, EPA claimed authority in the Final Rule to balance the interests of obligated parties and cellulosic producers. In the current proposed rule, EPA attempts to go further. The Agency states that the volume of cellulosic biofuel production is influenced by where EPA sets the cellulosic biofuel requirement and therefore, it must set the requirement so as to not strand investments and/or further delay the “industry’s ability to move towards the higher levels of commercial production envisioned in the statute.”<sup>37</sup> EPA also states that “[w]e believe that the cellulosic biofuel standard should provide an incentive for the industry to grow according to the goals that the Congress established through EISA.” EPA concludes that “we are not compelled to rely solely on volumes actually in production at the time we make our decision, as petitioners would prefer.”<sup>38</sup>

While EPA may possess some limited discretion to interpret the statute; the agency cannot rewrite it. No “goals” can be found within the Agency’s description of its statutory authority for this proposed rule contained in Section I. A. of the Preamble. Nor does EPA cite where it is authorized in CAA section 211(o) to balance the interests of producers and obligated parties in setting the annual cellulosic biofuel levels or to provide explicit incentives for investment and production. EPA cannot provide such citations because they don’t exist. The resulting decision regarding 2011 cellulosic biofuel levels is therefore both contrary to the CAA and an exercise in arbitrary decision-making. “Beliefs,” “goals” and non-statutory “incentives” simply cannot trump black letter law, despite any benefit EPA may foresee for implementing such a policy.

EPA believes that it has the discretion to deviate from the EIA projection of cellulosic biofuels for 2011. Furthermore, the Agency believes that it should encourage and stimulate this alternative fuel:

---

<sup>34</sup> 75 Fed. Reg. at 76,794

<sup>35</sup> 76 Fed. Reg. at 38,881

<sup>36</sup> Section 211(o) of the Clean Air Act does not contain a “Findings” or “Purposes” section, the method that Congress traditionally uses when creating statutory goals.

<sup>37</sup> 76 Fed. Reg. at 38,881

<sup>38</sup> 76 Fed. Reg. at 38,881

As discussed in the rule that set the 2011 cellulosic standard, we believe that the volume of cellulosic biofuel actually produced in a given year is likely to be strongly influenced by the standard we set. At this early point in the RFS program, the volume of cellulosic biofuel actually made available will in general not exceed the standard that we set, and there is no recourse for increasing the cellulosic biofuel standard if our projection were to fall short of actual production. Therefore, setting a standard that is lower than what the industry could reasonably achieve could strand investments and/or further delay the industry's ability to move towards the higher levels of commercial production envisioned in the statute. We believe it is appropriate to consider these factors in projecting production volumes, and that we are not compelled to rely solely on volumes actually in production at the time we make our decision, as petitioners would prefer.<sup>39</sup>

EPA chooses to require a high volume in order to avoid the possibility of selecting a low volume. NPRA suggests that EPA's role should not be cheer leader because an unrealistically high value imposes an unreasonable burden on RFS obligated parties. RFS obligated parties must secure RINs for compliance even if the Agency is in "fantasy land." In 2011, EPA's unrealistic cellulosic biofuels mandate will in effect be no more than a tax on American manufacturers and, ultimately, consumers. For example, RFS obligated parties can buy compliance with the cellulosic biofuels requirement for 2011. RFS obligated parties can buy up to 6.0 million cellulosic biofuel waiver credits at \$1.13/gallon-RIN for 2011; this is a \$6.78 million tax that NPRA's members must pay due to EPA's misguided optimism regarding cellulosic biofuels production this year. There is also no recourse for a rebate for obligated parties if 6.0 million ethanol-equivalent gallons are substantially higher than actual cellulosic biofuel supply in 2011. Refiners should not have to pay millions of dollars in compliance taxes because of EPA's optimism.

Last year, the Agency was handicapped because of the limited utility of the Production Outlook Reports.

In addition to the sources described above, we had intended to use information provided through the Production Outlook Reports required under § 80.1449 for all registered renewable fuel producers and importers. These reports were due to the Agency by September 1, 2010. While these reports were informative for the companies that did submit them, most potential cellulosic biofuel producers had not yet registered under the RFS program and therefore were not required to submit Production Outlook Reports. Moreover, only a small percentage of the reports were both complete and correct upon initial submission, and about one fourth of all registered producers and importers failed to submit a report. These issues are likely the result of this being the first time that such reports were due and remedial actions are expected to lead to a more complete set of valid

---

<sup>39</sup> 76 Fed. Reg. at 38,881

reports later in 2010. However, the Production Outlook Reports were of limited value for development of the biofuel volume projections that we used to set the standards for 2011.<sup>40</sup>

Obviously, this contributed to the uncertainty in the Agency's projections for 2011. It is understandable that EPA's expectations for 2011 will not necessarily match actual supply.

#### **F. EPA Should Consider New Information.**

Even EIA's projection for 2011 may be high. The Agency posts "RFS2 EMTS Informational Data." This shows that no cellulosic biofuel or cellulosic diesel RINs were generated between July 2010 and June 2011.<sup>41</sup> June 2011 is the latest month available. Because no cellulosic biofuel RINs were generated in this 12-month period, it is unlikely that millions of gallons of cellulosic biofuels will be produced or imported by the end of 2011. Valid RINs are the compliance currency for the RFS. The absence of cellulosic biofuel RINs is more than enough to justify the NPRA/API petition. This is new and, furthermore, it is EPA's own data.

So far, there is only a single cellulosic biofuel production facility that is registered and currently eligible to generate cellulosic biofuel RINs – Range Fuels.<sup>42</sup> This facility is not in operation currently. This information is a sufficient reason to reduce the regulatory volume of cellulosic biofuel for 2011.

Unless the Agency still believes today that 6.0 million ethanol-equivalent gallons of cellulosic biofuels will be supplied in 2011, EPA must grant the petition and reduce the regulatory volume of cellulosic biofuel for 2011.

#### **G. EPA Should Reduce the Advanced Biofuel and Total Renewable Fuel RVOs for 2012.**

EPA should reduce the regulatory volume for advanced biofuels in 2011 to reflect the very large reduction in the cellulosic biofuel requirement. EPA reduced the cellulosic biofuel requirement from the statutory level of 250 million gallons in 2011 to 6.0 million ethanol-equivalent gallons (6.6 million actual gallons). However, the Agency promulgated 1.35 billion gallons for advanced biofuels in 2011 (the statutory level) even though it substantially reduced cellulosic biofuels, a subset of advanced biofuels. EPA reduced cellulosic biofuels in 2011 by 244 million gallons (from 250.0 to 6.0), but chose not to reduce the advanced biofuels RVO at all.

Most of the advanced biofuel requirement will be met with biomass-based diesel. The biomass-based diesel requirement for 2011 is 0.8 billion gallons, or 1.2 billion ethanol-equivalent gallons. Since 1.2 is less than 1.35, there is a possible shortfall that must be accounted for with excess biomass-based diesel, imports of sugarcane ethanol, or another qualified biofuel.

---

<sup>40</sup> 75 Fed. Reg. at 76,794

<sup>41</sup> See <http://www.epa.gov/otaq/fuels/renewablefuels/compliancehelp/rfsdata.htm>

<sup>42</sup> 76 Fed. Reg. at 38,850

Excess biomass-based diesel is unlikely because it is questionable that the regulatory 800 million gallons will be available in 2011. EIA publishes monthly biodiesel data in its “Monthly Energy Report (DOE/EIA-0035(2011/07)).”<sup>43</sup> The July 2011 issue (released on July 27, 2011) shows that U.S. biodiesel production for 2009 was 506 million gallons and for 2010 had dropped to 311 million gallons. Is it realistic to expect domestic biodiesel supply to increase significantly this year to meet the regulatory volume of 800 million gallons, much less also provide excess supplies for compliance with the advanced biofuel requirement (1.35 billion gallons)?

The supply of biomass-based diesel this year may be inadequate. The regulatory 800 million gallons divided by 12 months = 66.7 million gallons/month as a necessary average for 2011. According to EIA, monthly consumption of biodiesel has never been this high for a single month in the last few years. The peak monthly consumption of biodiesel in the last few years was 45 million gallons in October 2009. Monthly consumption averaged only 18.5 million gallons in 2010 and has averaged only 34 million gallons for January - April 2011. Therefore, consumption will have to increase substantially and very quickly to supply 800 million gallons in 2011.

The tax credit for biodiesel expired at the end of 2009 and was not approved by Congress until December 2010 (yes, late; but it applied to 2011 and retroactively to January 1, 2010). This was not much leadtime for 2011 planning.<sup>44</sup> Now it is scheduled to expire at the end of 2011, leading to additional market uncertainty for 2012.

EIA reports that imports of ethanol from Brazil were 5 million gallons in 2009, zero in 2010,<sup>45</sup> and zero for January - April 2011. It is very doubtful that many millions of gallons of this product will be imported during the remainder of 2011. The fact of no imports for the first four months of 2011 is new and, therefore, warrants a reconsideration of the regulatory volumes in 2011.

In fact, the U.S. has been exporting ethanol to Brazil. According to EIA, between February and April 2011, 93 million gallons of ethanol were shipped from the U.S. to Brazil.

The Agency’s “RFS2 EMTS Informational Data” show that the average monthly supply of advanced biofuel RINs in January – June 2011 is 5 million gallon-RINs. This is an inadequate supplement to biomass-based diesel RINs for compliance with the advanced biofuel requirement for 2011. This is new information and is a sufficient basis for the requested reconsideration.

EPA must grant the petition unless it believes today that there will be sufficient volumes of advanced biofuels in 2011.

---

<sup>43</sup> Available at [http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10\\_8.pdf](http://www.eia.doe.gov/totalenergy/data/monthly/pdf/sec10_8.pdf)

<sup>44</sup> See section 701 of H.R. 4853 (P.L. 111-312), signed by President Obama on 12/17/10.

<sup>45</sup> EIA reports that the only country shipping ethanol to the U.S. in 2010 was Canada (10 million gallons). [www.eia.gov/petroleum/data.cfm](http://www.eia.gov/petroleum/data.cfm) See “U.S. Imports by Country of Origin” and select “Fuel Ethanol” as the Product.



When the Agency reduces the advanced biofuels RVO for 2011, it must also reduce the total renewable fuel RVO by the same amount. The implicit mandate for conventional biofuels, 12.6 billion gallons in 2011, should be maintained and not increased.

#### **H. EPA Should Not Allow Delayed RINs**

“Delayed RINs” are inappropriate because they are based on a revaluation of past activity. A RIN is created as type X because the biofuel producer did not yet qualify to create RINs of type Y. When that biofuel producer becomes qualified to create type Y RINs, it can disrupt the market, go back and change type X RINs to type Y RINs.

This injects considerable uncertainty. Obligated parties expect a defined, stable process to plan for RFS compliance.

EPA’s rules must be effective in the future. The Agency should not allow RINs to be altered after they were created and accepted in EMTS.

NPRA urges the Agency to avoid allowing the use of “delayed RINs” in the future.

#### **TRANSFERRED BLENDSTOCKS IN EARLY BENZENE CREDIT GENERATION CALCULATIONS**

NPRA supports the changes proposed by the Agency. The Agency clearly intended to permit blendstock transfers to qualify for early benzene credits. The regulation at 80.1275(d)(3) is inconsistent with EPA’s intent and should be repealed.

#### **TECHNICAL AMENDMENTS TO RFS2 REGULATIONS**

There are other RFS2 technical amendments that should be included in this final rule.

NPRA received notification from EPA that the API/NPRA/Growth Energy/RFA request for RIN transfer date flexibility was denied. We ask the agency to reconsider this position. And, while we disagree as to the whether or not this issue conflicts with the intent of the regulations, we ask the agency for leniency in the form of enforcement discretion as biofuel producers and first purchasers update their electronic systems for all parties to come into compliance. Furthermore, EPA should either strike RFS2 Q&A 10.6 or modify it to read as follows:

***A:** All parties are required to submit transactional information to EMTS within 5 business days of the transfer date as identified on the Product Transfer Document pursuant to 80.1452(c). The transfer date is the date that the seller transfers title of the renewable fuel to the buyer. The PTD identifying the **assigned** RINs must be transferred to the buyer ~~on the same day~~ **within 5 business days of** ~~as~~ the transfer of title of the **biofuel**. Regardless of when the buyer receives the PTD, the buying party would be in violation if they do not submit the transactional information to EMTS within ~~5~~ **10** business days of the ownership transfer date. A seller that fails to deliver a PTD to the*

*buyer in a timely manner would be in violation of 80.1453(a). Furthermore, the selling party may be in violations of 80.1460(e) if their failure to deliver the PTD in a timely manner caused the buyer's violation. EPA suggests that sellers send buyers a facsimile or electronic version of the PTD, in addition to a paper copy, so as to avoid these problems.*

EPA's RFS2 Q&A 7.8 (diesel blendstock RVO issue) suggests that any diesel blendstock or heating oil that meets the qualities of MVNRLM diesel should be included in an obligated party's obligated volume. This is in direct contradiction to §80.1407 (e) and (f), in Preamble II F 2 (pages 14720 and 14721) which state that diesel fuel that is designated as heating oil, jet fuel, or any designation other than MVNRLM or a subcategory of MVNRLM, will not be subject to the applicable percentage standard and will not be used to calculate the RVOs. EPA should strike RFS2 Q&A 7.8.

The RFS2 final reporting date (last day of February) coincides with the RFG and Anti-dumping compliance deadline. This creates a staffing problem as the regulatory requirements are often handled by the same personnel. This also creates an issue when small discrepancies in gasoline production or import volumes are realized, which potentially trigger an increased RFS RVO and the ensuing scramble to obtain the necessary RINs. Delaying the RFS reporting date until after volumetric auditing will have no impact on emissions, air quality or compliance with the standard.

The Agency's RFS2 regulations specify that when a refiner designates gasoline or diesel which it produces, for export, there is a commensurate reduction in that refiner's RVO. This limitation will likely result in obligated parties having to purchase RINs for exported gasoline and diesel since it often occurs that the party that designates product for export will be other than the refiner of that product. EPA should allow any obligated party that "designated for export" gasoline or diesel to reduce their RVO regardless of whether that product was so designated when it was produced. Likewise, a company that changes the use of a fuel "designated for export" to domestic use would incur a RVO obligation for the volume that the use designation was changed. This ensures industry wide volume obligations are properly accounted for and attainable. This system allows a refiner to claim the RVO benefit without unnecessary tracking by designating product for export. It also ensures appropriate accounting for fuels designated for export that are later used domestically by a party further.

## **CONCLUSIONS**

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

- reduce the regulatory volumes for cellulosic and advanced biofuels and the total RFS in 2011;
- reduce the proposed regulatory volumes of biomass-based diesel in 2012 and 2013;
- lower the proposed levels for advanced biofuels in 2012 (2.0 billion gallons) and the total RFS (15.2 billion gallons) consistent with the reduced volumes of cellulosic biofuels and biomass-based diesel; and

- select a regulatory value for cellulosic biofuel for 2012 that reflects actual supply in 2011.

Fuels and petrochemical manufacturers are certainly facing challenging economic and international competitiveness times. We look forward to working with the Administration to help sculpt a regulatory environment that provides the maximum protection to public health and welfare without destroying existing or obstructing the creation of new jobs in the United States and adversely impacting our nation's energy and manufacturing needs.

NPRA members are dedicated to working cooperatively at all levels to ensure an adequate supply of clean, reliable and affordable transportation fuels. NPRA members are focused on building a better tomorrow for the American people, continuing our efforts to improve the environment at the same time we manufacture vital products to strengthen our economy and improve the lives of families.