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November 18, 2013

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Application by CARBIO, et. al. on behalf of biodiesel companies from Argentina related to the "Alternative Renewable Biomass Tracking Requirement" (40 C.F.R. § 80.1454(h))

Dear Administrator McCarthy:

We hope you are well. Today, we bring to your attention an important matter that if not addressed may allow hundreds of millions of gallons of biodiesel that do not meet any of the renewable biomass requirements of the Renewable Fuels Program (RFS2) to be imported into the United States as early as January 1, 2014.

We understand a number of companies in Argentina, working through their trade association "CARBIO", are requesting the U.S. Environmental Protection Agency (EPA) to approve an "Alternative Renewable Biomass Tracking Requirement" under 40 C.F.R. § 80.1454(h), which, generally, would serve to replace the stringent feedstock recordkeeping requirements of the RFS2 regulations.

We do not believe that any "independent third party" has actually conducted a comprehensive program of annual compliance surveys on any biodiesel facilities or their feedstock suppliers in Argentina. Rather, we believe a plan has been submitted to EPA that outlines a survey program, but that the actual "comprehensive program of annual compliance surveys" has not yet begun. In context of the steps that EPA is taking to insure that RINs being generated actually meet the requirements of the regulations, at best, it would seem premature for EPA to approve a foreign survey plan that cannot meet the requirements of any of the recently proposed quality assurance plans. This is especially true where EPA has provided the public with little to no guidance on what a survey plan under Section 80.1454(h) would entail.

Furthermore, it would seem that any approval under Section 80.1454(h) of a plan by EPA would be premature given that the issue of what constitutes allowable RIN generation is being discussed in two pending rules that have not yet been finalized:

1. The RFS Renewable Identification Number (RIN) Quality Assurance Program; Proposed Rule, 78 Fed. Reg. 12,158 (Feb. 21, 2013), Docket ID No. EPA–HQ–OAR–2012–0621; and

2. Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS2 Standards; Notice of Proposed Rulemaking, 78 Fed. Reg. 36,042 (June 14, 2013), Docket ID No. EPA–HQ–OAR–2012-0401.

The National Biodiesel Board has commented on both rules. We support additional assurances that foreign producers of renewable fuel are in compliance with the RFS2, and we support additional provisions to assist EPA in the enforcement of the RFS2 requirements, particularly increasing the bond requirements for foreign production of renewable fuels. We commented at length on how a "quality assurance plan" (Q-A-P) should be applied to foreign biofuel producers. Specifically, we are concerned about the jurisdiction of the EPA and the U.S. Department of Justice in reaching into other countries to enforce the RFS2 program. We asked the question: How does EPA best protect obligated parties and the RFS from fraud or invalid RINs that are illegally or invalidly generated from foreign producers? Of particular difficulty is ensuring that EPA's restrictions on the types of renewable biomass that can be used are met. These restrictions require a rigorous tracking program. Again, we think this is an important issue for the EPA to get right, as there are currently hundreds of millions and potentially billions of RINs that will likely be generated under the program. An excerpt of our Q-A-P comments is attached.

In light of the current Renewable Volume Obligation discussion being undertaken as a proposed rule by the EPA, there will likely be huge losses in domestic production if the EPA moves to prematurely approve biodiesel from Argentina to qualify for the program based on a survey plan that has not been subject to public review and that does not have the same level of rigor or oversight as the programs in place for domestic producers. Even as we write, the EPA is in the process of proposing the 2014 Renewable Volume Obligations for Biomass-based Diesel. As you know, many believe the proposal will include a meager 1.28 billion gallons for 2014, and perhaps hold it steady in 2015 at the same volume. Due in part to a "Differential Export Tax"[1] in Argentina, which encourages biodiesel exports over soybean exports, the Argentinian Biodiesel industry has the ability to produce and import to the United States more than 900 million gallons of biodiesel annually.

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[1] ***Understanding DETs (LMC March 2013 DET Analysis)***

The Argentine Differential Export Tax on soybean and soybean related products are as follows:

- *Soybeans - 35%*
- *Soybean Oil – 32%*
- *Soybean Meal – 32%*
- *Biodiesel – 17.5%*

DETs are Differential Export Taxes. In Argentina, export taxes are levied on beans as well as soybean products; however, they create an incentive to process soybeans in the country for export. This is done by applying different tax rates on soybeans and the products from crushing which decline with the degree of processing, being higher on beans than on products. DETs the government to change the balance of exports between beans and products away from that balance that would exist in a free market, with a knock-on effect on soybean crushers elsewhere in the world.

Soybeans can either be used directly as beans, or can be crushed to produce soybean oil and meal. The ***crush margin*** *is the difference between the cost of the beans and the revenue from the meal and oil. This is determined, in turn, by the relative price of the beans compared to the prices of the meal and oil. If the beans become cheaper in relation to products, crushing becomes more profitable and the crush margin increases.*

This "differential" in the DETs arises because ... soybean exports are taxed at the highest rate in Argentina; this is currently set at 35%. A lower export tax rate of 32% is charged on oil and meal. These differences in the rates of taxation increase the profitability of crushing in Argentina, …. The export tax on biodiesel until very recently was set at a net rate of 17.5% (calculated after deducting a 2.5% tax refund from the nominal export tax of 20%). This provides an incentive to process soybean oil into biodiesel for export.

According to the Energy Information Administration, already in 2013, we have seen imports from Argentina come to the United States, even though presumably these gallons do not qualify as RIN generating gallons for purposes of the RFS2. In 2013, without biodiesel from Argentina, the United States will import approximately 350 million gallons of biodiesel, of which approximately ½ will qualify for the Biomass-based Diesel program.

In 2014 it is anticipated, without including biodiesel from Argentina, that as much as 400 million gallons of RIN generating biodiesel and renewable diesel may be shipped to the United States.

Given this outlook for 2014, the total volume of imports including biodiesel from Argentina could be as much as 1.3 billion gallons. Potentially, this import volume could be more than the entire 2014 RVO for Biomass-based Diesel (1.28 billion gallons). Clearly, we do not believe this is the program envisioned by Congress or this Administration.

As you consider moving forward on an "Alternative Renewable Biomass Tracking Requirement" under 40 C.F.R. § 80.1454(h), we urge you to consider the greater context of this decision and the ever present impact it will likely have on domestic biodiesel production.

Due to the difficulty in overseeing foreign production and in taking enforcement actions against foreign producers highlighted in the proposed rules noted above, we also have significant concerns regarding the effectiveness of any survey plan that might have been proposed. According to a case study by the Association of American Geographers, Argentina ranks third in soybean production and soybean consumption due to its large cattle industry, and is a leading exporter of soybean oil.[2] Soybean production in Argentina has grown fast in the past few years, and soybean area continues to increase at a rapid pace.[3] The World Bank has noted, with respect to Argentina, that "[a]griculture (including land use change and forestry) is the largest contributor to GHG emissions in the country, while contributing less than 6% of GDP…."[4] The concerns of the National Biodiesel Board are even more pronounced due to the lack of public notice and opportunity to comment that EPA has provided on its "alternative renewable biomass tracking requirement," as it relates to foreign production.

Thus, we urge you to provide the public with notice and an opportunity to comment on any proposed survey plan for foreign feedstocks and production before EPA takes any action. This is particularly true in light of recent events that may not have been contemplated under the RFS2 proposed rule, and the lack of any meaningful guidance provided to the public as to how EPA might implement a "consortium" approach overseas. We also believe that the implementation and enforcement of the program must be

[2] Kingsland, M. and Hamilton, M. 2010. Population & Natural Resources case study: How can food production be produced sustainably to feed growing populations? In Solem, M., Klein, P., Muñiz-Solari, O., and Ray, W., eds., AAG Center for Global Geography Education. Available from http://globalgeography.aag.org.

[3] Doane Advisory Services, *A Look at Brazil, Argentina soybean sectors*, AG Professional, Mar. 14, 2013, *available at* http://www.agprofessional.com/news/A-look-At-Brazil-Argentina-soybean-sectors-197594841.html. "Over the last seven years [Brazil and Argentina] have added nearly 24 million acres, an amount equal to soybean acreage in Illinois, Iowa and Indiana combined." *Id.*

[4] World Bank, Latin American and the Caribbean Region: Agriculture and Rural Development Team, *Argentina: Country Note on Climate Change Aspects in Agriculture*, at 2 (Dec. 2009), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Climate_ArgentinaWeb.pdf.

transparent to ensure compliance. The public, in addition to EPA, should be able to monitor compliance. Finally, we outline additional issues that EPA should consider prior to approving any such survey plan.

I. EPA Must Give the Public Notice and an Opportunity to Comment on Argentina's Proposal for Alternative Renewable Biomass Tracking.

In the proposed RFS2 rule, EPA outlined possible compliance alternatives for "***domestic*** renewable fuel." 74 Fed. Reg. 24,904, 24,938-24,940 (May 26, 2009) (emphasis added). One such alternative was to require renewable fuel producers to set up and administer a quality assurance program, creating the possibility of a partial affirmative defense. *Id.* at 24,940. The proposal provided no explanation as to how such a plan might apply to foreign feedstocks, only noting that EPA seeks comment on whether foreign producers should be subject to similar requirements as domestic producers with respect to the renewable biomass requirements.

EPA suggested, for domestic producers, creation of a "consortium" to establish a quality assurance program for the *renewable fuel production supply chain*. 74 Fed. Reg. at 24,940. This alternative was purportedly to be patterned after the survey program administered by the Reformulated Gasoline Survey Association.[5] *Id.* The proposal referenced a "nationwide verification program" carried out by an independent surveyor providing oversight of the feedstock designations and handling processes. *Id.* The survey plan would be required to include a methodology for conducting the surveys, and would be required to be approved by EPA. *Id.* The proposal indicated that this alternative approach was intended to merely provide a partial affirmative defense, and would include a means of addressing potential violations. *Id.* Although EPA sought comment on whether the alternatives proposed for domestic producers should also apply to foreign producers, EPA recognized in the proposed rule that "EISA creates unique challenges related to the implementation and enforcement of the definition of renewable biomass for foreign-produced renewable fuel." *Id.* at 24,941.

The consortium approach finalized in the RFS2 Final Rule under 40 C.F.R. § 80.1454(h) differs in significant ways from the proposal, and, moreover, provides only very broad strokes as to what is to be included in any such plan.[6] Among the significant differences from the proposal is that the final regulation does not require participation by all feedstock producers and handlers in the plan, 74 Fed. Reg. at 24,940, requiring only that the renewable fuel producer "take all reasonable steps to ensure that each feedstock producer, aggregator, distributor or supplier cooperates with this program." 40 C.F.R. § 80.1454(h)(5)(i). It also moved from a "nationwide verification program," 74 Fed. Reg. at 24,940, to a

[5] Under the reformulated gasoline program, a refiner or importer can establish compliance based on an average basis, allowing, for example, use of offsets to meet emissions requirements. Under these surveys, EPA is also able to monitor compliance with testing. EPA provided no indication that the alternative tracking program under the RFS2 program would allow for averaging, and testing cannot be conducted to ensure the feedstock meets the renewable biomass requirements at issue.

[6] The proposal did include a reference to a quality assurance program implemented by producers, outlining some specific elements of such program. 74 Fed. Reg. at 24,939. EPA did not finalize this proposed alternative, noting instead that it was finalizing the option that was "similar to the model of the successful Reformulated Gasoline Survey Association." 75 Fed. Reg. 14,670, 14,700 (Mar. 26, 2010).

plan for an undefined "survey area" and "covered area" or an undefined set of producers. 40 C.F.R. § 80.1454(h). The broad category of issues that are to be included in a survey plan also significantly differs from the regulation providing for a survey program under the reformulated gasoline program, which provides more prescriptive requirements and criteria for approval of the survey plan by EPA. *See* 40 C.F.R. § 80.68; *see also* 40 C.F.R. § 80.1502 (establishing a survey program related to sales of E15). EPA provided no guidance in either the proposal or final rule as to the methodology for the surveys to be conducted. That EPA must approve the survey plan under the RFS2 program does not substitute for EPA's obligation to provide adequate notice and opportunity to comment or to replace the need for public input.

The approval of a plan constitutes final agency action, which is subject to judicial review under Section 307(b) of the Clean Air Act. 42 U.S.C. § 7607(b). Given the lack of guidance provided by EPA in the proposed and final rules, EPA has not provided adequate public notice or a meaningful opportunity to comment as required under the Act. 42 U.S.C. § 7607(d). Public notice and comment gives the parties affected by a decision an opportunity to participate in the decision-making process. *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979); *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). The D.C. Circuit has stated that it will defer to an agency "so long as we are assured that its promulgation process as a whole and in each of its major aspects provides a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978). Indeed, it was impracticable for parties to provide comment on the implementation of a survey plan and its potential application to Argentina. While the public could comment as to why foreign producers should be subject to more stringent requirements,[7] only by placing the proposal in context does the public have adequate opportunity to address technical, factual and policy concerns with the so-called consortium approach for foreign feedstocks and production. Considering the rapid expansion of soybean area in Argentina and the very recent history of deforestation and land use changes for such production, providing for public comment ensures that EPA has "negate[d] the dangers of arbitrariness and irrationality in the formulation of rules …." *Id.* (citation omitted). The concerns behind EPA's recent proposals also indicate that EPA should reassess its consortium approach with respect to feedstock from foreign countries. As such, there are grounds to grant a petition for reconsideration of the consortium approach in general, 42 U.S.C. § 7607(d)(7), and EPA should provide notice and comment on any proposed approval of the request for a consortium approach in Argentina.

Moreover, the regulation itself provides that the survey program is intended to "achieve the level of quality assurance required under" the other renewable biomass provisions. 40 C.F.R. § 80.1454(h). EPA's regulation for foreign countries seeking an aggregate compliance approach, which was promulgated after the RFS2 Final Rule, provides for a 60-day public comment period. 40 C.F.R. § 80.1457(c). EPA found that public notice and comment on these petitions "is necessary and important," and that the data and calculations in the petitions should be made available to the public. 75 Fed. Reg. 76,790, 76,823-76,824 (Dec. 9, 2010). EPA provides no explanation why a "consortium"

[7] *See, e.g.,* NBB Comments at 27, EPA-HQ-OAR-2005-0161-2249.2 (Sept. 25, 2009) (distinguishing countries with declining agricultural land from those with increasing agricultural land).

survey plan for feedstock from foreign countries should escape similar public scrutiny, particularly where the aggregate compliance approach has only been applied in countries where agricultural land is stable or declining, which is simply not the case for Argentina. In addition, EPA is not familiar with agriculture production in foreign countries, and the public could provide invaluable assistance to EPA to ensure that the proposed plan will be effective. Thus, EPA should provide for public notice and comment on survey plans submitted to EPA under 40 C.F.R. § 80.1454(h) to ensure that the survey plan provides the same assurances as the other compliance approaches for the renewable biomass requirements.

Even if EPA somehow believes that the public had ample opportunity to comment, EPA has discretion to provide additional opportunities to ensure "public understanding and participation" in the process. *Weyerhaeuser Co.*, 590 F.2d at 1028 (citations omitted). Given the significant concerns that have arisen with respect to quality assurance programs conducted overseas and with respect to EPA's ability to enforce the RFS2 requirements, EPA should provide the public with an opportunity to review and comment on any survey plan under consideration by EPA.

II. EPA Should Ensure Sufficient Transparency of Any Approved Survey Plan Under Section 80.1454(h).

EPA should also consider making the plans and results of the audits available to the public on an ongoing basis. In its proposal for a quality assurance program for RIN generation, EPA recognized that the effectiveness of a quality assurance program is positively correlated to the amount of transparency with its implementation.[8] 78 Fed. Reg. at 12,189. EPA found that providing a level of transparency on the auditors and the quality assurance programs being implemented by them would "allow affected stakeholders to notify EPA of concerns or deficiencies in a third-party auditor's registration or QAP." *Id.* EPA also found that transparency "will work hand-in-hand with our QAP process to improve the integrity of information submitted for RFS compliance and deters fraudulent behavior." *Id.* at 12,197. Under the proposal, this transparency is to be provided on an ongoing basis where EPA has proposed requiring annual renewal of an auditor's registration. *Id.* at 12,189.

Transparency has also been identified as a key component in voluntary certification programs for sustainable production of crops, including soybean. For example, the Roundtable on Responsible Soy Standard for Responsible Soy Production (RTRS) identified a commitment to transparency as necessary for those participating in the certification program, including providing a publicly available summary of information about the performance of each certified organization with respect to each criterion.[9] EPA should provide the public with notice of its proposed determination on the request for a consortium approach for Argentina and give the public an opportunity to comment on the types of information EPA

[8] Although NBB has concerns with the quality assurance program for RINs as proposed, it does believe that EPA should reconsider its "consortium" approach for renewable biomass from foreign countries based on its proposal and the comments submitted, particularly with respect to EPA's concerns regarding foreign production of biofuels. NBB respectfully refers EPA to its comments on the February 2013 proposed rule.

[9] RTRS, *RTRS Standard for Responsible Soy Production Version 2.0_Eng.*, at i, Sept. 16, 2013, *available at* http://www.responsiblesoy.org/.

should provide on an ongoing basis to ensure compliance with the approved plans and with the renewable biomass requirements.

III. EPA Must Ensure that Any Survey Plan Approved Under Section 80.1454(h) is Designed to Achieve at Least the Same Level of Quality Assurance Required Under the Individual Tracking Program and the Aggregate Compliance Approach.

EPA's regulations establish an "alternative renewable biomass tracking requirement" in lieu of the recordkeeping requirements for individual producers under 40 C.F.R. § 80.1454(c)(1) and (d). The regulation requires an independent third party to conduct a comprehensive program of annual compliance surveys to be carried out in accordance with a survey plan approved by EPA. 40 C.F.R. § 80.1454(h)(1). The plan, however, must be "designed to achieve at least the same level of quality assurance required in paragraphs (c)(1), (d) and (g)."[10] 40 C.F.R. § 80.1454(h)(2)(iv). EPA's regulations provide little detail as to what the survey plan must look like except that it must be (1) conducted at renewable fuel production and import facilities and their feedstock suppliers and (2) representative of all renewable fuel producers and importers in the survey area and representative of their feedstock suppliers. 40 C.F.R. § 80.1454(i)(ii), (iii). Although NBB believes that public notice and comment should be provided prior to any determination with respect to any proposed survey plan for Argentina under 40 C.F.R. § 80.1454(h), we provide the following guidance that we believe must be considered as EPA reviews any such plan.

A. Production and import facilities and feedstock suppliers.

Although EPA notes that the survey plan should include production and import facilities and feedstock suppliers, EPA does not adequately define these facilities, particularly with respect to import facilities and feedstock suppliers.

The regulations do not define "import facilities." EPA's regulations include various testing and recordkeeping requirements for imports. *See, e.g.,* 40 C.F.R. § 80.1466. Any survey plan should include a review of these records and inspection of the load port and port of entry.

The regulations also do not define "feedstock suppliers." The feedstock supplier may not be the actual grower of the commodity. EPA recognized as much noting that the producer/importer participating in the alternative tracking program "must take all reasonable steps to ensure that ***each feedstock producer, aggregator, distributor, or supplier*** cooperates." 40 C.F.R. § 80.1454(h)(5)(i) (emphasis added). Given certain commodities, the feedstock suppliers may be in a central location, such as a crushing facility, accepting feedstock grown on cropland from a very broad area. If the aggregate compliance approach is not available, then we assume that, unlike in the United States and Canada, the total amount of eligible agricultural land is not stable or declining in these areas. As noted above, reports indicate that soybean production in Argentina continues to grow at a rapid pace, hitting a record high for the 2012/2013 crop year. China and the European Union remain significant importers of

[10] Paragraph (g) relates to the aggregate compliance approach established for planted crops and crop residues in the United States and other countries that petition and obtain such an approach under 40 C.F.R. § 80.1457.

soybean oil from Argentina and soy production is expanding into other parts of Argentina once considered too dry and uneconomical to produce soy.[11] "Argentina has lost 70 percent of its natural forest, much of it in the last 20 years, with increased soy production."[12]

The proposal should identify the original source of the feedstock and establish requirements to show that, e.g., for crops and crop residue, the feedstock is from "existing agricultural land." It should also provide a detailed explanation of how the feedstock gets from the original source to the biofuel production facility and then to the importer. In other words, the survey plan should ensure that the eligible feedstock is adequately segregated throughout the supply chain. It is only upon fully understanding the production process from the original source of the feedstock and down the chain that the survey plan can be reviewed and compared to the individual tracking requirements.

The annual surveys would confirm that the fuel is being produced from feedstock from the "existing agricultural lands" of the identified sources. If new growers are included in the survey area, it must show that the new growers similarly meet the requirements. This would provide safeguards to ensure that feedstock from outside these survey areas are not being used.

B. Representative of <u>all</u> renewable fuel producers and importers in the survey area and representative of their feedstock suppliers.

Although the producers and importers eligible to rely on the survey plan appear limited under EPA's regulations, EPA makes clear that the survey plan must be representative of <u>all</u> renewable fuel producers and importers in the survey area <u>and their feedstock suppliers</u>. While EPA requires that the survey plan identify the parties covered, the public has not had the opportunity to review and comment on what such a plan might look like for foreign production. The effectiveness of a plan may depend on several factors, including the policies of the country at issue regarding land use, the type of fuel being produced, the type of feedstock being utilized, and the size of the survey area. EPA must ensure the plan clearly defines the survey area and the parties subject to the survey requirements.

As an initial matter, EPA did not provide the public with any parameters as to the "survey area" that can be covered in any such plan. This is unlike the petition process provided for an aggregate compliance approach, which EPA determined must be on a nationwide basis. EPA found that "national level data most accurately reflects the broader effects of renewable fuel feedstock production on land use patterns." 75 Fed. Reg. at 76,821. EPA's proposed rule similarly indicated that an industry-wide "consortium" would be on a nationwide level. 74 Fed. Reg. at 24,940. If the survey area is less than the entire nation, it is likely that the country's policies or land use trends are not similar to those in the United States or Canada. It also would be difficult to determine if there merely have been shifts in land use, resulting in substantial new clearings outside the survey area. In addition, EPA provides no guidance on how the survey plan is to confirm that the lands to be covered met the "existing agricultural land" definition on December 19, 2007. Any evidence indicating that the areas may have been cleared

[11] Anne Herrberg, *Soy production endangers Argentina*, Deutsche Welle, Mar. 9, 2012, *available at* http://www.dw.de/soy-production-endangers-argentina/a-16216304.
[12] *Id.*

post-2007 should require a careful review of the proposed survey area. The initial identification of these lands must be based, at a minimum, on the types of documentation required for individual tracking. In short, the survey area should be carefully delineated, and the compliance carefully tracked.

EPA similarly did not explain how it would determine that the surveys are "representative" of producers/importers in the survey area and feedstock suppliers. Ensuring that the surveys to be conducted are sufficiently representative of the producers/importers and their suppliers is key to ensuring that that this approach will provide at least the same assurances as individual tracking and the aggregate compliance approaches. With the aggregate compliance approach, for example, agricultural lands in the United States and Canada are tracked through extensive and highly reliable surveys conducted by government entities. These surveys have broad coverage, and, more importantly, are subject to strict quality control standards. EPA should ensure that the survey plan includes quality control standards. This is particularly true where, as noted above, it is unclear how far down the chain EPA is going to require the annual surveys to cover.

C. EPA must ensure that the annual compliance surveys are sufficiently rigorous.

EPA's regulations provide merely broad strokes as to what is expected in a survey plan. This includes: (i) identification of the parties for whom the survey is to be conducted; (ii) identification of the independent surveyor; (iii) a methodology for determining when the audits will be conducted, the audit locations, and the number of audits; and (iv) ***any other elements determined to be necessary*** to achieve the level of quality assurance required under the individual tracking program and the aggregate compliance approach. 40 C.F.R. § 80.1454(h)(4).

To achieve the level of quality assurance required, the compliance surveys must include audits along the supply chain within the "survey area." Because EPA cannot inspect or even easily visit other countries, these audits should include on-site visits. Section 80.1454(h) simply refers to audits, and requiring producers ensure cooperation by parties along the supply chain, referring simply to "copies of management plans, product transfer documents, and other records or information." 40 C.F.R. § 80.1454(h)(5)(i). Simply reviewing documentation at a producer or importer's facility does not adequately establish that the feedstock came from, e.g., eligible agricultural lands. In the proposed rule for a quality assurance program for RINs, for example, EPA proposed to require on-site visits as part of the audits. 78 Fed. Reg. at 12,192. EPA noted that the goal of these visits is to "verify that plant has the technology to produce, store, and blend biofuels at registered levels, is operating in accordance with the facility's registration, and that the RINs generated since the last visit are valid." *Id.* Similarly, site visits along the entire supply chain would better ensure that the feedstock is properly being segregated in a manner consistent with the survey plan and the requirements of the RFS2.

In addition, EPA makes no mention of the use of satellite imagery under the consortium approach. Under the individual tracking and aggregate compliance approaches, EPA is able to obtain mapping and nationwide data to track new clearings of land. Requiring the parties to submit satellite imagery of the surveyed lands and surrounding areas would provide additional assurances that new clearings are not occurring, allowing the surveyors to focus on ensuring the feedstock used came from lands within the

surveyed area. Such mapping, however, should not replace ongoing on-site visits of fields and review of new clearings and agricultural production for that year. But, it could provide the public with added assurances that the plan is effective and that the compliance surveys for Argentina are being conducted properly.

D. NBB is concerned that the surveyor is not truly independent.

Independence of the party conducting the audit (here, surveys) is key to ensuring the integrity of the program. EPA so recognized in its proposed rule for a quality assurance program for RINs, noting that the "first, and perhaps the most important, requirement for auditors is that they remain independent of renewable fuel producers." 78 Fed. Reg. at 12,187. Ensuring against a conflict of interest is necessary to avoid incentives to promote invalid verification. *Id.* EPA's regulation for a consortium approach refers to the requirements in 40 C.F.R. § 80.68(c)(13)(i), but that provision refers to independence from the "refiner or importer." Without a better understanding of the survey plan, it is not clear who the "refiner or importer" is in this situation. There are various parties that can be involved in the production and import of the biofuel, including, e.g., the farmer, the feedstock supplier, the biofuel producer, the exporter, the importer, and the purchaser of the fuel. Moreover, EPA notes that an organization may arrange for the surveys, but does not explain what type of "organization" it is referencing. EPA should protect against any conflict of interest that might influence the "independence" of the surveyor. *For example, it is possible the surveyor or the company responsible for contracting with the surveyor could be the same company that markets or buys and sells the RINs once the biodiesel arrives in United States, which could create substantial financial motivation for all parties participating in that biofuel chain of custody.*

EPA's regulations also do not provide specific requirements for the independent surveyor's qualifications. Given the range of facilities being reviewed, the surveying entity must ensure that it has appropriately qualified employees who have experience and knowledge regarding the growing practices within the survey area. For example, there are several bodies that provide certification for sustainable production, such as the RTRS. These bodies provide various core competency requirements that could serve as a model for EPA to ensure the surveyors being hired meet the appropriate qualifications.

* * *

Given the questions left unanswered by the RFS2 Final Rule with respect to its potential application to foreign production, EPA should provide the public with notice and an opportunity to comment on requests for approval of a "consortium" approach under 40 C.F.R. § 80.1454(h). At a minimum, it should provide the public with additional guidance as to the actual content of a survey plan, including an explanation of what constitutes a covered survey area, who are the participants in such a program, what facilities are being audited and what are the elements of such audit, how EPA is ensuring against conflicts of interest, and what methodology must be implemented in determining the number and location of the surveys/audits. Consistent with its proposed approach for quality assurance programs for RINs, EPA should also provide greater transparency on the survey plans and their implementation on an ongoing basis. Due to the concerns that have been raised recently regarding potential fraud and the difficulty in policing activities overseas, EPA must take every precaution to ensure that proposals for a

consortium approach provide the same level of assurance as the individual tracking and aggregate compliance approaches.

While we believe that public notice and comment is required on any proposed survey plan, we would like to meet with you to determine whether EPA is in fact considering a proposal similar to the one described herein – and provide you with additional information on the detrimental impacts it is likely to have on our industry.

To arrange a meeting, please call Kirsten Skala at 202.737.8801 or by email to KSkala@biodiesel.org. We look forward to hearing from you on this important issue.

Sincerely,

Anne Steckel
Vice President of Federal Affairs
National Biodiesel Board

cc: The Honorable Tom Vilsack,
The Honorable Dan Utech

Attachment

NBB's comments are as follows:

IF IMPORTS OF RENEWABLE FUEL ARE ALLOWED TO CONTINUE TO QUALIFY FOR THE RFS PROGRAM, THEN IT IS IN THE PUBLIC INTEREST FOR EPA TO REQUIRE EVERY GALLON OF IMPORTED FUEL TO HAVE BEEN VALIDATED BY AN ENHANCED AND THE MOST ROBUST QUALITY ASSURANCE PLAN AND TO MEET SPECIFIC BOND REQUIREMENTS THAT AMOUNT TO NO LESS THAN 10% OF THE VALUE OF RENEWABLE FUELS IMPORTED EACH YEAR PER COMPANY.

EPA addresses the imports of biofuels and whether the RINs from foreign producers are valid as a bit of an afterthought. At the core of the RFS program is the requirement that feedstocks sufficiently qualify for the program. The EPA provides specific regulations for the treatment and qualifications of foreign producers at 40 C.F.R. §§ 80.1465, 80.1466 and 80.1467, but once paperwork documents are initially approved by the EPA, it does not require any validation or certification that the renewable biofuel product that arrives in the United States was produced in accordance with the RFS regulation. In order for the RFS to continue to function as intended, then each RIN used for compliance must be valid. Under the program today, it is impossible to determine whether any gallon of imported renewable fuel actually meet any requirements of the program.

NBB proposes that each gallon of imported renewable fuel must be validated through the highest level quality assurance plan, where each gallon produced and each RIN validated must first be approved through a real time monitoring system. In the cases where foreign product is being used to meet the strict requirements of the RFS program, then it is necessary for each foreign biofuel producing company to be continually monitored.

In its proposal EPA did not propose to limit whether purchasers of RINs from imported renewable fuel can also be eligible for the affirmative defense under the Q-A-P and importers can participate under the Q-A-P. EPA requested "comment on the likelihood of such producers participating in the quality assurance program, any difficulties to participating they might encounter, and any issues that could affect the integrity of the proposed program." 78 Fed. Reg. at 12,165. To the extent imports of renewable fuel continue to qualify for the program, NBB is concerned that EPA is unable to adequately oversee foreign entities.

With respect to the verification process, NBB is most concerned with the ability of EPA to accurately verify feedstock used outside of the United States, such as palm oil or palm oil derivatives and soybean oil from Argentina and Brazil used to produce biodiesel. Certain such feedstocks are yet to be approved, and foreign crops (except Canada) are subject to numerous recordkeeping and reporting requirements. High level Q-A-P's should be required to ensure that the renewable fuel generating RINs (i.e., fuel designated as "RFS-FRRF") has been properly segregated as required under 40 C.F.R. § 80.1466(j)(1). The Q-A-P should be required, and the third-party auditor also should ensure that the bond is updated annually and meets the requirements of 40 C.F.R. §§ 80.1466 and 80.1467. EPA should consider additional requirements for such fuels to ensure adequate oversight including increasing the bond required for each company to be no less than 10 percent of the total value of imports each year.

The elements of the proposed Q-A-Ps also do not appear to account for the additional recordkeeping requirements required for foreign renewable fuel producers and foreign RIN owners under 40 C.F.R. §§ 80.1466 and 80.1467. This additional documentation includes, for example, certification each time the renewable fuel is transferred for transport and load port and port of entry testing. This documentation should be required for all imported renewable fuel, regardless of who generates the RIN. EPA should ensure that any approved Q-A-P covers both the foreign renewable fuel producer and the domestic purchaser. The Q-A-P elements as proposed appear to focus on the production process. Thus, EPA should consider imposing additional requirements to review documentation from the foreign producer, the exporter in the foreign country (if different), and the importer itself once the fuel reaches the United States.

In addition, EPA should strengthen the ability to ensure invalid RINs associated with imported fuel are replaced. For example, EPA should consider having the domestic purchaser of the imported fuel be first in line to replace any invalid RIN, regardless of whether the RIN was subsequently transferred. EPA should also consider increasing the bond required for foreign renewable fuel producers and foreign RIN owners. At a minimum, EPA should provide additional information on how it assesses bonds and ensures that the bond is updated annually.

While NBB believes additional regulations may be required for imports of fuel from overseas to ensure compliance with the RFS2 requirements, it also recognizes the ongoing and significant trade that occurs directly across the border, largely as a result of NAFTA. In addition, EPA has approved an aggregate approach for crops from Canada, and EPA has provided for alternative methods for truck imports. See, e.g., 40 C.F.R. § 80.1466(l). NBB agrees that truck and rail imports crossing one land border do not present the same types of difficulties in tracking and enforcement as imports brought in through multiple countries or on vessels from overseas. Thus, the additional requirements proposed by NBB focus on imports from vessels and not on imports brought in on trucks or by rail across the border, and EPA should continue to consider additional flexibilities for imports by truck or rail, which we expect would largely be from Canada.