

Shell Oil Products US (SOPUS), Shell Deer Park Refining, Shell Trading US Company (STUSCO), and Motiva Enterprises LLC (Motiva) Comments on EPA's Proposed RFS2 Regulations. 74 Fed. Reg. 24904 (May 26, 2009)
September 25, 2009

I. January 1, 2010 Implementation is Infeasible

EPA should provide the affected industries adequate lead time to implement these complicated new rules. There simply is not enough time between now and January 1, 2010 for implementation.

There is not sufficient time before January 1, 2010, for foreign and domestic renewable fuel producers to satisfy the requirements for registration under proposed section 80.1450. Under this provision, producers are required to provide EPA a list of feedstocks capable of being used by each facility, a description of the facility's renewable fuel production capacity, a list of the facility's process energy sources, and an independent third party engineering review and written verification of the information. This will likely take renewable fuel producers significant time to implement.

Renewable fuel producers will require considerable time to put in place systems to ensure that the feedstocks for their products meet the definition of "renewable biomass." Under proposed section 80.1426, RINs must be generated for any fuel that meets the definition of "renewable fuel" and may not be generated for fuels that do not meet the definition of "renewable fuel." Thus for each batch of fuel produced, the producer must determine whether the fuel meets the definition of "renewable fuel." To do so requires the producer to determine whether the feedstocks for the fuel meet the definition of "renewable biomass." This in turn will require most renewable fuel producers to determine whether the feedstock was grown on land that meets the definition of "existing agricultural land." See 80.1426(d) and 80.1401. It will take the renewable fuel producers substantial time and effort to make these determinations. It will also take time to put in place the processes necessary to ensure that the fuels that are produced continue to meet these requirements, and the processes to ensure that adequate records are generated and maintained to meet the recordkeeping requirements under sections 89,1451(b) (e.g., "records that serve as evidence that the land from which the feedstock was obtained was continuously and actively managed or fallow, and nonforested, since December 19, 2007.") It is simply not possible to comply with these registration requirements and put in place the necessary processes between now and January 1, 2010.

Obligated parties will need time to put in place systems to track the four (or more) different kinds of RINs that must be accounted for under this rule. Indeed, at this point, the obligated parties do not even know for certain whether they will have to account for only four types of RINs or six given the uncertainty, created by EPA's analysis in this NPRM, that surrounds the ability of most vegetable oil based

biomass-based diesel fuels to meet EISA's greenhouse gas emission reduction requirements.

Additional time is needed to implement the biomass-based diesel program given that it is unclear whether most vegetable oil based fuels will meet EISA's greenhouse gas emission reduction requirements. EPA discusses several ways that the Agency might deal with this problem, but at this time, the obligated parties have no certainty and therefore no ability to put in place plans to attempt to comply with the biomass-based diesel requirement. EPA needs to provide this certainty, and then provide the industry time to put in place plans for compliance.

It is not even clear at this time whether refiners and importers will be the obligated parties, or whether the obligation will be shifted downstream to parties who are better able to make decisions concerning how much, and which, renewable fuels to blend. EPA needs to provide certainty to the regulated community on this critical issue, and time sufficient for the obligated parties to put into place plans for compliance.

Although EPA has proposed not to waive the cellulosic renewable fuel requirement for 2010, EPA has not adequately evaluated whether there will in fact be 100 million gallons of production of cellulosic ethanol in 2010. We are doubtful that there is in fact 100 million gallons of existing production capacity. Recent news articles about Cello Biofuels are counter to the EPA's assessment in the NPRM. EPA should do a thorough analysis of the availability of cellulosic ethanol and adjust the cellulosic, advanced, and renewable standards consistent with existing cellulosic production capacity. Until this analysis is done, the obligated parties do not have certainty regarding the actual size of the obligation. EPA needs to provide the obligated parties this certainty, and sufficient time to put into place plans for compliance.

In sum, at this point, the only workable option for implementation of the program is January 1, 2011, or later. Even if EPA is able to promulgate a final rule before January 2010, it will take until 2011 to accomplish the registrations that are required and to put in place the systems and plans that are necessary for compliance. EPA should not attempt to implement the program in mid-2010. A mid-2010 start date will not provide the regulated parties sufficient time to accomplish the registrations and put plans in place for compliance. Moreover, starting the program in mid-2010 will only add additional complexities (e.g., additional RIN types to distinguish RFS 1 RINs from RFS 2 RINs) and make a smooth transition to the RFS 2 rules nearly impossible.

Additionally, EPA should delay the start of the program to January 1, 2012 if the rules cannot be promulgated by the end of 2010. In the meantime, if EPA delays the implementation of RFS2 but is intent on increasing the required renewable fuel volumes to implement EISA during 2010, EPA should use the existing RFS rules with the EISA renewable fuel volumes (adjusted down for

biomass-based diesel and cellulosic), similar to the way that EPA implemented the RFS 2 requirements in 2009.

II. Comments on Specific Provisions of the Proposal

a. 80.1401 Definitions

EPA defines the term "Co-processed" to mean "that renewable biomass was simultaneously processed with petroleum feedstock in the same unit or units to produce a fuel that is partially renewable." We support EPA's proposed definition. As we understand it, this would mean that "serial batch processing in which 100% vegetable oil is processed one day/week/month and 100% petroleum the next day/week/month could occur without the activity being considered "co-processing."

b. 80.1403 Which fuels are not subject to the 20% GHG thresholds?

In section 80.1403, EPA proposes to grandfather the volume of renewable fuel produced at facilities that were under construction as of the date of EISA's enactment from EISA's 20 percent greenhouse gas emission reduction requirement. In the preamble, EPA also requests comment on whether the grandfathering provision should cease to apply in the future. EPA should limit the exemption to the volumes of fuels produced at qualifying facilities as of the date of enactment, and EPA should sunset the exemption. Both of these limitations to the exemption are consistent with congressional intent. Congress clearly intended the renewable fuels provisions of EISA to result in greenhouse gas emission reductions. It is consistent with that intent to limit the exemption to the volumes produced at the date of enactment. If it is not limited, instead of improving existing facilities and building new more efficient facilities to produce biofuels with greater greenhouse gas reduction benefits, renewable fuel producers may simply modify existing facilities to produce greater volumes of the least performing biofuels. Sunsetting the grandfathering provision is also consistent with congressional intent as it will ultimately encourage investments in the most efficient facilities resulting in better performing biofuels and greenhouse gas reduction benefits.

c. 80.1405 What are the renewable fuels standards?

In section 80.1405, EPA proposes to implement the biomass based-diesel standard in 2010. Rather than simply start with the 2010 EISA requirement, however, EPA proposes to combine the 2009 and 2010 requirements. EPA should not combine these requirements. By imposing the 2009 volume requirements in 2010, EPA would be imposing a retroactive requirement and immediately put virtually all obligated parties in an immediate compliance deficit.

This is not consistent with longstanding legal principles, or principles of basic fairness, that prohibit the government from promulgating ex post facto laws.

Imposing a combined multi-year standard is contrary to the plain language of EISA. By combining the 2009 and 2010 standards, EPA is effectively escalating the standard above 1 billion gallons in advance of the schedule that Congress established without considering the factors that Congress specified. The law expressly provides that the volume requirements for the years 2009 through 2012 "shall" be determined in accordance with the table in the law, which specifies that the volume mandate in 2010 is 0.65 billion gallons, not 1.15 billion gallons as EPA proposes. Moreover, the law specifies that EPA can only adjust the volumes for years "after the calendar years specified in the table" and only after the factors specified in the law are taken into account. EPA's proposal to combine the 2009 and 2010 volume mandates for 2010 is clearly contrary to the express intent of Congress. Combining the 2009 and 2010 standards also makes little sense as a practical matter since it results in a standard of 1.15 billion when Congress only envisioned a 1 billion gallon mandate through at least 2012. Thus, by combining the 2009 and 2010 standards, EPA is creating a situation where unnecessary blending capacity is required for a one-year period. The same would be true if EPA attempts to combine the 2010 and 2011 standards if the program starts in 2011.

Notwithstanding our objections to EPA's proposed approach, if EPA postpones implementation of the program until January 1, 2011 and combines the 2010 and 2011 volume mandates, EPA should follow the same logic and allow obligated parties to utilize RINs generated from biodiesel or renewable diesel (RR=15 or RR=17) in 2009 and 2010. By proposing to implement this program on January 1, 2010, EPA is creating a great deal of uncertainty and causing some obligated parties to attempt to acquire biodiesel-specific RINS now in an effort to comply. EPA should not penalize these obligated parties by later limiting their use of such RINs.

d. 80.1406 To whom do the renewable volume obligations apply?

Under the RFS 1 rules, the obligation was imposed on refiners and importers based on the amount of gasoline that they produce or import. EPA should move the obligation downstream to blenders who have control over the amount and type of biofuel blended. Shifting the burden downstream is appropriate in light of the complicated four mandate structure of EISA, since it is only the downstream blender that has the ability to decide which biofuels to blend. Shifting the obligation downstream also addresses the issue of state ethanol blending laws, which have the potential to interfere with the ability of obligated parties to comply. These state laws are intended to require suppliers to make available to downstream parties both ethanol blended and non-blended fuels. Thus, if the economics of ethanol are unfavorable, the downstream party, who is not

obligated under the current rules, may choose not to blend ethanol, which would then result in the loss of RINs that could be used for compliance.

More specifically, we recommend that the obligated party be the party that has title to gasoline or diesel fuel at the time that it enters the truck at a terminal rack (the typical point of taxation). To the extent that a party downstream of that point adds ethanol or biodiesel to the gasoline or diesel, the obligation for that volume of gasoline or diesel fuel should transfer to the party that blended the ethanol or biodiesel and be subtracted from the obligation of the party that held title to the gasoline or diesel fuel as it enters the truck at a terminal rack.

In the preamble, EPA recognizes that placing the obligation on refiners and importers is not workable under the EISA structure, and suggests that allowing renewable fuel producers to separate RINs and sell them directly to obligated parties may be a way to address this problem. We disagree. Allowing the renewable fuel producers to separate the RINs could result in hoarding of RINs by the producers and take away the economic incentive for the blender (who could either use or sell the RIN) to blend the renewable fuel.

e. 80.1407 How are the renewable volume obligations calculated?

Section 80.1407 details which fuels are included and which are excluded from an obligated party's obligation. Consistent with EISA and the RFS1 rules these provisions exclude exported gasoline from the obligation. In an apparent oversight, however, section 80.1407 fails to exclude exported distillate fuels from the obligation. EISA requires EPA to exclude such fuel from an obligated party's obligation, as EISA is limited to transportation fuels used in the United States.

In addition, similar to the provisions that apply to gasoline fuels, EPA should include provisions in this section specifying which types of distillate fuels are included, and excluded from the obligation. And, EPA should clarify that gasoline and distillate volumes produced at transmix facilities do not incur an obligation since such fuel was already accounted for and is part of the obligation of refiners and importers.¹ To not exclude such fuels produced at transmix facilities would be to double count such volumes.

f. 80.1415 How are equivalence values assigned to renewable fuel?

In section 80.1415, EPA proposes to assign all renewable fuels an equivalence value of 1.0. We disagree with this approach, and urge EPA to recognize equivalence values based on the greenhouse gas emission reduction performance of the various renewable fuels. By doing so, EPA will be creating an

¹ In the event that the obligation remains with the refiners/importers. In the event that EPA moves the obligation downstream to the renewable fuel blenders, the volumes of gasoline and diesel produced by transmix processors would be captured in the blender's obligation.

additional incentive for the use of the best performing biofuels and advance Congress' intent for the RFS2. At a minimum, EPA should carry forward the approach to equivalence values that applied in the RFS1 rules, i.e., fuels were assigned equivalence values based on their energy content. Equivalence values are necessary to create a level playing field for fuels, within and across categories, and as EPA explained in the RFS1 rules, recognizing such equivalence values is consistent with congressional intent.

g. 80.1416 Treatment of parties who produce or import new renewable fuels and pathways

Section 80.1416 of the proposed rules includes a process for renewable fuel providers to establish pathways for new renewable fuels. We support this concept. However, EPA should ensure that the process is expedited. In particular, EPA should include time limits for the Agency to make a determination that a petition is complete, and for EPA to act on such a petition.

In addition, EPA should expand the concept to allow any renewable fuel producer to petition EPA to establish a unique greenhouse gas emissions performance factor for their fuels. This is particularly important where establishment of a unique performance factor would make the difference regarding the classification of a fuel (e.g., as a general renewable fuel or advanced renewable fuel). Beyond that, it would be beneficial to create an incentive for producers to innovate and improve the performance of their fuels especially if EPA adopts the suggestion to establish equivalence factors based on the greenhouse gas performance of the fuels. If EPA is going to include indirect land use change in the calculation of greenhouse gas emissions performance, EPA's process should also allow renewable fuel producers to establish unique factors for indirect land use change effects to encourage the use of best practices.

h. 80.1425 Renewable Identification Numbers (RINS)

We generally support EPA's approach of maintaining the existing RIN structure, but modifying the D code to identify the categories of renewable fuels. We are concerned, however, about the possibility of this system growing in complexity if EPA attempts to implement the RFS2 program mid-year, or if obligated parties become responsible for averaging various biodiesel fuels to meet the Act's GHG threshold. EPA should avoid these complexities by making the program effective on January 1, 2011 (or later), and make the biodiesel producers or importers responsible for meeting the GHG reduction thresholds.

In addition, due to the changes in the program, it no longer seems that the RR code is necessary unless EPA adopts an equivalence value in the final rule.

i. 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

Consistent with the RFS1 rules, EPA appropriately requires that RINs be assigned to all fuels produced that meet the definition of “renewable fuels” and requires producers to provide obligated parties with RINs with the renewable fuels. Also consistent with EISA, EPA correctly prohibits renewable fuel producers from assigning RINs to fuels that do not meet the requirements of EISA’s definition of “renewable fuel” and requires producers to document that the renewable fuel does, in fact, not meet the definitions if no RINs are assigned. This system is necessary to ensure that Congress’ intent is followed and to also avoid the potential withholding of RINs by renewable fuel producers.

Definitions of the various renewable fuel pathways, particularly the biomass-based diesel pathways, require further clarification. EPA should establish separate pathways for biomass-based diesel that are produced from non-food crops such as jatropha and camelina, since these fuels should be accorded a more favorable indirect land use change factor.

EPA should further clarify in the rules how an importer assigns RINs to the renewable content in imported transportation fuel (section (d)(1)(ii)) as data on the origin of the fuel and the data needed to determine the proper D code are not likely to be available to the importer. As difficult as it may be to properly determine the D code for renewable fuels imports, it will be significantly more difficult when it is imported as a portion of blended transportation fuel.

EPA has set out that ethanol from starch with “process heat derived from biomass” (Table 1, first row) should receive a D code of 4, which is consistent with the definition of “cellulosic ethanol” that was found in RFS1. However, in section 80.1427 (a)(3)(ii), the EPA is allowing RINs generated in 2009 with D code of 1 under RFS1 to be “deemed equivalent” to D=1 RINs in EISA. This should be changed to make the equivalence to D=4 RINs in EISA since 20% of the obligation could be met with 2009 RINs which don’t truly qualify as “cellulosic” as defined under RFS2. In our estimate, most or all of the 2009 “cellulosic” RINs actually came from ethanol plants that used some form of waste heat from biomass while using starch as the feedstock. We think it is best to let any true cellulosic ethanol RINs generated in 2009 be verified by petition to EPA.

- j. 80.1427 How are RINs used to demonstrate compliance & 80.1428 General requirements for RIN distribution

Sections 80.1427 and 1428 set forth the rules for RIN usage and distribution. Under the RFS1 rules and the proposed rules, any party that registers with EPA can buy and sell RINs. This open trading system has benefits in terms of providing transparency and liquidity in the RIN market. However, there is a closely related issue – allowing non-obligated parties to separate RINs from renewable fuels – that has had some unintended consequences that could undermine program implementation. In particular, several states have now

enacted laws that require fuel suppliers to provide marketers with unblended fuel so that the marketers, who are not obligated parties, can blend ethanol into the fuel if they choose to do so, and capture the RIN. If the economics of renewable fuel blending are not favorable, these non-obligated parties may not blend renewable fuels at all. EPA should address this issue by re-aligning the obligation with the ability to separate RINs. If a party is able to separate the RIN from the renewable fuel, the party should also have the corresponding obligation for the gasoline and diesel fuel into which the renewable fuels were blended.

Although we disagree with implementation in 2010, and the imposition of retroactive requirements, as discussed above, if EPA does so, we generally agree with EPA's approach towards 2008 and 2009 biodiesel RINs.

The mechanism for applying a single RIN to multiple categories should be clarified. The proposal indicates that if a RIN is retired for compliance with the advanced renewable fuel requirement, for example, it does not clearly state that the same RIN would also be retired for the general renewable fuel obligation. It should be made clear that the RIN would be retired once (for compliance with the "highest level" mandate) and its use would count toward fulfillment of the "lower" mandates. For example, the RVO_{RF} should include the sum of $RINNUM_{RF}$ plus $RINNUM_{AB}$, and the RVO_{AB} should include the sum of $RINNUM_{BBD}$ plus $RINNUM_{CB}$.

We generally support EPA's proposal, and the Agency's rationale for allowing RINs to be valid in the year that they were created or the subsequent year. We oppose, however, EPA's proposal to limit the carryover of RINs to 20%. If EPA must impose a cap on the amount of RINs that can be carried over, we recommend 40%. If EPA must establish a RIN rollover cap, the cap should be large enough to provide obligated parties with sufficient flexibility in the event the production of ethanol or other renewable fuels is significantly constrained in any given year. Increasing the roll over cap to 40% would also help address a practical problem that has arisen due to the fact that RINs are assigned at the time that renewable fuel is produced. Due to this, at the beginning of a year, renewable fuel producers may be supplying renewable fuels with RINs from the year before. Our experience is that this can amount to a substantial amount of RINs largely filling the existing 20% rollover cap. According to DOE data, at any point in time there is approximately 20 days of ethanol supply in the industry supply chain. Therefore, at year end, there will be a significant portion of January's ethanol consumption that will bring prior year RINs for practical reasons. Our experience in RFS1 shows that some suppliers are still delivering ethanol with prior year K=1 RINs as late as March. This decreases the amount of the roll over that is truly useable by obligated parties to manage their obligation across compliance periods.

k. 80.1429 Requirements for separating RINs from volumes of renewable fuel

Section 80.1429 sets forth the proposed rules for RIN separation. Under the RFS1 rules, RINs could be separated by an obligated party or by the party that owned the renewable fuel at the time it is blended. In combination with revising the rules to re-align the obligation with the ability to comply, EPA should revise the rules to limit the ability to separate RINs to obligated parties. Since the time that EPA promulgated the RFS 1 rules several states have passed laws that could interfere with the ability of obligated parties to comply with the RFS rules. EPA could facilitate compliance with the RFS by re-aligning the obligated parties and limiting the ability to separate RINs to such parties.

EPA should clarify that the 2.5 gal transfer limit in (a)(4), which was a feature of RFS 1, should not apply to RFS2, since there is no longer a 2.5 equivalence value for cellulosic ethanol. In addition, EPA should eliminate the requirement for renewable fuel producers to provide a PTD the "same day" as they transfer title to the renewable fuel. Experience under the RFS1 program suggests that this is an unnecessary and impractical requirement. This PTD requirement will be especially unworkable for foreign renewable fuel producers. We propose the EPA require "timely" delivery of PTDs or "within 10 business days".

l. 80.1430 Requirements for exporters of renewable fuels

EPA should clarify the rules for retiring RINs. The proposed rules are clear that if a party exports biomass based diesel, or general renewable fuel, it incurs an equivalent biomass based diesel, or renewable fuel obligation. The rules do not address, however, the situation where a party exports cellulosic renewable fuel, or advanced renewable fuel. To avoid confusion, EPA should clarify how it intends to address this situation. We presume that EPA intends to apply the same logic to cellulosic renewable fuel and advanced renewable fuel as that applied to biomass based diesel and general renewable fuel.

m. 80.1431 Treatment of invalid RINs

EPA has imposed a new EMTS system to facilitate the RIN system and reduce errors. While this will be a helpful new tool, participation in the program should be voluntary. In any event, where parties purchase RINs that have been cleared through the EMTS system, they should be able to rely on those RINs and held harmless if the RIN is later found to be invalid for some reason. Liability for the invalid RIN should fall on the party that caused the RIN to be invalid, not a party that innocently acquires an invalid RIN.

- n. 80.1440 What are the provisions for blenders who handle and blend less than 125,000 gallons of renewable fuel per year?

Section 80.1440 proposes to allow “small blenders” to refuse RINs and let the renewable fuel producer separate and transfer RINs. EPA should not allow this, as it could result in the hoarding of RINs by renewable fuel producers, which would potentially interfere with the ability of obligated parties to comply, and potentially unnecessarily increase the costs of the program to consumers. If EPA wants to reduce the burden on small blenders, they should only be allowed to assign the RINs to obligated parties.

- p. 80.1442 What are the provisions for small refiners under the RFS program?

EPA should not promulgate an exemption for “small refiners.” The Energy Policy Act of 2005 very specifically provides an exemption for “small refineries.” Nowhere does the Act provide a similar exemption for “small refiners.” Thus, EPA should never have provided the small refiners exemption. Now, EPA is proposing to extend the exemption for an additional two years. EPA should not extend this exemption. The law includes a provision that allows an extension of the small refinery exemption upon a showing of undue economic hardship by individual small refineries. EPA should limit any exemption extension to situations where the party seeking the exemption qualifies as a small refinery and can make such a showing. Any exemption should only apply to the specific small refinery that has petitioned for an extension, not the entire universe of small refineries.

- q. 80.1449 What are the production outlook report requirements?

Section 80.1449 sets forth provisions concerning renewable fuel production outlook reports. While such reports could be useful for EPA to assess the need for any adjustments to the various renewable fuel standards, EPA should limit these reports to producers of renewable fuel (both domestic and foreign) and not require such reports from importers. Importers will tend to import renewable fuels based on variable economic conditions and will likely not be able to reliably predict the amount of renewable fuels that they may import in future years.

- r. 80.1450 What are the registration requirements under the RFS program?

Section 80.1450 sets forth the requirements for renewable fuel producers to register with EPA. As proposed, all renewable fuel producers would be required to make a showing to EPA, certified by an independent third party, to establish the pathway for the renewable fuels produced at each facility so that the renewable fuels produced at each facility can be classified appropriately under

the RIN system. It is clear that this will be a burdensome process for renewable fuel producers and that it will take considerable time for all renewable fuel producers to complete the registration process. It is imperative that EPA provide sufficient lead time at the beginning of this program to allow these registrations to occur. If sufficient time is not provided, it could result in a shortage of RINs, because renewable fuel producers will not be able to assign RINs to the fuels that they produce unless they are registered under the new rules.

- s. 80.1451 What are the recordkeeping requirements under the RFS program? & 80.1452 What are the reporting requirements under the RFS program?

Section 80.1451 contains onerous documentation requirements for renewable fuel producers. For each batch of renewable fuel produced, the renewable fuel producer is required to maintain records to establish that the feedstock meets the definition of "renewable biomass" as that term is defined in section 80.1401. EPA should consider other options to facilitate the ability of renewable fuel producers to demonstrate that the fuels that they produce meet the definition of "renewable biomass." In particular, EPA should require producers to make a one time demonstration to EPA during the registration process to establish the typical source of feedstocks and the process at the facility. Thereafter, rather than requiring each producer to amass the records that EPA proposes for each feedstock for each batch, EPA should recognize certifications from third party organizations such as the Roundtable for Sustainable Palm Oil, the Roundtable for Responsible Soy, the Better Sugarcane Initiative, and the Roundtable for Sustainable Biofuels, as sufficient. The following are brief descriptions of these third party organizations.

- Roundtable for Sustainable Palm Oil (RSPO) <http://www.rspo.org/>
The RSPO started in 2001 and is an association created by organisations carrying out their activities in and around the entire supply chain for palm oil. It aims to promote the growth and use of sustainable palm oil through co-operation within the supply chain and open dialogue. A set of Principles and Criteria has been in place since November 2005 (with some updates since). Companies can be certified against the Principles and Criteria following a successful audit by an accredited certification body. To date, there have been ten planned or completed audits and the first volumes of 'certified sustainable palm oil' came to market in late 2008.

- Round Table for Responsible Soy (RTRS) <http://www.responsiblesoy.org/eng/index.htm>
The RTRS started in 2004 and is a multi-stakeholder and participatory process that promotes economically viable, socially equitable and environmentally sustainable production, processing and trading of soy. Its executive board and members come from three key constituencies: producers; NGOs; and trade, industry and finance.

- Better Sugarcane Initiative (BSI) www.bettersugarcane.org
BSI's mission is to promote measurable improvements in the key environmental and social impacts of sugarcane production and primary processing. In 2008, BSI launched a process to develop principles and criteria for sugar production and processing issues in the mills. It has established three technical working groups, which are assessing Better Management Practices being used by sugar growers under three categories: Environment and agronomy; Social and community; Milling and co-products.
- Roundtable for Sustainable Biofuels (RSB) <http://cgse.epfl.ch>
The RSB was set up in 2007 as an umbrella organisation on sustainability of biofuels and is based at the Swiss EPFL (École Polytechnique Fédérale de Lausanne) Energy Center. It has close links into government RSB's goals is to create a standard that can apply to all feedstocks. Working groups exist on environment, social, implementation, greenhouse gases and jatropha.

Section 80.1452 would require that all program participants use the EMTS effective January 1, 2011. Rather than making the use of EMTS mandatory, the EMTS should be the preferred option, but not mandatory in all cases. This option should be allowed to ensure that if there are problems with the EMTS for some reason the program can continue to function.

Section 80.1452 also would require importers and RIN owners to report monthly. This should remain quarterly. Monthly reporting will not provide adequate time for obligated parties to complete RIN tracking/reconciliation with counterparties – it barely works with quarterly reporting now. EPA's proposal is unnecessary and unworkable.

Part (e)(3) would require that after EMTS starts, obligated parties will be required to report within 3 days to the transaction – this is unworkable.

Part (e)(3)(x) requires obligated parties to disclose the price for RINs. We strongly disagree with this proposal. EPA does not need this information for compliance purposes, and it is highly sensitive confidential business information that EPA should not require parties to submit unless it is absolutely necessary for compliance.

- t. 80.1453 What are the product transfer document (PTD) requirements for the RFS program?

Once EMTS is in place, regulated parties should not be required to send each other PTDs. After EMTS, the rules should provide that all that is required to be sent to a counter party is reference to the EMTS activity ID number.

u. 80.1455 What are the provisions for cellulosic biofuel allowances?

Where EPA adjusts the cellulosic biofuel requirement due to inadequate production capacity, EPA proposes to make allowances available to obligated parties up to the level of the adjusted cellulosic biofuel standard. We agree that this is required by EISA. In addition, whenever EPA adjusts the cellulosic biofuel mandate due to inadequate production capacity, EPA should reduce the overhanging advanced and general renewable fuel mandates by an equal amount. If EPA does not reduce the overhanging mandates, EPA will be merely creating an incentive to increase use of the least performing biofuels and exacerbating the E10 blend wall problem and the de facto E85 mandate imposed by EISA.

80.1427 should also be clarified to make clear that allowances used to comply with the cellulosic renewable fuel mandate also count towards the advanced and general renewable fuel obligations. While we understand that is EPA's intent, the proposed regulations should be clarified to reflect this. See 74 Fed. Reg. at 24967 ("Because cellulosic biofuel RINs can be used to meet the advanced biofuel and total renewable fuel standards in addition to the cellulosic biofuel standard, we propose that cellulosic biofuel allowances also be available for use in meeting those three standards.)."

v. 80.1464 What are the attest engagement requirements under the RFS program?

EPA proposes to require auditors to attest PTDs. While it is reasonable that this be required for parties that issue the PTDs, it is duplicative and overly burdensome to require this for parties that receive PTDs. In addition, given the EMTS system, it appears that the attestation requirements will no longer be necessary and should be eliminated.

w. 80.1466 What are the additional requirements under this subpart for foreign producers and importers of renewable fuels?

Section 80.1466 sets forth the requirements for foreign producers and importers of renewable fuels. According to the proposed regulations, each time a renewable fuel is loaded for transport to the US, it must be certified by a independent third party. This system will be very burdensome on foreign producers, who may decide instead to send their renewable fuel elsewhere in the world. This requirement may ultimately limit the availability of renewable fuels to meet EISA's advanced biofuel mandates, since most of the fuel expected to meet that requirement is sugar cane ethanol. It will take substantial effort and time to put into place processes to ensure that the requirements of these rules are met for foreign produced ethanol. EPA must provide the industry with sufficient lead time at the beginning of the program to implement these requirements.

Section 80.1466 also imposes segregation requirements for foreign produced renewable fuel until certain conditions are met. This system essentially envisions a process by which foreign produced renewable fuels are manufactured solely for the United States. The reality is, however, that the producer of the renewable fuel probably does not know where the ethanol will actually be used at the time it is produced. These requirements allow no flexibility for importers to acquire cargoes at the last minute for the U.S., which would tend to increase supply availability and reduce costs. Because of these rules, costs are likely to increase, which could adversely impact consumers. We suggest that rather than require that the material be segregated and tracked, EPA employ a material balance model, which would provide additional flexibility.

- x. 80.1469 What are the labeling requirements that apply to retailers and wholesale purchaser-consumers of ethanol fuel blends that contain greater than 10 volume percent ethanol?

Section 80.1469 contains requirements for the labeling of gasoline containing greater than 10 volume percent ethanol. We agree that under existing law, such fuel can only be used in FFVs and that consumers should be advised that is the case and that any misfueling is a violation by the consumer and is a violation of federal law for which the consumer would be liable.

III. Other Policy Issues

a. Sustainability criteria

EPA's proposed rules concerning the definition of "renewable biomass" are the first step that the Agency has taken towards adopting sustainability criteria for biofuels. While we support the concept of sustainability criteria, we are concerned that the regulatory structure that EPA has proposed will be unworkable. At the very least, EPA's proposed approach will require elaborate new processes for biofuel producers to ensure that the feedstocks that they are using meet the definition of "renewable biomass" and it will likely discourage imports of biofuels, which could make the advanced biofuel mandate unworkable.

EPA should consider options for a more workable program. In particular, we encourage EPA to recognize certifications of third party organizations such as the RSPO, or the RSB, as sufficient to meet EISA's requirements concerning the definition of "renewable fuel." At a minimum, in lieu of the burdensome recordkeeping and certification requirements that EPA proposed, the Agency should provide renewable fuel producers the opportunity to establish a third party organization similar to the RFG Survey Association to audit compliance with the Act to ensure that biofuels are in fact made from "renewable biomass" without imposing requirements on individual producers to track every kernel of corn, bean of soy, or cane of sugar used to produce biofuels.

b. Indirect land use change

We recognize and support the need to ensure that biofuels contribute to greenhouse gas emission reductions. However there is a growing body of opinion/evidence that the methodologies for determining indirect land use change effects of biofuels are not yet sufficiently advanced to reliably establish specific factors for regulation.

Rather than imposing a highly uncertain indirect land use change factor on the carbon intensity of biofuels, EPA should focus solely on direct land use change at this time, and adopt internationally agreed/recognized sustainability criteria for biofuels to address potential indirect land use change issues. By participating in a concerted international effort to properly account for the greenhouse gas and social/environmental aspects of direct land use change, we believe that concerns relating to indirect land use changes associated with biofuel production will be addressed more effectively.

Rather than adopting a highly uncertain indirect land use change factor, EPA should adopt appropriate sustainability criteria for biofuels. We are concerned that applying an indirect land use change factor could have a significant adverse impact on the existing biofuels industry, and the developing advanced biofuels industry. Further, unless there a globally harmonized approach to this issue, action by EPA is likely to lead to unnecessary and counterproductive shuffling of biofuels from one jurisdiction to another.

c. The baseline for measuring GHG emission reductions

During the public hearings on the proposed rule, several parties suggested that EPA should change the methodology for determining the greenhouse gas emission reductions of biofuels by changing the gasoline and diesel baselines. We agree with EPA's stated view that EISA specifies the baseline:

“(C) Baseline Lifecycle Greenhouse Gas Emissions. – The term ‘baseline lifecycle greenhouse gas emissions’ means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.”

We agree with EPA's interpretation of this provision, and EPA's conclusion that Congress did not authorize EPA to go beyond this definition.

d. E10 Blend wall

EPA requests comments on the E10 blend wall issue and the recent petition that the Agency received requesting that EPA grant a substantially similar waiver under section 211(f) of the Act to allow greater than 10 volume percent ethanol in gasoline. We note that this issue is the subject of a separate notice published by the Agency and that we have submitted comments in response to that notice through API. In sum, we do not believe that there is sufficient basis at this time to grant, in whole or in part, a substantially similar waiver for elevated levels of ethanol in gasoline. There is considerable ongoing effort to evaluate the potential effects of increased ethanol levels on automobile emission control devices through the Coordinating Research Council. EPA will not have sufficient data to consider the petition until such time that work is completed.

It is important for EPA to take into account that even if a substantially similar waiver were issued, it would likely be a significant period of time before gasoline containing elevated levels of ethanol would be available. Issuance of a substantially similar waiver is not the end of the process. It is just the beginning. Following issuance of a substantially similar waiver, EPA would be required to revise its existing fuels regulations to accommodate higher levels of ethanol; ASTM would have to update the gasoline specification, and numerous states and local governments would have to revise their laws and/or regulations to allow the higher ethanol levels. In addition, it will take considerable time, effort, and investment for the infrastructure to be put into place to accommodate higher ethanol levels. EPA should recognize that the blendwall is fast approaching and approving higher levels of ethanol in gasoline by issuing a substantially similar waiver is not a "silver bullet" solution. In fact, an increase to E15 would only buy a few years time until the new "E15 blend wall" would be reached by the EISA mandated volumes.

e. E85

EPA discusses E85 at length in the proposal and appears to believe that it is a solution to the ethanol blend wall problem. EPA has greatly overestimated the likely success of E85.

Shell supports the incorporation of ethanol into existing gasoline grades that can be used in today's vehicle fleet. In the US, that is 10 volume percent. EPA should recognize that at this time, E85 is only compatible with approximately three percent of motor vehicles, and generally requires dedicated storage tanks and dispensers constructed from materials that are compatible with E85. We are concerned that widespread introduction of E85 alongside conventional gasoline grades will further increase supply chain complexity, which in turn may increase vulnerability to supply disruption, especially during times of regional or national crisis. Aside from all of these challenges, a significant challenge for E85 is that it can lead to a reduction in fuel economy in excess of 25% compared to gasoline

that has no bio content, which makes consumer acceptance an additional significant hurdle for E85.

* * *