Biotechnology Innovation Organization

February 22, 2017

The Honorable Scott Pruitt
Administrator, Environmental Protection Agency
Air and Radiation Docket and Information Center
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Docket ID No. EPA-HQ-OAR-2016-0544

Dear Administrator Pruitt:

The Biotechnology Innovation Organization ("BIO") is pleased to comment on the U.S. Environmental Protection Agency's ("EPA's") Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation[1] ("Proposed Denial"). BIO is supportive of EPA's proposal. In BIO's view, granting the petitions in question would add unnecessary regulatory complexity and uncertainty to the Renewable Fuel Standard ("RFS") program, jeopardize U.S. economic and job growth, and would fail to further the statutory requirements and goals that Congress directed EPA to enforce and pursue when Congress created the program.

As BIO and other industry associations delineated in an October 27, 2016, letter to EPA, because the oil industry is highly consolidated and vertically integrated, enforcing the RFS program at the right point in the supply chain is critical to ensure that key market players have the incentive to facilitate the goals of the program. Moving the point of obligation downstream would remove that imperative for refiners and inject uncertainty into the program, undermining the ability of market actors to plan for growth in renewable fuels use as mandated by Congress. Further, committing to one regulatory regime only to change the rules midstream hampers the RFS program's goal -- mandated by Congress in the law that created the program -- of accelerating the commercialization of advanced and cellulosic biofuels. Changing the point of obligation would achieve just the opposite of that goal. It would increase program complexity, impose a set of new administrative and compliance costs and risks that would adversely affect a significant range of new entities, and undermine investor confidence in the broader renewable fuels industry just as cellulosic and other advanced biofuels are coming online[2]. Also, as EPA rightly noted in its draft analysis of the Proposed Denial, market data does not justify changing the RFS point of obligation[3].

[1] *See* Notice of Opportunity to Comment on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, 81. Fed. Reg. 83776 (Nov. 22, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-11-22/pdf/2016-27854.pdf .
[2] Letter from Advanced Biofuels Business Council et al to Administrator McCarthy, EPA-HQ-OAR-2016-0544-0054 (Nov. 15, 2016), available at https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0054 .
[3] Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-HQ-OAR-2016-0544-0120, (Nov. 10, 2016), available at https://www.epa.gov/sites/production/files/2016-11/documents/420d16004.pdf ("Proposed Denial").

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Background

BIO is the world's largest trade association representing biotechnology companies, academic institutions, state biotechnology centers and related organizations across the United States and in more than 30 other nations. BIO members are involved in the research and development of innovative healthcare, agricultural, and industrial and environmental biotechnology products. In the energy space, BIO represents over 75 companies leading the development of new technologies for producing conventional and advanced biofuels. Through the application of industrial biotechnology, BIO members are improving conventional biofuel processes, furthering advanced and cellulosic biofuel production technologies, and speeding development of new energy crops.

The RFS has been an economic driver for these companies. It has spurred investment, research and development, and commercialization of advanced and cellulosic biofuels. The RFS has enabled the advanced biofuels industry to make significant investments to meet the requirements of the RFS. As a result, according to a 2014 footprint analysis conducted for Fuels America, the RFS creates $184.5 billion of economic output, 852,056 jobs, and $46.2 billion in wages and $14.5 billion in taxes each year in the United States.[4]

Market Uncertainty

Three years after its adoption as part of the Energy Independence and Security Act of 2007, the EPA issued a final RFS2 Rule[5]. Relying on the incentives created by the RFS statute and the regulations put forward by EPA, industry ramped up its investment in the development of the advanced and cellulosic biofuels industry. Unfortunately, the certainty created by the RFS was upended in 2013 when EPA issued its initial proposed rule for 2014 RFS Renewable Volume Obligations ("RVOs") (the "2014 RFS Proposal"). In the 2014 RFS Proposal, EPA announced its intention to undertake a sharp and surprising departure from EPA's prior approach to interpreting and implementing the statute[6]. The 2014 RFS Proposal inaugurated a destabilizing period for the program. BIO and its members, and other market participants, experienced over three years of regulatory uncertainty and confusion, lost opportunities, and stalled growth attributable to EPA's departure (first proposed by EPA in late 2013, and implemented by EPA in late 2015[7]) from the basic purposes and requirements of the RFS statute.

BIO has estimated that EPA's actions resulted in a shortfall of about $22.4 billion in investment in advanced and cellulosic biofuels[8]. Fortunately, EPA departed from its flawed reliance on the general waiver authority in promulgating final Renewable Fuel Standard RVOs for 2017 and biomass-based diesel volume requirements for 2018[9], putting the RFS

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[4] *See* Fuels America, Fuels America Releases New Footprint Analysis: Renewable Fuel Drives Economic Growth, *available at* http://www.fuelsamerica.org/pages/fuels_america_releases_new_footprint_anaylsis; http://fuelsamerica.guerrillaeconomics.net/assets/site/res/2014%20Fuels%20America%20Methodology.pdf (Apr. 15, 2014) (providing detailed description of study results, data sources, and methodology).
[5] 75 Fed. Reg. 14,670.
[6] 2014 Standards for the Renewable Fuel Standard Program, 78 Fed. Reg. 71732 (Nov. 29, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28155.pdf ("2014 RFS Proposal").
[7] Renewable Fuel Standard Program: Standards for 2014, 2015, 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77420 (Dec. 14, 2015), available at https://www.gpo.gov/fdsys/pkg/FR-2015-12-14/pdf/2015-30893.pdf .
[8] Comment submitted by Brent Erickson, Executive Vice President, Biotechnology Innovation Organization (BIO), page 31, EPA-HQ-OAR-2016-0004-2721 (Jul. 28, 2016) available at https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0004-2721 .
[9] Renewable Fuel Standard Program: Standards for 2017 and Biomass Based Diesel Volume for 2018, 81 Fed. Reg. 89746 (Dec. 12, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-12-12/pdf/2016-28879.pdf .

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back on track. This action has begun to provide certainty for investors in advanced and cellulosic biofuels[10].

Particularly given the investment impacts of past mistaken actions, EPA was correct to recognize that a change in the point of obligation would be a substantial disruption that has the potential to undermine the success of the RFS[11], particularly for investors investing in new cellulosic biofuel production technologies and commercial scale production facilities at a time when many are nearing commercial-scale production[12]. Denying the petitions to move the point of obligation will help maintain investment in this space, furthering the continued expansion of the advanced and cellulosic biofuels industry as contemplated by Congress when it created the current RFS program.

No Disadvantage for Petitioners

We do not aim here to summarize EPA's thorough and cogent analyses of various issues discussed in EPA's proposed decision to deny the petition.[13] Nonetheless, we note here that EPA was correct to recognize that the petitioners are not disadvantaged compared with integrated refiners in terms of their cost of compliance and that the evidence does not show that other stakeholders, such as unobligated blenders, are receiving windfall profits[14]. As a policy brief published by the Iowa State University Center for Agricultural and Rural Development (CARD) (attached as Appendix I to this letter) has noted, it would be misguided to conclude that refiners who do not have the fuel blending capabilities of large, integrated oil companies are in danger of going out of business due to their need to buy RINs (Renewable Identification Numbers). As the policy brief published by CARD shows, high RIN prices, holding constant gasoline consumption levels, have no impact on profits of refiners, blenders, or integrated oil companies. Moving the point of obligation from refiners to blenders would have no impact on this loss; it would be better for EPA to send a stable investment signal to the fuels market rather than undertaking actions like moving the point of obligation[15].

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[10] Lane, Jim. "Back on Track: EPA issues on-time, robust Renewable Fuel Standard volumes for 2017-18." *Biofuels Digest,* 23 Nov. 2016, available at http://www.biofuelsdigest.com/bdigest/2016/11/23/back-on-track-epa-issues-on-time-robust-renewable-fuel-standard-volumes-for-2017-18/ .

[11] Proposed Denial 12.

[12] *Id.* at 39; *see id.* at 2 ("In the short term, we believe that initiating a rulemaking process to reconsider or change the point of obligation could work to counter the program's goals by causing significant confusion and uncertainty in the fuels marketplace. Such a dynamic would likely cause delays to the investments necessary to expand the supply of renewable fuels in the United States, particularly investments in cellulosic biofuels, the category of renewable fuels from which much the majority of the statutory volume increases in future years is expected.").

[13] Although we commend EPA for the thoroughness and cogency of such analyses, we caution that our agreement with the basic conclusion of the proposed denial decision should not be taken as a blanket endorsement of all the statements and arguments set forth in the proposed decision.

[14] *Id.* at 2.

[15] Babcock, Bruce; Lade, Gabriel; and Pouliot, Sébastien. "Impact on Merchant Refiners and Blenders from Changing the RFS Point of Obligation" *Iowa State University Center for Agricultural and Rural Development,* Dec. 2016, http://www.card.iastate.edu/products/publications/pdf/16pb20.pdf; *see also id.* at 1 ("High RIN prices that result from substitution of ethanol for gasoline [have an] impact [on] refiner profits from a loss of market share to biofuel producers. This loss of profits from lost market share is consistent with the objective of the RFS to substitute biofuels for gasoline. Moving the point of obligation from refiners to blenders would have no impact on this loss."); *id.* at 14 ("The primary reason why fueling infrastructure and consumption of ethanol has lagged expectations is uncertainty about the U.S. commitment to RFS blending targets, not the fact that refiners are further upstream in the fuel supply chain. Thus, if EPA is to continue to push forward with its goal of continuing to expand the biofuel blending mandates, it would be better served to send a stable investment signal to the fuels market rather than undertaking actions like moving the point of obligation."); Initial Brief for Petitioner-Intervenors Americans for Clean Energy, et al. at 2, *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. filed Jan. 12, 2017) ("[C]osts and value in the RIN market (as in any market) are implicitly passed through the value chain to facilitate the most efficient means of compliance, regardless of the point of obligation. . . . In other words, the RFS program (if properly carried out) can fulfill Congress's intent of rapid growth without changing the point of obligation.").

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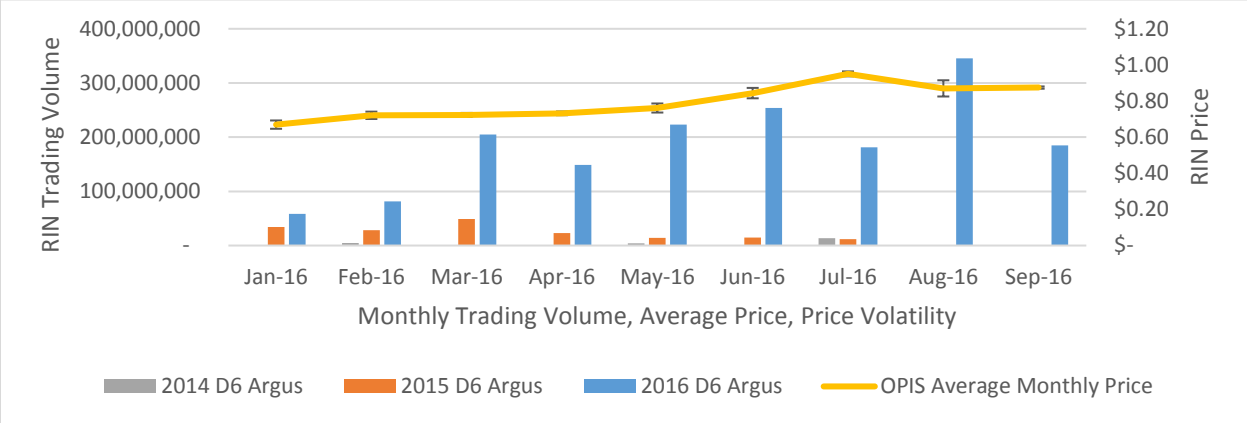
Further, data recently released by EPA in response to a Freedom of Information Act (FOIA) request enable an accurate accounting of how obligated parties achieved RFS compliance from 2010 through 2015, using available RINs and alternate compliance flexibilities.[16] A true accounting of RINs and other compliance options demonstrates that refiners and importers reached the 10 percent blending limit as early as 2010 and definitively surpassed it by 2012. At no point in time did refiners and importers experience an aggregate shortage of RINs. The full analysis is attached as Appendix II to this letter.[17]

Additionally, in an EPA official's declaration (attached as Appendix III to this letter) submitted by the agency to the U.S. Court of Appeals for the District of Columbia Circuit in *Americans for Clean Energy, Inc. v. EPA*, the agency presented evidence showing that "obligated parties have been able to obtain RINs in the marketplace throughout 2016, and that large volumes of RINs have been traded."[18] Presenting data from the EPA Moderated Transaction System, the agency declaration reports a steady volume of RIN transactions each month between January and September 2016.[19] These data are sufficient to show that the market has functioned as intended to make RINs available to obligated parties who needed them for compliance. Moreover, BIO has correlated the volume of monthly trades presented by EPA with average monthly prices and price differentials published by Oil Price Information Service. The correlation for D6 RINs, shown in Figure 1 below, corroborates EPA's finding that the RIN markets functioned as intended to provide sufficient RINs at prices sensitive to demand.

Figure 1: Monthly RIN Trading Volumes, Average Price and Price Differentials for D6 RINs in 2016



[16] EPA. (2016) "Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program." https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and.

[17] The analysis, *The Myth of High RIN Prices As Proof of the Blend Wall*, published in Jan. 2017, is also available at https://www.bio.org/sites/default/files/Disproving_the_Blend_Wall.pdf, available via https://www.bio.org/press-release/new-bio-report-dispels-myth-blend-wall-and-high-rin-prices .

[18] Declaration of Paul Machiele (Exhibit 2 to EPA Response in Opposition to Small Refiners' Coalition's Motion for Stay) at 8, *Americans for Clean Energy, Inc. v. EPA* (D.C. Cir. No. 16-1005) (filed Nov. 14, 2016) (declaration of Manager of Fuels Center in Assessment and Standards Division of EPA Office of Air and Radiation's Office of Transportation and Air Quality); *see also id.* at 1 ("I have served as the Manager of the Fuels Center for the last fourteen years. . . . I and my staff have been involved in developing every RFS regulation since inception of the program[.]").

[19] *See id.* at 3-8.

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Conclusion

"Renewable fuel producers and their customers require market certainty to justify investment and growth in renewable fuel production and infrastructure."[20] Given the impact that changing the point of obligation would have on the RFS, the uncertainty that it would create in the advanced and cellulosic biofuels sector, and the lack of sufficient basis to support changing the point of obligation, EPA was correct in proposing to deny the petitions to change the RFS point of obligation. BIO respectfully urges EPA to act in a timely manner to finalize its proposal to deny these requests, so as to remove any uncertainty that might be thought to arise from the pendency of these petitions.

Sincerely,

Brent Erickson, Executive Vice President
Biotechnology Innovation Organization (BIO)

[20] EPA Response in Opposition to Small Refiners' Coalition's Motion for Stay at 18, *Americans for Clean Energy, Inc. v. EPA* (D.C. Cir. No. 16-1005) (filed Nov. 14, 2016); *see id.* at 19 ("uncertainty in the fuel markets" is contrary to Congress's decision in the RFS statute to "mandate[] rapidly increasing renewable fuel use in transportation fuel over time").

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