RFA RENEWABLE FUELS ASSOCIATION

30 Years of Leadership

August 11, 2011

VIA ELECTRONIC FILING
EPA Docket Center, EPA West Building (Air Docket)
Attention: Docket ID No. EPA-HQ-OAR-2010-0133
U.S. Environmental Protection Agency
Mail Code: *2822T*
1200 Pennsylvania Avenue, NW
Washington, DC 20460

VIA EMAIL
Julia MacAllister
Office of Transportation and Air Quality
Assessment and Standards Division
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor MI 48105
macallister.julia@epa.gov

Re: Comments of the Renewable Fuels Association; Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Proposed Rule 76 Fed. Reg. 38844; Docket No: EPA-HQ-OAR-2010-0133

Dear Ms. MacAllister:

The Renewable Fuels Association ("RFA") is pleased to submit the following comments in response to the U.S. Environmental Protection Agency's ("EPA") notice of proposed rulemaking regarding 2012 Renewable Fuel Standard ("RFS") required volumes. 76 Fed. Reg. 38,844 (July 1, 2011).

RFA is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of ethanol fuel by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA serves as the premier meeting ground for industry leaders and supporters. RFA's 300-plus members are working to help America become cleaner, safer, energy secure, and economically vibrant.

I. EPA should finalize the 2012 cellulosic biofuel standard at the high end of the proposed range and should reject any suggestion that future annual cellulosic biofuel standards be based on past production levels.

EPA proposes to reduce the cellulosic biofuels standard from the statutory level, based on an expectation that current industry production capacity is insufficient to meet the 2012 requirement. EPA proposes to set the reduced 2012 standard at a volume between 3.55 and 15.7 ethanol-equivalent gallons ("EEG"). RFA recommends that EPA finalize the 2012 standard at or near the top end of that range. Setting the standard at the high end of the range provides a strong policy signal that will support development of cellulosic biofuel technology. By setting the standard near the high end of expected industry production, EPA will provide certainty to projects under development and assist the industry in meeting the increased production requirements of the RFS2 over time. If EPA sets the 2012 standard well below what the industry is likely to produce in 2012, the urgency of project development will dissipate, making each subsequent annual target that much more difficult to achieve. EPA acknowledges in the Proposed Rule that "setting a standard below what the industry could reasonably achieve could strand investments and/or further delay the industry's ability to move toward the higher levels of commercial production envisioned in the statute." 76 Fed. Reg. 38,881.

During EPA's July 12 public hearing on the Proposed Rule, representatives from the oil and gas industry suggested that EPA should consider basing annual cellulosic biofuels standards on backward-looking actual demonstrated production volumes of cellulosic ethanol. RFA strongly urges EPA to reject this concept. Congress clearly intended for the RFS2 volume requirements to "pull" renewable fuels into the marketplace and stimulate innovation. Basing annual cellulosic biofuel requirements on past production levels does absolutely nothing to encourage the construction of new cellulosic biofuel capacity and discourages innovation.

II. EPA should maintain the overall 2012 RFS requirement of 15.2 billion gallons, but should lower the advanced biofuel standard by an amount commensurate to the reduction in the cellulosic biofuels requirement.

We agree with EPA's proposal to maintain the overall RFS at 15.2 billion gallons in 2012. However, based on the likelihood that volumes of advanced biofuels will be insufficient to meet the 2.0 billion EEG advanced biofuels standard, we believe EPA should reduce the advanced biofuels standard commensurate with the proposed

reduction in the cellulosic biofuels standard. Under CAA 211 (0)(7)(D)(i), EPA has the flexibility to reduce the advanced biofuel standard in the event that the projected volume of cellulosic biofuel is determined to be below the volume specified in the statute. From a policy perspective, such a reduction makes sense. The result of maintaining the advanced biofuels volume at the statutory level will likely be that sugarcane ethanol from Brazil will be shipped to the U.S., while U.S. grain-derived ethanol will be shipped to Brazil to meet that nation's fuel demands. These cross-shipments of ethanol will result in increased transportation costs and emissions, including greenhouse gases (GHG), from the transport of fuels that could be used in their countries of origin.

By proposing to waive the cellulosic biofuel requirement down to 3.55-15.7 million EEG, but simultaneously maintaining the advanced biofuel standard at 2.0 billion EEG, EPA is allowing only advanced biofuels to make up for the 484-496 million EEG shortfall in cellulosic biofuels. Currently, the only advanced biofuels being produced in commercial volumes are Brazilian sugarcane ethanol and biodiesel. Based on current market dynamics and the outlook for 2012, it is unlikely that these fuels will be available in sufficient quantities to meet the 2012 advanced biofuels standard.

In attempting to make the case that sugarcane ethanol imports will be sufficient to offset the proposed cellulosic biofuel shortfall, EPA cites 2012 ethanol import projections from the Energy Information Administration (EIA) and the Food and Agriculture Policy Research Institute (FAPRI). However, an examination of current Brazilian sugarcane ethanol production and export trends casts doubt on the validity of the EIA and FAPRI projections and calls into serious question whether 2012 sugarcane ethanol import volumes will be adequate to meet the advanced biofuels standard. Due to increased domestic ethanol demand in Brazil, volatile world sugar markets, and lower-than-expected Brazilian sugarcane and ethanol production, it is highly improbable that Brazil can or will export significant amounts of sugarcane ethanol to the United States in 2012.

The U.S. has imported just 27,910 gallons of ethanol from Brazil so far in the 2011 calendar year (January-May).[1] Assuming this pattern continues through the remainder of the 2011 calendar year, imports of Brazilian ethanol will total less than 70,000 gallons, or 0.01% of the amount of advanced biofuels required to offset

[1] USDA Foreign Agriculture Service, Global Agricultural Trade System (GATS) Online.

the 2012 cellulosic biofuel shortfall. It is also notable that EPA's data from EMTS shows that only 32.5 million advanced biofuel RINs have been generated in the first six months of 2011 (January-June), meaning the industry is on pace to generate 65 million advanced biofuel RINs for the entire 2011 calendar year.[2] This amount of advanced biofuel RINs would be insufficient to meet the 2011 advanced biofuel standard and would be equivalent to roughly 15% of the 2012 advanced biofuel RIN requirement.

Moreover, the shortage of Brazilian sugarcane ethanol has recently resulted in Brazil needing to import significant quantities of U.S. grain ethanol to satisfy domestic demand. Brazil imported nearly 23 million gallons of U.S. ethanol in 2010 and had already imported 126 million gallons in the first six months of 2011.[3] Ethanol output in Brazil has struggled recently to even keep up with domestic demand. Thus, it seems highly likely that any volume of sugarcane ethanol that is shipped from Brazil to the U.S. for RFS compliance would need to be offset by corresponding exports of grain ethanol from the U.S. to Brazil. The "shuffling" of ethanol sources in this scenario would be driven purely by RFS requirements and could result in significant economic and environmental inefficiencies. The additional GHG emissions and costs associated with transporting sugarcane ethanol from Brazil to the U.S., and in turn shipping offsetting volumes of U.S. grain ethanol to Brazil, could be avoided if EPA allowed any RIN-generating renewable fuel to offset the 2012 shortfall in cellulosic ethanol.

Further, it seems unlikely that biodiesel production volumes will exceed the RFS2 biomass-based diesel requirements of 1.0 billion gallons (1.5 billion EEG) in 2012. Because it is unlikely that sufficient supplies of advanced biofuels will be available to offset the reduction in the cellulosic biofuels standard in 2012, we believe EPA should exercise its authority to reduce the advanced biofuel standard *while keeping the overall RFS intact at 15.2 billion gallons*. As EPA acknowledges, doing so would increase the use of "conventional" renewable fuel such as ethanol from corn and grain sorghum. There is sufficient activated production capacity to accommodate an increase in the amount of "conventional" renewable fuel that could count toward the overall RFS from 13.2 billion gallons to a volume that would offset the reduction in

[2] RFS2 EMTS Informational Data. http://www.epa.gov/otaq/fuels/renewablefuels/compliancehelp/rfsdata.htm
[3] USDA Foreign Agriculture Service, Global Agricultural Trade System (GATS) Online.

the cellulosic biofuels standard (i.e., the amount of "conventional" renewable fuels that could count toward the overall RFS could be adjusted upward from 13.2 to 13.684-13.696 billion EEG and the advanced biofuel standard could be adjusted downward to 1.504-1.516 billion EEG). It is important to note that taking this approach ***would not preclude advanced biofuels*** from offsetting the cellulosic biofuel shortfall in the event that sufficient quantities are available; rather, it would allow any RIN-generating renewable fuel to do so. This approach would effectively provide obligated parties with the maximum flexibility to ensure the overall RFS requirement of 15.2 billion gallons is met.

There is ample capacity to ensure that grain ethanol could contribute toward offsetting the cellulosic biofuel shortfall in 2012. As of July 27, 2011, there were 209 installed ethanol facilities with the capacity to produce 14.7 billion gallons.[4] Further, current year-to-date production levels (January-May) suggest grain ethanol production in 2011 will be approximately 13.85 billion gallons[5], well above the level of "conventional" renewable fuels that would be allowed to generate RINs in 2012 if EPA were to reduce the advanced biofuels standard but leave the overall RFS intact at 15.2 billion gallons.

We agree with EPA that one of Congress' goals with the Energy Independence and Security Act of 2007 was to encourage the development of cellulosic and other advanced biofuels. However, it is also clear that Congress intended to maximize the use of all available domestic renewable fuels, in accordance with the overall RFS schedule, regardless of feedstock. Further, it is unlikely that Congress intended to encourage the additional GHG emissions and economic inefficiencies that would arise from importing large volumes of Brazilian sugarcane ethanol only to export offsetting volumes of U.S. grain ethanol to Brazil. Thus, we believe the most practical and certain option for meeting the 2012 RFS requirements established by the statute is to lower the advanced biofuel standard but maintain the total renewable fuel requirement.

---

[4] Renewable Fuels Association, Biorefinery Locations. http://www.ethanolrfa.org/bio-refinery-locations/. Accessed Aug. 1, 2011.
[5] Based on Jan.-May average of 903,700 barrels/day of ethanol production. Energy Information Administration. http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=M_EPOOXE_YNP_NUS_MBBLD&f=M. Accessed July 28, 2011.

Finally, we note that EPA has inappropriately requested comment on whether EPA should waive or reduce the total RFS to a lower volume. EPA's authority to waive the overall RFS volume is addressed and circumscribed by the statute to very limited circumstances. Specifically, CAA § 211(0)(7) provides that EPA can waive or partially waive the RFS volume based on a petition or on the Administrator's own motion only if EPA determines, after public notice and opportunity for comment, that implementation of the RFS volumes would "severely harm the economy or environment of a State, a region, or the United States" or based on a determination that "there is an inadequate domestic supply." 42 U.S.C. § 7545(o)(7). EPA has made no such proposed determinations in this rulemaking nor is there any evidence in the record to suggest that the facts are present that would support such a determination in the first instance. This annual volume-setting rulemaking for the types of renewable fuels to be used to meet the RFS cannot be used in lieu of the waiver proceedings required under CAA § 211(0)(7) to support a waiver of the total RFS volume.

III. Because the proposed "small refiner exemption" actions are inconsistent with the statutory requirements and the RVO requirements, EPA should take appropriate steps to ensure that the total RVO is maintained for both 2011 and 2012.

A. Section 211(o)(7) provides the only waiver authority in the statute for RFS.

Congress established in § 211(o)(7) a procedure for waiving the RFS volumes. Specifically, a waiver of the RFS can only be accomplished if, after public notice and opportunity for comment, the Administrator finds that implementation of the RFS volumes would "severely harm the economy or environment of a State, a region, or the United States" or that "there is an inadequate domestic supply." 42 U.S.C. § 7545(o)(7). Notwithstanding this clear language, in May 2011, EPA granted an extension of the exemption for two years to 13 small refineries without releasing their names or making any § 211(o)(7) findings. The extension was based on a revised DOE study, which was conducted at the request of Congress and based on petitions by several small refineries. The DOE revised study was completed in March of 2011 and found that the RFS would have disproportionate economic impacts on 13 out of 18 small refineries reviewed.

In this proposed rule, EPA states that the "proposed standards for 2012 are shown in Table I.A.3–2 and include the adjustment for exempt small refineries (which constitute about 2.5% of both gasoline and diesel pools." 76 Fed. Reg. 38,848. EPA goes on to state that the

gasoline produced by exempted small refiners is 3.27 billion gallons, which works out to 327 million gallons of lost ethanol blending. 76 Fed. Reg. 38,858. EPA granted a waiver for these refineries in May but did not provide notice or an opportunity for comment on that action and importantly did not reallocate the renewable fuel volume obligations to other parties that would remain obligated. Thus, EPA effectively issued a § 211(o)(7) waiver without following the proper procedures, and EPA has provided no indication as to why it would believe that an effective waiver of the total RFS volume could be accomplished in this manner. Where Congress speaks to an issue directly, such as supplying a procedure for reducing the overall RFS volume as it did in § 211(o)(7), that is an indication that other authorities do not exist to accomplish the same result (*i.e.,* to waive the overall volume requirements).

EPA indicates in the proposal that for 2012, it will take into account any exemptions issued prior to the issuance of this final rule but that it may also issue small refiner exemptions after the rule is final and that those exemptions will not affect the obligations of other refiners. EPA cites the need for certainty in RFS obligations as supporting this policy, stating that the Act is "best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements." 76 Fed. Reg. 38,859. EPA goes on to indicate that periodic revisions to the standards to reflect waivers to small refiners would "introduce an undesirable level of uncertainty." *Id.* RFA agrees that certainty is important, but it also believes that the overall RFS level constitutes Congress' paramount goal and that a series of small refiner exemptions could amount to significant volumes of renewable fuels *not* being sold as required by the Act. The preamble to this rule, noting the 3.27 billion gallons that will not be blended as a result of the 2.5% waiver evidences that concern.

EPA can accomplish the goal of certainty without creating an impermissible waiver. For example, EPA could set a deadline for small refiners to seek an exemption, such as requiring them to submit exemption requests for the following year during the public comment period on the proposed RFS for each subsequent year. If EPA determines that it is going to grant such exemption requests, it can provide an opportunity for public input on them prior to finalizing the RVOs, thus ensuring a transparent process that also provides certainty to obligated parties. This would allow EPA to create final RVOs that are consistent with the overall RFS mandates.

B. EPA's 2011 small refiner exemptions should be made up in 2011 or in 2012 to ensure that the integrity of the RFS is maintained.

EPA's granting of small refinery exemptions in mid-2011 acted as a waiver of the RFS that was not permitted by the statute. The Agency should ensure that the volume that it waived in 2011 is made up either this year or next so that the overall integrity of the RFS is maintained. There is no indication that a shortage of ethanol existed to meet the RFS volumes and therefore, EPA should ensure that the volume effectively waived for 2011 by the May action is compensated for in this rulemaking.

IV. RFA opposes EPA's proposed technical amendment to the definition of "annual cover crop" (§80.1401) and encourages the agency to maintain its current definition.

EPA does not clearly justify the need to revise the definition of "annual cover crop" and provides no information on how it would accurately determine whether there is "no existing market to which [the cover crop] can be sold except for the use of the feedstock." Accordingly, RFA is concerned that an arbitrary revision of the definition may preclude biofuels from certain feedstocks from qualifying as advanced biofuels. Further, such a definitional change could result in the mischaracterization of the GHG effects of certain biofuel feedstocks that are known to have very low climate impacts. As an example, barley is commonly used as livestock feed. But in many cases, barley is grown purely as a cover crop, with the primary objectives of reducing tillage and dust, enhancing pest control, improving water penetration, and providing nitrogen to the soil. In one case, cultivation of barley as a cover crop was intended *specifically* as feedstock for biofuel production and the land likely would not have produced a winter cover crop at all if not for the intended use as biofuel feedstock. EPA was correct to previously assume that annual cover crops would have little or no land use impact. This is because the primary utility of the land on which cover crops are planted is production of a different crop. The potential existence of alternative markets for cover crops will vary regionally and over time, making it infeasible for EPA to make accurate determinations of whether the cover crop may have had market opportunities other than as a biofuel feedstock.

Because of these concerns, RFA encourages EPA to withdraw the proposed amendment to the definition of "annual cover crop" and maintain the existing

definition. Alternatively, if EPA finalizes the proposed new definition of "annual cover crop," the agency should also create a simple process for renewable fuel producers to demonstrate the cover crop feedstock they are using had no other market opportunities (i.e., biofuel producers using cover crop feedstocks should not be required to undertake the full petition process to secure approval of a new pathway).

V. RFA generally supports EPA's proposed technical amendment to §80.1431 providing limited flexibility to allow certain RINs that were improperly generated to be transferred and used for compliance. However, to improve flexibility and efficiency, RFA is recommending slight modifications to the proposed criteria for establishing limitations on the improperly generated RINs that may be transferred and used for compliance.

EPA proposes to amend § 80.1431 to allow certain RINs that were improperly generated to nevertheless be transferred and used for compliance. We concur with EPA that allowing such flexibility "…could reduce disruptions to the RIN market." However, we remain concerned that *liability* continues to be imposed on good faith purchasers for violation of the RFS, with the concomitant exposure for penalties under the Clean Air Act. We appreciate the desire to establish incentives for "parties that generate, transfer and use RINs to comply with the regulations," but the "strict liability" approach embodied in the regulations is overly punitive. EPA's proposed change provides partial relief and is appropriately limited to good faith purchasers of RINs who did not have actual or constructive knowledge that the RIN was improperly generated. As good faith purchasers who acted reasonably, there is no fault attributable to the obligated parties in this type of situation. The proposed flexibility would enable timelier and more efficient resolution of RIN invalidity issues but unfortunately, leaves the purchaser still liable for potential enforcement for noncompliance with the rules, notwithstanding good faith efforts to comply.

With respect to the specific criteria for obtaining the proposed flexibility, we agree with EPA's first two proposed limitations requiring that the improperly generated RINs have resulted from an inadvertent error, and that the improperly generated RINs have the correct D code. However, in regard to the third proposed limitation (which establishes a fixed time period for correcting the information submitted to EMTS and retiring an equivalent number of excess RINs generated as a result of the error), we encourage EPA to consider an 18-month time period

rather than the proposed 60-day time period. This longer time period is suggested because the renewable fuel producer's attestations for the prior year are due by May 31 each year. An 18-month period would enable remedial flexibility in the event that invalid RINs are identified during the audit of the renewable fuel producer's RFS compliance records.

Regarding the fourth proposed limitation, which establishes that the proposed flexibility is applicable only to a fixed percentage of improperly generated RINs, there is no reason to limit the proposed flexibility in this way. Instead, EPA should consider providing itself with the discretion to determine when invalid RINs may be used to satisfy compliance obligations. EPA has invited comment on limiting the availability of this flexibility to situations where the number of excess RINs generated for a particular batch exceeds the number of RINs that should have been generated by no more than 2%. Such a strict limitation would make the intended flexibility unavailable to affected parties in many cases. Further, there can be significant variability in the size of renewable fuel batches. Thus, if the batch is large, a percentage-based cap could allow a large number of improperly generated RINs to qualify for this flexibility; conversely, a percentage-based cap would create challenges for small batches of renewable fuels that may have been associated with improperly generated RINs. There is no reasonable equitable basis, however, for granting remedial flexibility for a particular number of RINS in a large batch while denying such flexibility for the same number of RINs simply because the batch for which they were utilized was small. Indeed, the users of such RINs would be indistinguishable.

EPA's fifth proposed limitation suggests that the proposed flexibility could not be repeatedly used by a renewable fuel producer. The agency invited comment on the possibility of establishing a limit on the number of times this flexibility could be used within a compliance period by a given RIN generator. RFA believes setting such a limit would restrict the ability of EPA to respond to certain scenarios where there is justifiable rationale for providing greater or lesser access to the proposed flexibility than a fixed limit would allow. Instead, we recommend that EPA address potential excessive use of the flexibility on a case-by-case basis. This is particularly the case where a good faith error could be left undiscovered for some period of time, meaning that upon discovery the user of the RINs would have no ability to "undo" what the Agency would have already determined to be a good faith error.

Indeed, the fourth and fifth limitations appear simply to constitute evidence that could be used to determine whether the error made was truly in good faith. Since EPA is making that determination separately, the percent of the batch and any history of improper RIN use seem to be subfactors that provide an indication of whether there was a good faith mistake. Accordingly, we believe these limitations should be eliminated and at most should be cited as factors in determining whether the RINs were generated and/or used in good faith.

Overall, RFA is supportive of allowing flexibility with regard to the use of improperly generated RINs for compliance. EPA should revise the provisions, however, to focus on the good faith nature of the actions at issue and not impose limitations that treat similarly situated parties differently.

VI. EPA should reconsider its stance on the interpretation of the RIN transfer date. The agency should use this rulemaking as an opportunity to craft a reasonable technical amendment that satisfies all affected parties. Failing any action to reconsider its current position, EPA should provide enforcement discretion for a period of six months to allow affected parties to come into compliance.

The RFA recently received notification from EPA that its joint request with the American Petroleum Institute (API), National Petrochemical and Refiners Association (NPRA) and Growth Energy for RIN transfer date flexibility was denied. We ask the agency to reconsider this position. If EPA's current position stands and the requested flexibility is not granted, both obligated parties and renewable fuel producers will be required to undertake costly and burdensome changes to existing accounting systems. The additional expense of making these changes would far outweigh any perceived value to the RFS2 program associated with potentially improved precision around the actual date of title transfer. However, if the agency continues to believe that this cost to the industry is justified, the agency should provide for a transition policy that would allow six months for biofuel producers and first purchasers to update their systems to meet the requirements that are imposed by this interpretation of the regulations. Furthermore, to ensure consistency with other provisions of the RFS2, EPA should either strike RFS2 Q&A 10.6 in its entirety 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* ***bio****fuel. 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.*

RFA again encourages EPA to reconsider its stance on the RIN transfer date issue and use this rulemaking as an opportunity to craft a reasonable technical amendment that satisfies all affected parties. The coalition of RFA, API, NPRA and Growth Energy stands ready to assist the agency in any way possible to resolve this important issue. Alternatively, EPA should grant the enforcement discretion requested herein.

VII. RFA supports moving the deadline for submission of production outlook reports to later in the year (§80.1449(a)), but believes the proposed June 1 deadline is still too early.

We agree with EPA that the accuracy of renewable fuel production projections tends to increase the closer those projections are made to the following calendar year. Thus, we recommend extending the deadline to August 31 or as late as possible to still ensure the information is available to use in the development of the final rulemaking setting the RFS standards for the following year.

VIII. RFA continues to believe the 20% RIN rollover cap is excessive and threatens to undermine the normal functioning of the renewable fuels market. We again encourage EPA to consider lowering the cap on the amount of RINs that may carry forward into the next compliance year.

Current regulations allow the obligated party under RFS2 to use RINs generated in the previous compliance year to meet up to 20% of its current compliance year renewable volume obligation. RFA believes EPA took great liberty in constructing the provisions that allow such a substantial surplus of RINs to carry forward to the next compliance year. The Energy Policy Act of 2005 that established the RFS1 clearly intended for RINs to apply only to the compliance year in which the credit was generated and the Energy Independence and Security Act of 2007 that expanded the RFS was silent on the issue of the life of RINs. The 20% RIN rollover allowance is excessive and permits obligated partied to bank amounts of RINs that are substantial enough to distort and manipulate the renewable fuel market under certain conditions. EPA itself has recognized that "When renewable fuel volumes are being produced that exceed the RFS2 standards, the rollover issue could undermine the ability of a limit on credit life to guarantee an ongoing market for renewable fuels." 75 Fed. Reg. 14,734. Thus, RFA again encourages EPA to consider lowering the RIN rollover cap to some more reasonable level that doesn't threaten to disrupt the normal functioning of the renewable fuels marketplace.

IX. The proposed changes to § 80.1450(b)(1)(vi) should not be adopted because they are unnecessary, burdensome, and untimely.

EPA proposes to revise § 80.1450(b)(1)(vi) of the regulations to require facilities that are exempt from the 20% greenhouse gas reduction requirements to submit evidence to the Administrator regarding their eligibility for these grandfathering provisions. The grandfathering provisions apply to facilities that commenced construction before December 20, 2007 and completed construction before that date in 2010 or that commenced construction between December 20, 2007 and December 31, 2009, and are fired with natural gas, biomass, or a combination thereof. The current provision required registration information for such facilities to be submitted and accepted by EPA by July 1, 2010 or 60 days prior to the generation of RINs, whichever date comes later and was limited to evidence of contracts with construction and other companies and the require air permits from

EPA or other permitting authorities for construction and operation. 40 C.F.R. § 80.1450(b)(vi).

Now, EPA proposes to add to these requirements evidence that "construction was not discontinued for a period of 18 months after commencement of construction" or that construction was completed by the required date depending on which exemption is being claimed.

EPA should not adopt these proposed changes to require submittal of evidence of qualification in registrations for several reasons. First, all (or virtually all) facilities that would be claiming use of the grandfathering provisions has already begun generating RINs and therefore have already successfully registered. The terms of the provision require registration by July 1, 2010 or within 60 days of generating RINs and for the facilities in question, those dates have passed and registrations have been issued. Thus, the amendment of the provision would have no effect for these facilities. Second, as a practical matter, one of the provisions seems to require facilities to prove a negative – i.e., that construction was not discontinued. It is unclear how one proves that there was not a lack of activity. Third, the requirement to submit additional evidence now after registrations are issued that construction was completed by the specified dates seems unnecessary given that operation itself (and production of fuel) would be evidence of such completion.

If EPA questions whether a particular facility rightfully claimed use of the grandfathering provision, it can request information from that facility, but it is unnecessary, overly burdensome (and in creating evidence of the absence of a stoppage of construction, unreasonable) to require facilities to submit it, particularly where the requirement is being created after the registrations have already been issued. Accordingly, EPA should not adopt these additional requirements, particularly at this late date.

X. RFA strongly encourages EPA to re-evaluate and refine the indirect land use change (ILUC) analysis that was conducted for the RFS2 Final Rule, taking into account newly available studies, modeling results and data.

EPA correctly recognized in the RFS2 final rule that "…no existing model comprehensively simulates the direct and indirect effects of biofuel production both domestically and internationally, and therefore model development is still evolving." 75 Fed. Reg. 14,764. Further, the agency states that "…as the state of scientific knowledge continues to evolve in this area, the lifecycle GHG assessments for a variety of fuel pathways will continue to change. Therefore, while EPA is using its current lifecycle assessments to inform the regulatory determinations for fuel

pathways in this final rule, as required by the statute, *the Agency is also committing to further reassess these determinations and lifecycle estimates* (emphasis added)." 75 Fed. Reg. 14,765.

In keeping with its obligation to reassess lifecycle GHG estimates based on advances in the science, EPA should consider updating its lifecycle GHG analysis (particularly the ILUC estimates) based on the results of several new studies that have been published subsequent to EPA's release of the RFS2 final rule. A recent study by Wang *et al.* that integrates GREET model analysis of corn ethanol direct GHG emissions with GTAP model analysis of indirect GHG emissions concluded that "…at present and in the near future, using corn ethanol reduces greenhouse gas emission by more than 20%, relative to those of petroleum gasoline."[6] The Wang *et al.* paper recognized technological improvements in corn ethanol production, as documented by Mueller[7], and integrated ILUC results from a significantly improved version of the GTAP model, as documented by Tyner *et al.*[8] RFA strongly encourages EPA to consider this new research and make the accordant changes to its own analysis to reflect documented improvements in corn ethanol production efficiency and the best available science on ILUC. While the updated ILUC modeling approach published by Tyner *et al.* still falls short of providing acceptable levels of certainty and empirical validation, it represents a clear advance in the science, and as such, EPA is obligated to consider and respond to the work.

Further, we encourage EPA to consider the results of recent studies attempting to validate the existence and magnitude of ILUC using empirical approaches. A recent study by Kim & Dale highlighted the problems associated with conventional ILUC methodologies by stating, "Current practices for estimating indirect land use change (iLUC) due to United States biofuel production rely on assumption-heavy, global economic modeling approaches. Prior iLUC studies have failed to compare their predictions to past global historical data."[9] Kim & Dale used an empirical approach

[6] Wang, M.Q., Han, J., Haq, Z., Tyner, W.E., Wu, M., Elgowainy, A. Energy and greenhouse gas emission effects of corn and cellulosic ethanol with technology improvements and land use changes. Biomass and Bioenergy 35 (2011) 1885-1896.
[7] Mueller S. 2008 National dry mill corn ethanol survey. Biotechnol Lett; May 2010; online publication. doi:10.1007/s10529-010-0296-7.
[8] Tyner, W.E., Taheripour, F., Zhuang, Q., Birur, D., Baldos, U. Land Use Changes and Consequent CO2 Emissions due to US Corn Ethanol Production: A Comprehensive Analysis. July 2010. Published for Argonne National Laboratory.
[9] Kim, S., Dale, B.E. Indirect land use change for biofuels: Testing predictions and improving analytical methodologies. Biomass and Bioenergy 35 (2011) 3235-3240.

to detect evidence for ILUC that might be catalyzed by U.S. biofuels production. According to the study, "Results show that biofuel production in the United States from 2002 to 2007 is not significantly correlated with changes in croplands for corn (coarse grain) plus soybean in regions of the world which are corn (coarse grain) and soybean trading partners of the United States." The authors state that the results may be interpreted to suggest that "biofuel production in the United States through 2007 (the last date for which information is available) probably has not induced any indirect land use change." A similar empirical approach used by scientists at the Department of Energy's Oak Ridge National Laboratory resulted in a finding that "…minimal to zero indirect land use change was induced by use of corn for ethanol over the last decade."[10]

Again, we encourage EPA to honor its commitment to reassessing its own lifecycle GHG analysis based on advances in the science. The agency should evaluate the new studies referenced herein and develop plans to revise its lifecycle GHG analysis to reflect the best available science.

* * *

Thank you for the opportunity to comment. We look forward to working with EPA to ensure the continued success of the RFS2 program.

Sincerely,

Bob Dinneen
President

[10] Kline, K., Oladosu, D. Empirical Data and Decomposition Analysis of U.S. Corn Use for Ethanol Production from 2001-2008. Presentation to California Air Resources Board LCFS Expert Workgroup. October 2010. Available at: http://www.arb.ca.gov/fuels/lcfs/workgroups/ewg/101410decomposition.pdf