



August 17, 2018

Honorable Andrew Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Docket ID No: Docket ID No. EPA–HQ– OAR–2018–0167**

Dear Acting Administrator Wheeler,

The Advanced Biofuels Business Council (ABBC) is pleased to submit the following comments in response to the U.S. Environmental Protection Agency’s (EPA) Proposed Standards for 2019, and Biomass-Based Diesel Volume for 2020. The Council represents worldwide leaders in the effort to develop and commercialize the next generation of advanced biofuels, ranging from cellulosic ethanol made from dedicated energy crops, forest residues and agricultural waste to other types of advanced biofuels made from municipal solid waste, algae, and other feedstocks.

As a general matter, the Council appreciates EPA’s proposal to increase the Renewable Volume Obligation (RVO) for advanced biofuels and maintain the conventional biofuel standard of 15 billion gallons. As we have stated during previous rulemakings, the unnecessary (and now deemed unlawful) invocation of EPA’s general waiver authority to account for distribution-related concerns – even when targeted at conventional biofuel volumes – dampens investor interest in advanced biofuels. We appreciate that the regulatory and market uncertainty related to “distribution waivers” is behind us.

Unfortunately, we have ongoing concerns about EPA’s administration of the RFS for advanced biofuels.

The RFS essentially level sets a non-competitive marketplace to ensure that oil companies, otherwise unwilling to utilize non-petroleum fuels, use a minimum amount of renewable fuel each year. By all accounts, the program has worked well for many types of renewable fuel, including conventional biofuel (now at the statutory maximum) and biodiesel (now exceeding the statutory targets established by Congress in 2007). Renewable natural gas is also coming online very quickly. The RFS is working to create new manufacturing and economic growth opportunities across the country, while working to further reduce harmful emissions and foreign oil dependence.

One of the key questions going forward is whether the cellulosic biofuels industry will emerge as intended by Congress, when it set aggressive volumetric targets for this fuel in 2007. Economic conditions between 2008-2013 certainly played a role in slowing down progress. As is the case with all new technologies, some of the early cellulosic biofuel processing technologies did not materialize. However, the cellulosic biofuel

sector is far more technologically mature than it was even five years ago. One of the final hurdles we face as an industry is working with EPA to ensure that the RFS is optimized to promote commercial growth in cellulosic biofuels. Unfortunately, we are not there yet.

The baseline regulatory conditions under which the cellulosic biofuel industry operates remains challenging. While we understand the tendency to be risk-averse in the current RFS political climate, issuance of Cellulosic Waiver Credits (CWCs) on a gallon-for-gallon basis against the RVO continues to undercut demand for liquid cellulosic biofuels. One of the most promising cellulosic biofuel pathways – corn fiber ethanol – remains tied down by registration issues. To illustrate the point, the corn fiber ethanol sector is ready to generate hundreds of millions of D3 RINs in the near-term; however, largely registration-related issues have EPA projecting just 24 million gallons of liquid cellulosic biofuel in 2019.

It is also critical to point out that midstream – and often sudden – regulatory changes have a significant chilling effect on emerging technologies. Last year’s decision to change the cellulosic biofuel projection methodology – to be based more acutely on “actual production” – undervalues the ability for new companies to ramp up output and perversely inhibits their ability to do so (as ramp up depends on the expectation that these companies will do something different – i.e. ramp up – as opposed to adhere to “past performance”). Likewise, EPA’s sudden affinity for the use of small refinery waivers in 2017 – without volumetric reallocation – systematically undercuts the intent of the law to increase the production and use of biofuels across all D-RIN categories. Essentially, EPA’s over-issuance of small refinery waivers under Administrator Pruitt destroyed demand for all types of biofuels while simultaneously penalizing good investment behavior and rewarding bad investment behavior under the program. Together, these conditions undercut the broader intent of the law to expand markets for cellulosic biofuels.

We are confident that, with the right regulatory approach, cellulosic biofuels will meet expectations in the coming years. We very much appreciate the engagement by EPA staff to address challenging technical and regulatory questions in a difficult working environment. Respectfully, we would like to submit the following comments regarding the proposed 2019 RVO.

I. **Why careful program administration is critical to the efficacy of the RFS in growing renewable fuel markets and spurring the commercialization of advanced biofuels**

A. **The motor fuel market problem the RFS is designed to address**

Global oil markets are (collusively) price-controlled by OPEC at the global level and are extremely consolidated and vertically integrated domestically. The absence of free market forces in the liquid fuel marketplace are a problem for the advanced biofuels industry (and other innovators) because non-competitive marketplaces do not properly facilitate and reward innovation. Non-competitive and non-price driven markets are almost impossible to predict regarding future demand opportunity, because the market does not behave based on free market fundamentals and the creation of a better product does not necessarily translate into market demand. This lack of predictability increases investment risk – or makes risk difficult to assess precisely – which in turns drives investment and potential strategic partners to other sectors. The RFS is an aggressive but flexible program that requires obligated parties to blend increasing volumes of various types of renewable fuel over time. The policy is necessary to do what a free market

would do on its own: reward innovation.

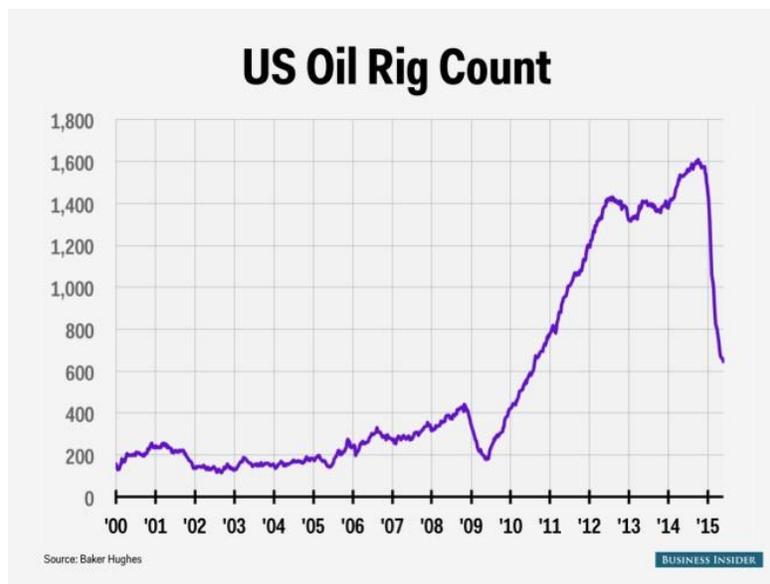
## B. Recent trends as case in point for why proper RFS implementation is so important

Much has been made of the domestic (tight) oil boom, which is partly responsible for driving down U.S. foreign oil dependence to roughly 20 percent of U.S. consumption. However, this recent uptick in domestic oil production does not mean the country is “out of the woods” when it comes to foreign oil dependence.

First, the Organization of the Petroleum Exporting Countries (OPEC) very recently used their market power to nearly snuff out U.S. innovation in the tight oil production sector. Certain members of OPEC decided in late 2014 to allow global crude oil prices to slip in part to curtail competition and reclaim market control. Essentially, OPEC colludes to lower oil price to thin out competition from those who cannot compete at that price or who’s investments terminate under adverse market conditions. The mere threat of OPEC price collusion repels investment to other (likely non-fuel energy) sectors.

A Bloomberg report entitled “OPEC Is About to Crush the U.S. Oil Boom” noted that the strategy worked very quickly.<sup>1</sup> In just 18 months, OPEC knocked U.S. oil production back significantly. A 2015 OPEC report openly acknowledged the effort and its effects: “In North America there are signs that US production has started to respond to reduced investment and activity. Indeed, all eyes are on how quickly US production falls.”<sup>2</sup> A July 2016 paper also concluded unequivocally that “OPEC altered their behavior to limit the role of U.S. shale oil producers.”<sup>3</sup>

The charts below illustrate how effective OPEC’s predatory strategy was in the 2014-2016 timeframe.



<sup>1</sup> <http://www.bloomberg.com/news/articles/2015-10-20/after-year-of-pain-opec-close-to-halting-u-s-oil-in-its-tracks>.

<sup>2</sup> [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/publications/MOMR\\_September\\_2015.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/publications/MOMR_September_2015.pdf)

<sup>3</sup> <http://www.upi.com/Paper-OPEC-worked-to-derail-US-shale/7621467376151/>

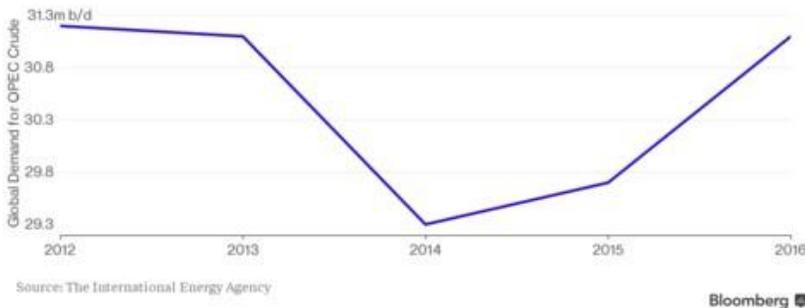
**Graph 5.6: US annual liquids production and annual growth**



Source: OPEC Secretariat.

**OPEC Loses (and Reclaims) Market Share**

U.S. supply ate into demand for OPEC's crude. Now the group is on the rise again.



Sources: The International Energy Agency

Bloomberg

It is true that a more recent rebound occurred in tight oil production. OPEC found it difficult to maintain supply controls on all members of OPEC, and some tight oil producers have persevered, adjusting to lower oil prices by using technology and resources more efficiently. The more recent rebound in U.S. rig counts is largely attributable to these factors.

However, it is also true that tight oil producers rely on another type of federal government support – uniquely advantageous U.S. tax policies – to weather storms in the global fuel energy marketplace. For example, some of the largest U.S. producers of tight oil have testified before Congress that support from the federal government – in the form of unique tax breaks for tight oil and gas development – insulate tight oil/gas investments and technologies from failure.<sup>4</sup>

In addition, even some of the most pro-oil reports warn that the recent recovery in tight oil is not enough to satisfy world demand and keep fuel energy prices low. For example, R.T. Duker (research director at the energy firm Wood MacKenzie, which reports regularly on the upswing in tight oil

<sup>4</sup> [https://www.huffingtonpost.com/2012/09/14/harold-hamm-tax-break\\_n\\_1884327.html](https://www.huffingtonpost.com/2012/09/14/harold-hamm-tax-break_n_1884327.html); and, <https://archives-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/EP/20120913/HHRG-112-IF03-WState-HammH-20120913.pdf>

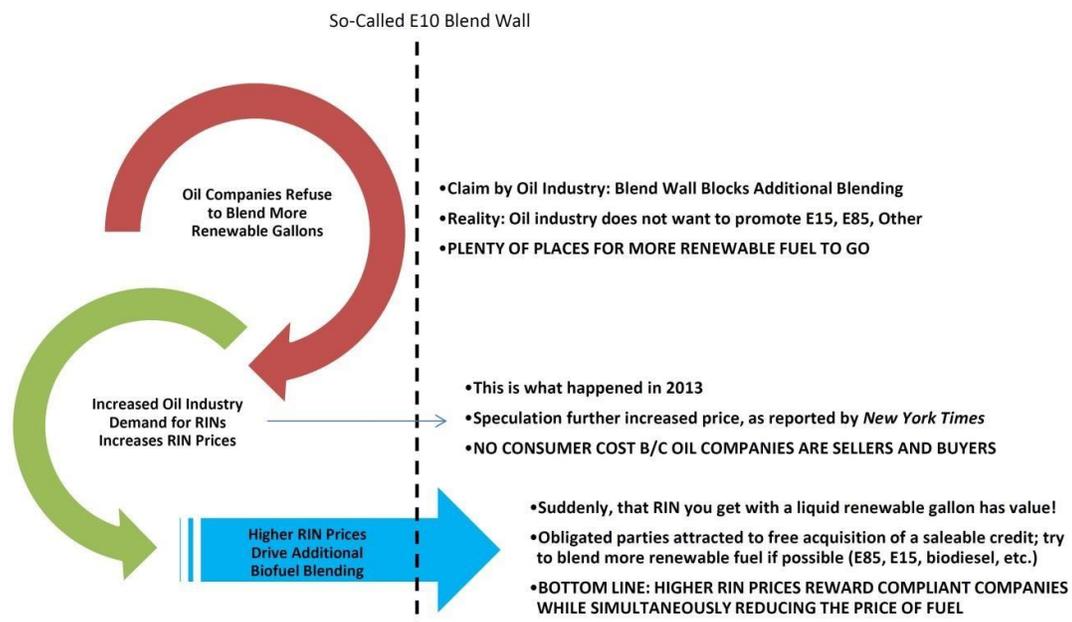
production) recently stated, “[e]ven as we add up how much supply there is in the U.S. and OPEC and other areas, you can’t get there with just OPEC, you can’t get there with just tight oil ... and we actually don’t think you can get there with just the two together.”

Finally, being less dependent on foreign oil is not the same as eliminating foreign oil dependence. In 2017, the U.S. spent \$191 billion on foreign oil. Imported petroleum is still among the top three categories of imported goods contributing to the \$810 billion U.S. trade deficit (goods only) in 2017.<sup>5</sup> Roughly one-third of the \$191 billion – or \$64 billion – went to OPEC countries openly colluding to depress the commercialization of American energy technologies. Americans spent more than \$11 billion on oil from Iraq, and more than \$7 billion on oil from Russia.

### C. How the RFS works to open markets and reduce foreign oil dependence

As acknowledged multiple times in the proposed rule, Congress sought to bolster energy independence and security by increasing the amount of clean, renewable fuel used in the domestic transportation fuel pool. The effectiveness of the program essentially boils down to how EPA manages market demand for Renewable Identification Numbers (RINs).

The primary value of the RIN program, other than facilitating compliance and some level of compliance flexibility, is its ability to increase market access for renewable fuels. That is, when an oil company refuses to blend more liquid biofuel, they can buy a RIN on the open market instead. If a significant number of oil companies refuse to blend liquid gallons and seek RINs on the open market, RIN trading and values increase because of this affirmative non-compliance. Higher RIN prices then provide an incentive for other obligated parties to blend physical quantities of (liquid) renewable fuel, because they acquire a (now more) valuable and saleable RIN with each gallon of renewable fuel purchased.



<sup>5</sup> [https://www.census.gov/foreign-trade/Press-Release/current\\_press\\_release/exh8.pdf](https://www.census.gov/foreign-trade/Press-Release/current_press_release/exh8.pdf).

II. Aspects of the proposed rule cut against the intent of the law and recent legal decisions; EPA must address the following aspects of the proposed rule to accelerate the commercial deployment of cellulosic biofuels and enforce the law as intended by Congress.

A. The proposed RVO suggests that the RFS will continue to grow volumetrically in 2019; however, the volumetric targets ring hollow given EPA's ongoing refusal to: (a) curb Small Refinery Exemptions (SREs); (b) reallocate waived SRE gallons.

When Congress created the RFS in 2005, it included a temporary exemption for small refineries – defined as those with less than 75,000 barrels of crude oil throughput per year – from the mandate through 2011. The revised version of the RFS created in 2007 did not alter this exemption, but EPA did extend the blanket exemption through 2013.<sup>6</sup> The statute also provides authority to EPA to, upon petition, grant an extension of the exemption to any small refinery demonstrating that the RFS causes “disproportionate economic hardship” to the petitioning refinery ([7 U.S.C. §7545 \(o\)\(9\)](#)).

In 2017, a *Reuters* report exposed that EPA had secretly been giving SREs to now dozens of refineries, some of them subsidiaries of the largest refining companies in the world. EPA's issuance of SREs jumped from less than 10 in years 2014 and 2015 to 20 in 2016 and at least 29 in 2017. The 2019 proposed rule itself notes that EPA retroactively waived more than 2 billion gallons from the RFS in 2016-17 alone. The final RVOs for 2016 and 2017 were essentially not enforced, and the quantity of carryover RINs – which can be used in lieu of liquid biofuel gallons in later years – ballooned to more than 3 billion gallons/RINs.

We have several specific concerns with EPA's ongoing use of SREs:

1. USDA Secretary Sonny Purdue rightly called EPA's use of SREs in 2016-2017 “demand destruction,” in clear contravention of the RFS. We agree. SREs reduce demand in all D-RIN categories. Setting RVOs then retroactively and egregiously waiving those standards violates both the spirit and intent of the law to build biofuels capacity, create jobs and further reduce oil dependence, as set forth by Congress.
2. In rationalizing its behavior regarding SREs, former EPA Administrator Scott Pruitt suggested that the Agency's hands are tied by recent court decisions. This is untrue. For example, a recent court decision by the Tenth Circuit Court of Appeals ([Sinclair Wyoming Refining Co. v. U.S. E.P.A., Aug. 15, 2017](#)) concluded that EPA's denial of a waiver for small refineries was improper based on too strict an interpretation of “disproportionate economic harm” (i.e. that disproportionate economic harm can exist without necessarily threatening the refinery's long-term viability). The ruling found that the denial of the Sinclair petition on the more stringent grounds was wrongful; however, it did not conclude that the Sinclair petition should be approved, or that any demonstration of economic harm by an oil refiner necessarily warrants an SRE. Likewise, in finding for *Ergon-West Virginia (EWW)*, the 4th Circuit Court of Appeals found that the U.S. Department of Energy (DOE) – and by extension EPA – failed to consider critical “hardship” factors when denying an SRE petition from EWW. Like *Sinclair*, though, the court did not establish a new standard in which any economic hardship warrants an SRE.

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<sup>6</sup> [40 CFR Part 80, Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Final Rule](#), at 1340).

3. The statute is clear that any SREs that exist post-2011 (adjusted by EPA to be post-2013) should be extensions of previously awarded SREs for specific refineries. It is not clear from the public record that the SREs were “extensions” of previous individual exemptions, as required by statute. EPA has not provided a list of companies receiving SREs in either 2014 or 2015 (after the blanket exemption period expired in 2013). However, it is unclear how EPA could be “extending” fewer than 10 annual SREs in the 2014-15 timeframe into 20 SREs in 2016 and at least 29 SREs in 2017.
4. Clean Air Act (CAA) section 211(o)(9) provides the statutory guidance for awarding SREs to small refineries. The statute is clear that SREs should only be temporary. In fact, the title of the section is “temporary exemption.” See CAA 211(o)(9)(A). The purpose of the SRE allowance in the statute is to protect small refineries by giving them more time to comply with the law.<sup>7</sup> The intent of the statute is clear. Small refiners are to be given more time to comply with the RFS, but not an indefinite amount of time. While much of the information about SREs lies behind Confidential Business Information (CBI) protection, EPA appears to be extending its blanket exemption indefinitely by awarding SREs to any small refiner demonstrating potential economic harm. We believe this change of policy violates the statute and undercuts Congressional intent. It certainly undercuts investment made under the former approach.

**B. The methodology proposed for setting the RVO for liquid cellulosic biofuels – first adopted for the 2018 RVO – is overly conservative and undercuts U.S. investment in this emerging sector; it should be dropped in favor of EPA’s prior forward-looking approach.**

Congress intended – and the courts have reaffirmed – that RFS cellulosic biofuel blending requirements must be set in a forward-looking manner. Specifically, EPA is obligated to take a “neutral aim at accuracy” when setting “the *projected* volume of cellulosic biofuel production” in each calendar year. See *American Petroleum Institute v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013), *reaffirmed by Americans for Clean Energy v. EPA*, No. 16-1005, slip op (D.C. Cir. July 28, 2017).

The statutory requirement for EPA to enforce *projected* volumes is critical to investment in next-generation biofuels because the RFS, by design, creates the market opportunity that attracts project finance in an otherwise non-competitive marketplace. Ethanol, for example, is the cheapest form of octane in the marketplace today. If motor fuel markets were price-driven and rewarded innovation, 15 percent ethanol blends would be ubiquitous across the country. Instead, our industry relies on a corrective mechanism – the RFS – and regulatory synergies (e.g. Reid Vapor Pressure regulations) to drive demand.

It follows that if EPA fails to properly consider forthcoming supply of D3-eligible cellulosic biofuel in any given RVO, investment in cellulosic biofuel suffers due to: (1) the uncertainty around whether the RFS will drive interest among oil companies to secure new cellulosic biofuel gallons coming online; and, (2) the increased risk of D3 RIN oversupply once new (unaccounted for) gallons come online, which in turn depresses D3 RIN prices, decreases market liquidity and dampens investor interest in the first stages of commercial growth.

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<sup>7</sup> <https://www.gpo.gov/fdsys/pkg/FR-2010-12-09/pdf/2010-30296.pdf>

Unfortunately, the 2019 proposal continues to rely on a methodology first used in 2018 that undercuts U.S. investment in cellulosic biofuels by creating the very conditions described above. The methodology essentially looks at the volume of cellulosic biofuel expected to come online then discounts the projection “based on past performance.” See FR32034. EPA seems to downplay the role of actual production in the final number, as if it’s just one of many factors. But in practice, this new methodology transposes a new facility’s lack of production in prior years to forthcoming RVOs even if the (new) facility is just coming online and expects these facilities to produce commercial quantities of cellulosic biofuels ahead of the regulation that is supposed to create the market demand for these fuels. Put another way, while the RFS is intended to drive new gallons of cellulosic biofuel, the methodology used to achieve that outcome is driven by the assumption that past performance will prevail.

As such, the methodology – absent other adjustments to program implementation – turns the RFS on its head. The clear intent of the RFS is to *drive* renewable production and use, as opposed to merely reflecting renewable fuel production already occurring. This is a critical difference because securing project finance for emergent fuels depends on demonstrating market demand. So, if the RFS signals that new cellulosic gallons may be stranded, project finance and commercial deployment is much less likely to occur. This methodology may violate the law, as it could be described as a back-door way of basing the cellulosic biofuel RVO on actual production (as sought by the oil industry for years) rather than projected volumes. We do not fault EPA for trying to be more accurate in its projections. However, the courts expressly rejected the oil industry’s “actual production petition” in *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. July 28, 2017). Either way, the new methodology certainly undercuts rather than drives the manufacturing outcomes intended by Congress and prioritized by the Trump administration.

In addition, we continue to raise concerns about EPA’s proposed rationale for needing to adjust its prior approach for projecting liquid cellulosic biofuel production. In the proposed rule, EPA acknowledges that its projections for cellulosic biofuels have been both too high *and too low* in prior years. EPA again describes its prior projection methodology as “somewhat inaccurate,” as if to portend a problem that needs to be fixed. But if one looks at the two years predating the adoption of a new methodology last year – 2015 and 2016 – EPA projected that there would be a cumulative 353 million cellulosic RINS available. There were at least 330 million cellulosic RINs available during those compliance years. It should be noted that the RFS was not enforced in 2015 – or was enforced after the fact when the 2014-2016 multiyear rule took effect. And yet, the cellulosic biofuel sector increased output and EPA staff was extremely accurate as predictor during the years leading up to the decision to change the methodology.

The Council expressed concern during last year’s rulemaking that EPA seemed to alter the public record late in the process in 2017 to suggest that the D3 projection methodology needed changing. For example, a May 2017 memo stated, regarding its prior methodology, “we [EPA staff] believe the methodology overall has resulted in reasonably accurate projections in these years and is appropriate for use in 2018.”<sup>8</sup> And yet, the proposed rule for 2018 – and now again in 2019 – calls the same methodology “somewhat

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<sup>8</sup> See Assessment of the Accuracy of Cellulosic Biofuel Production Projections in 2015 and 2016, Dallas Buckholder, May 2017 (accessed on the public docket at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=SR%2B&D=EPA-HQ-OAR-2017-0091> on August 30, 2017).

inaccurate” without an explanation for why the agency reached opposite conclusions about the same methodology inside of the same rulemaking.

In overstating the problem necessitating a change in methodology, EPA does not mention the unique regulatory characteristics of the D3 pool allowing the Agency to make available the equivalent of those required RVO gallons as Cellulosic Waiver Credits (CWCs). In other words, obligated parties had access to 140M D3 RINs (plus any RINs banked) *as well as an additional* 123M CWCs on a gallon-for-gallon basis, against the 123M gallon 2015 cellulosic RVO. In 2016, EPA did over-estimate cellulosic RIN supply by ~40M gallons, but the 230 million CWCs made available in 2016 covered the delta by 190 million gallons (equivalent). EPA over-estimated the two-year (2015-16) compliance period by just 23M cellulosic RINs; however, the Agency issued a cumulative 353 million CWCs to create a “total compliance pool” of ~683 million gallons (equivalent) against the two-year cumulative RVO of 353M gallons. These figures are illustrative, as there is some compliance flexibility from year-to-year. But clearly, there is no shortage of compliance optionality. The issue we have in the D3 pool is RIN (+ CWC) over-supply.

In 2017, the standard for cellulosic biofuel was 311 million gallons. More than 250 million D3 RINs were generated in that year. Again, the delta must be taken against the availability of 311 million CWCs and in consideration of substantial RIN carryover. It is also important to note that cellulosic biofuel producers were operating under difficult and uncertain regulatory conditions in 2017. As discussed, EPA continued to make available cellulosic waiver credits (CWCs) on a one-for-one basis against the RVO. CWCs are discussed in more detail below, but the availability of CWCs dampens demand for (and therefore the output of) cellulosic biofuel. Second, EPA fundamentally changed its approach to Small Refinery Exemptions (SREs) starting in early 2017; retroactively curtailing demand for biofuels across all compliance pools by more than 2 billion gallons in 2016-17 alone. Finally, as discussed below, fuel registrations for cellulosic ethanol (particularly corn fiber ethanol) remain uncertain for many companies that could together produce hundreds of millions of gallons of D3-ethanol in the near-term. There is also no mention of – or factor to account for – the fact that the “past performance” of cellulosic biofuel producers was achieved under adverse conditions in which 2016 was essentially a catch-up year to account for EPA’s failure to enforce the law from 2013-15.

The Council commented last year that EPA should, at minimum, use multiple years to set the RVO. We appreciate EPA’s decision to do so. EPA asks for comment about whether 2018 data should be considered for setting the percentile values. It absolutely should, while considering the backloaded nature of RIN-generation – calendar-wise – from year-to-year. EPA should also use data from 2015, when it underestimated the output of cellulosic biofuels. EPA states that it excluded this data because a different methodology was used; except that 2016 was also a year with a different methodology. The clear difference between 2015 and 2016 from a percentile perspective is 2015 data is advantageous to biofuels and 2016 data is not. Both years should be considered; or neither. Arbitrarily considering one year and not the other raises procedural questions.

Respectfully, we ask the agency to drop its ongoing use of the “new” methodology for setting cellulosic volumes and return to the forward-looking approach used successfully in recent years. We remain concerned that the shift to the current methodology was intended as a back-door way to base cellulosic biofuel projections on “actual production” or “past performance” rather than expected production. Most

importantly, investors in U.S. innovation need to know that the methodology – irrespective of the numerical target – is designed to be inclusive rather than exclusive of new gallons.

**C. EPA staff should move quickly to resolve outstanding RFS-eligibility questions related to fuel registration; should not hinge projected volumes on registration**

As discussed, the RFS is a market corrective program that provides the market signal necessary to spur investment in cellulosic biofuels. As such, it is critical that prospective producers be notified in a timely manner whether their company-specific processes are RFS-eligible. EPA has made progress on pathways to some degree. However, there are still outstanding questions on RFS-registration side related to organic and industrial waste, bio-intermediates, and corn fiber. It is challenging for our industry to scale – and provide dependable data to the EPA about the expected rate of commercialization – if we do not know which emerging fuels are eligible under the RFS.

The Council expressed concern last year about EPA’s proposal to exclude from the RVO cellulosic biofuel gallons from facilities that have not been able to secure registration from EPA to produce D3 gallons. We appreciate the Agency’s more nuanced approach this year; specifically, its consideration of facility- and company-based factors regarding inclusion or exclusion from the 2019 projections.

However, there is still significant discussion in the proposed rule about using fuel registration as a marker for likely output. We understand the imperative to be as accurate as possible, as well as the logic of assuming fuel registration is a good indicator of readiness. However, it is also worth consideration that some of these companies have been seeking registration for more than a year; and as such, the registrations should be imminent and ready for 2019 eligibility. The regulation requires the EPA to estimate “projected” capacity, not “approved” capacity. We would not expect EPA to allow non-registered fuels to be eligible for RINS after the given compliance year, but to presume failure *ahead of* an entire compliance year – as if to assume failure on the part of the EPA to grant registrations to producers in a timely manner – discourages rather than encourages new production of cellulosic biofuels. A better approach would be to consider the status of *pending* registrations and let the market work it out. If obligated parties want to buy cellulosic biofuels in late 2019 from companies that only received registration in late 2019, we fail to the issue with this approach.

To be clear, we appreciate EPA staff’s attention to technical issues involving new fuels that have never been addressed at the regulatory level. Unfortunately, it is also true that the RFS fuel registration process continues to dampen output in the liquid cellulosic biofuel sector. The corn fiber cellulosic ethanol industry alone could produce hundreds of million of gallons of liquid D3 biofuel in the near-term; and yet, the proposed RVO calls for only 24 million gallons of liquid cellulosic biofuel gallons in 2019. One of the primary market impediments for corn fiber cellulosic biofuel producers remains the inability to get this fuel registered at EPA. Many of our members have been engaged in the process for multiple years. If there are unanswered technical questions, we are eager to learn what those questions are.

**D. Alternative compliance should not be allowed to undercut interest among obligated parties in securing physical gallons of cellulosic ethanol.**

At its core, particularly regarding cellulosic/advanced biofuels, the RFS is an adjustable mandate that allows EPA to account for uncertainty associated with financial markets and the development of new technologies. Due to multiple market variables, we are now in a situation in which EPA must waive a portion of the cellulosic biofuel standard on a year-to-year basis. There is broad agreement that Clean Air Act section 211(o)(7)(D)(ii) requires EPA to issue cellulosic waiver credits (CWCs) whenever it acts to waive any part of the cellulosic biofuel volumetric standard pursuant to its authorities and obligations under section 211(o)(7)(D)(i). As part of this requirement, Congress required EPA to promulgate regulations to govern the issuance of CWCs, based on the pricing formula established by section 211(o)(7)(D)(ii) and to address certain policy objectives set forth in section 211(o)(7)(D)(iii), which reads in its entirety (emphasis added):

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

EPA's current approach to administering the D3 compliance pool is to provide a forecast of expected cellulosic biofuel production capacity together with the issuance of CWCs in a number equal to the projected RVO. While the Council recognizes the difficulty of predicting new fuel markets in the context of a regulation, and understands that EPA staff are making a good faith effort to get the forecasts right, we believe that EPA fails the test set forth by CAA Sec. 211(o)(7)(D)(iii) by creating a system under which it is not known if D3 RINs will, once produced, be needed for compliance.

As discussed, we agree that EPA must by statute issue cellulosic biofuel waiver credits upon even partial waiver of the cellulosic biofuel standard. The final rule establishing the RFS (published March 26, 2010) includes the rules governing the issuance of CWCs required by section 211(o)(7)(D)(iii). In the rule, EPA recognized that: (1) "Congress afforded the Agency considerable flexibility in implementing the system of cellulosic biofuel credits;" (2) the waiver credit system should facilitate the broader aims of the RFS to promote advanced biofuels; (3) the availability of waiver credits could have "unintended consequences," and, (4) restrictions on the use of waiver credits are being enforced by U.S. EPA at least

in part to “ensure that waiver credits are not over-utilized at the expense of actual renewable volume.”

To date, EPA has chosen to issue as many CWCs as gallons required for use as part of the annual RVOs. In other words, if EPA’s current approach remains unchanged, the agency will issue 381 million CWCs for the 2019 compliance year to match – on a gallon for gallon basis – the 381-million-gallon cellulosic biofuel blending requirement for 2019. EPA also does not require obligated parties to show cause for needing CWCs. So, while EPA does not allow obligated parties to purchase more CWCs than they need for compliance (i.e. the delta between their obligation and what they have already secured) and does not allow obligated parties to accumulate and carryover CWCs from year to year, there is nothing in the regulation that requires obligated parties to make a good faith effort to secure liquid D3 gallons instead CWCs on a year to year basis. As such, obligated parties have the option to buy a predictable, risk-free, condition-free, government-backed waiver as an alternative to buying liquid D3 gallons that would facilitate the RFS (something oil companies do not want to do) and empower a competitor (something the oil companies also do not want to do).

We have expressed our concerns about obligated parties using CWCs to default on their D3 obligations since 2014. For example, we sent a letter to EPA co-signed with the Biotechnology Industry Organization (BIO) expressing our concern that “[p]roducers are reporting that obligated parties are indicating that their compliance strategy is (and may continue to be) to secure D5 RINs and cellulosic biofuel waiver credits as opposed to D3 [liquid gallons] – even if D3 RINs are available at lower cost,” and that EPA’s current approach to “needs to be augmented to prevent obligated parties from taking advantage of the availability of waiver credits and leveraging more overarching uncertainty in the D3 marketplace.”<sup>9</sup> In January 2015, the Council and the Renewable Fuels Association (RFA) submitted a memorandum to EPA on behalf of our shared cellulosic biofuel members detailing the legal latitude EPA has with regard to issuing CWCs. Both documents are in the RFS public record.

As detailed in the 2015 memorandum, EPA has acknowledged in RFS documentation that it must not issue more CWCs than the number of gallons required by the RVO but is free to issue fewer CWCs than the number of gallons required for blending in any given year. Likewise, the statute does not require EPA to identify how many CWCs will be available at the outset of the year. The statute does not require the agency to issue them unconditionally, without any data or attestation showing that obligated parties attempted in good faith to secure liquid D3 gallons. We commend the EPA for having the foresight in the 2010 final rule that CWCs could undercut the objective of the RFS. But EPA’s current approach to avoiding this outcome falls well short of its clear statutory charge to promote certainty, liquidity, and transparency and “ensure that waiver credits are not over-utilized at the expense of actual renewable volume.”

As EPA has acknowledged, administering CWCs in a way that requires obligated parties to buy D3 gallons is fundamental to the success of new cellulosic facilities and to attracting additional investment in cellulosic biofuel capacity. It is difficult to see how this approach squares with the clear intent of the law to promote advanced and cellulosic biofuels. Together with EPA’s proposed new methodology for setting the cellulosic biofuel RVO, the over-issuance of CWCs threatens to flood D3 RIN markets.

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<sup>9</sup> See *Cellulosic refiners hamstrung by chaos in RFS-credit market*, published May 11, 2015, E&E News.

Respectfully, we request that EPA immediately stop making CWCs available – unconditionally – on a gallon-for-gallon basis with the cellulosic RVO. In the longer-term, our industry has submitted additional ideas to EPA staff over the last several years that would further accelerate the commercialization of cellulosic biofuels. As always, we would be happy to discuss those concepts further.

#### E. EPA should not invoke its general waiver authority

In late July 2017, *Americans for Clean Energy* struck down EPA’s reinterpretation of its general waiver authority to include the challenges related to the distribution of renewable fuels. *Americans for Clean Energy v. EPA*, No. 16-1005, slip op (D.C. Cir. July 28, 2017). While the issue is generally regarded as one that involves conventional biofuels (first-generation ethanol) – because the general waiver authority was being used to reduce the residual conventional biofuel standard – waiving the RFS based on oil industry intransigence (as related to making the investments necessary to comply with the law) froze investment in next-generation ethanol fuels because of questions about market growth. A May 2016 analysis by the Biotechnology Innovation Organization (BIO) “estimates that the impact of EPA’s rulemaking delays, unwarranted expansion of its waiver authorities, and methodology for setting annual RVOs has caused a \$22.4 billion shortfall in investment in advanced biofuels.”<sup>10</sup>

In the proposed rule, EPA asks for comment on the use of general waiver authority. It would be neither appropriate nor legally defensible for EPA to exercise its general waiver authority in the 2019 RVO.

With the definition of “supply” now reverting to EPA’s original interpretation of the phrase “inadequate domestic supply” to mean supply of renewable fuel, there is clearly more than enough supply of renewable fuel to maintain the 15-billion-gallon conventional biofuel standard.<sup>11</sup> The proposed rule appears to be still open to the idea that EPA could invoke its general waiver authority based on “severe economic harm.” The Council believes this is implausible based on the following:

- **“Severe economic harm” is a very high bar.** EPA has considered the question of “severe economic harm” in the context of RFS waivers before.<sup>12</sup> Essentially, the economic harm: (a) must be more than significant; (b) would occur but for a waiver; (c) occurs in the context of the broader economy as opposed to one sector or actor within it; and, (d) must be evidenced by a comprehensive and robust analytical basis. Notably, the D.C. Circuit recently rejected the notion that Congress provided a “boundless general waiver authority.”<sup>13</sup> Such a broad waiver authority would interfere with “how the Renewable Fuel Program is supposed to work.”<sup>14</sup>
- **There is a substantial public record detailing the macro-economic benefits of augmenting tight world oil supplies with renewable fuels.** The primary reason Americans have paid significantly more for a gallon of motor fuel or heating oil over the last decade is the reduced availability of cheap crude oil supply relative to increased demand, and the market response (both direct and

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<sup>10</sup> [https://www.bio.org/sites/default/files/Estimating\\_Another\\_Year\\_of\\_Chilled\\_Investment.pdf](https://www.bio.org/sites/default/files/Estimating_Another_Year_of_Chilled_Investment.pdf)

<sup>11</sup> <https://www.eia.gov/petroleum/ethanolcapacity/>

<sup>12</sup> See Texas Waiver decision, published in the Federal Register August 13, 2008, at 47,168.

<sup>13</sup> *ACEI*, No. 16-1005, slip op. at 32; see also *National Petrochemical & Refiners Ass’n v. E.P.A.*, 630 F.3d 145, 149 (D.C. Cir. 2010) (“The EISA authorized the waiver of the volume requirements only in limited circumstances.”).

<sup>14</sup> *Id.* at 31.

via speculation) to this dynamic. The RFS has driven the development of a new alternative fuel industry during a period of very high economic vulnerability and fuel prices in the United States. Speaking to this dynamic, energy economist Philip K. Verleger (who served as an advisor on energy issues to both the Ford and Carter administrations) recently said, “the U.S. renewable fuels program has cut annual consumer expenditures in 2013 between \$700 billion and \$2.6 trillion ... [t]his translates to consumers paying between \$0.50 and \$1.50 per gallon less for gasoline.”<sup>15</sup> Mr. Verleger notes that the RFS put the equivalent of Ecuador’s world oil output on the market during a period of extreme tightness:

Had Congress not raised the renewable fuels requirement, commercial crude oil inventories at the end of August [2013] would have dropped to 5.2 million barrels, a level two hundred million barrels lower than at any time since 1990 ... [t]he lower stocks would almost certainly have pushed prices higher. Crude oil today might easily sell at prices as high as or higher than in 2008. Preliminary econometric tests suggest the price at the end of August would have been \$150 per barrel.”

Oil markets have changed in the last 3 years due to advancements in tight oil extraction. But as discussed in Section 1, this does not mean that the U.S. economy and consumers are protected from the current and future market manipulations of overseas oil cartels often hostile to our interests.<sup>16</sup> You would have to turn basic economics on its head to argue that reducing the use of alternative fuels would bring down oil prices in still tight world oil markets.

- **There is a substantial public record detailing the economic benefits of a U.S. renewable fuels industry.** The most recent analysis of the economic benefits of the RFS appears to be a June 2017 study in the American Journal of Agricultural Economics (Volume 99, 2017). The report found that the RFS in 2015 saved the U.S. economy \$17.8 billion in gasoline expenses, compared to a case where no RFS existed. Gasoline prices were \$0.18 (9.5%) per gallon lower because of the RFS. The program increased federal tax revenues and boosted the value of the U.S. agriculture sector by \$14.1 billion, or nearly \$6,800 per American farm. Crude oil imports were nearly 200 million barrels lower in 2015 than if the RFS did not exist.<sup>17</sup> This analysis builds on a state-by-state economic analysis sponsored by Fuels America detailing the robust economic benefits of the RFS.<sup>18</sup>
- **EPA’s own analysis shows that higher RIN prices do not increase gas prices.** EPA assessed RIN price effects on aggregate gas prices and concluded that higher RIN prices do not increase gas prices because (essentially) oil companies are selling RINs to other oil companies.<sup>19</sup> A former member of President Obama’s Council of Economic Advisers, who took part in several

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<sup>15</sup> See [http://www.pkverlegerllc.com/assets/documents/130923\\_Commentary.pdf](http://www.pkverlegerllc.com/assets/documents/130923_Commentary.pdf).

<sup>16</sup> <https://www.marketplace.org/2016/07/14/world/oil-drilling>. “Even as we add up how much supply there is in the U.S. and OPEC and other areas, you can’t get there with just OPEC, you can’t get there with just tight oil ... and we actually don’t think you can get there with just the two together”.

<sup>17</sup> <http://www.card.iastate.edu/products/publications/pdf/17wp575.pdf>.

<sup>18</sup> <http://fuelsamerica.guerrillaeconomics.net/>

<sup>19</sup> See “An Assessment of the Impact of RIN Prices on the Retail Price of E85,” Dallas Burkholder, Office of Transportation and Air Quality, US EPA. November 2015. EPA Air Docket EPA–HQ–OAR–2015–0111.

interagency reviews of RFS rules, found that “...the price of E10 does not vary with RIN prices...” and that RIN prices actually serve to “...decreas[e] the price of fuels with high renewable content (like E85).”<sup>20</sup>

- **The real-world replacement cost of ethanol would be significantly higher than a straight comparison to wholesale gasoline suggests.** The proposed rule suggests that recently lower oil prices have reduced or eliminated the price-advantage of ethanol relative to wholesale gasoline. However, the replacement for ethanol is not wholesale gasoline, it is high-end octane enhancers that would be necessary to maintain engine performance. Most of these petroleum-based octane enhancers are not only toxic but are also significantly more expensive than ethanol. For example, the national average price of E0 is roughly 30 cents-per-gallon higher than E10, and roughly 40 cents-per-gallon higher than E15.<sup>21</sup>
- **Some refineries did not prepare for compliance with the RFS, but others prepared for RFS implementation and profit from the increased use of renewable fuels.** An analysis of quarterly reports from oil companies shows that prominent oil companies such as Exxon Mobil, Hess, Marathon, and BP are making money selling RINs.<sup>22</sup> Some small refineries are making investments to move from RIN buyers to RIN sellers, demonstrating that exposure to RIN costs stems from a refusal to comply with the RFS via the use of physical renewable fuel gallons as opposed to being exposed to unavoidable regulatory compliance costs.<sup>23</sup>

### III. Additional comments on selected statements, positions detailed in proposed rule

- **EPA is required by law to take immediate action on the 500-million-gallon remand.** The Council is extremely concerned that EPA has done nothing to “make whole” the 500 million gallons illegally excluded from the RFS by the previous administration, as ordered by *Americans for Clean Energy (“ACE”) v. EPA*, 864 F.3d 691 (2017). The remand has been pending for more than a year, during a period in which EPA has found the time and resources to waive more than 2 billion gallons from the RFS via SREs. The proposed rule fails to include the 500 million gallons and does not even commit to resolving the issue by date certain. This is indefensible, particularly because there are more than 3 billion carryover RINs available.
- **The number of carryover RINs available for compliance has been allowed to balloon and is now seriously undercutting the intent of the law.** The proposed rule acknowledges that the number of carryover RINs now exceeds 3 billion. RINs are not paper credits; they are actual gallons produced by biofuel companies to facilitate compliance with the RFS. Carryover RINs are essentially unused capacity, and over-supplied carryover RINs depress interest among oil companies in signing off-take agreements to procure biofuels and RIN prices (which serve as the economic engine for markets to invest in biofuel blending/fueling infrastructure). The major cause of the spike in carryover RINs is overuse of SREs discussed above. The fastest way to draw down the carryover RIN pool is to move immediately on the remand pursuant to *Americans for Clean Energy (“ACE”)*

<sup>20</sup> Stock, James H. (April 2015). Columbia SIPA Center on Global Energy Policy. “The Renewable Fuel Standard: A Path Forward.” Available at: [http://energypolicy.columbia.edu/sites/default/files/energy/Renewable%20Fuel%20Standard\\_A%20Path%20Forward\\_April%202015.pdf](http://energypolicy.columbia.edu/sites/default/files/energy/Renewable%20Fuel%20Standard_A%20Path%20Forward_April%202015.pdf)

<sup>21</sup> See [www.e85prices.com](http://www.e85prices.com)

<sup>22</sup> For summary, see: <http://www.ethanolrfa.org/wp-content/uploads/2016/03/Oil-Earnings-and-RINs-8-1-13.pdf>; <https://www.bloomberg.com/news/articles/2016-09-13/icahn-hated-fuel-mandate-makes-big-profit-for-gas-station-owners>.

<sup>23</sup> <http://www.delawareonline.com/story/money/business/2016/09/07/refinery-seeks-permit-expand-ethanol-operations/89925398/>

v. *EPA*, 864 F.3d 691 (2017). We appreciate EPA acknowledging that a large RIN carryover pool provides buffer against unforeseen market variables in 2019. But the buffer is extreme and is undercutting growth in the biofuel marketplace.

- **EPA should intensify its focus on RIN trading transparency.** In the proposed rule, EPA acknowledges its memorandum of understanding with the Commodity Futures Trading Commission (CFTC). It is disappointing that substantive change (or analysis) has not occurred to address the fact that RINs are traded more opaquely than other credits, goods and commodities in the marketplace. Our recommendation is for EPA to – publicly – ask the CFTC for recommendations for improving the RIN trading platform that prioritizes transparency and real-time disclosure. At the very least, RIN trades exceeding a certain threshold should be reported in real-time to avoid trades on rumor (generated purposely or otherwise). There are many other elements worth considering (e.g. position limits), but we believe the experts on the matter (at CFTC) should be the ones investigating current activity and prioritizing outcomes. We appreciate EPA raising this question. The Council and many other biofuel stakeholders have been asking for greater transparency since D6 RIN prices first increased in 2013. We would like to be helpful on this issue.
- **EPA should commit to resolving the E15 RVP issue in an expeditious manner.** It is well understood that: (a) E15 is a primary new pathway for cellulosic ethanol to enter the marketplace; (2) E15 is a desirable option at the pump, because it offers cleaner octane at a lower price; (3) E15 is treated differently from a Reid Vapor Pressure (RVP) perspective than E10, which means that it cannot be used year-round in many of the most populated parts of the country; (4) fuel retailers are reluctant to make arrangements to offer fuel blends that cannot be offered year-round; and, (5) there is no substantive difference between E10 and E15 when it comes to RVP and environmental performance. Our industry has been asking EPA to resolve the E15 RVP issue for years. EPA could either offer the 1-pound waiver allowance to E15 or take it away for E10 (which would effectively require oil companies to make lower RVP blend-stock to allow 10% or 15% ethanol blending). EPA is on record asserting that it has the statutory authority to offer the 1-pound waiver to fuels other than E10. We agree. It is a technical fix. The Agency has earned considerable deference from the courts when it comes to enforcing the CAA. We ask that EPA establish a timeframe for action on E15 and RVP. This one regulatory clarification would: (a) provide instant downward pressure on D6 RIN prices, which in turn would provide regulatory relief for petroleum refineries choosing to buy RINs instead of blending renewable fuels; (b) create instant market headspace for second-generation ethanol producers, who need to show growing ethanol markets to optimize investment in cellulosic biofuels; (c) unleash a new wave of innovation and manufacturing across America as investment flows into second-generation ethanol; and, (d) increase consumer choice at the pump with a cheaper, domestically-produced motor fuel to keep fuel prices down and money in the pocket of American consumers.
- **Make a commitment to start modeling market responses to strong RVOs and RIN prices from the perspective of increased renewable fuel use.** At minimum, the Agency can test for market elasticities in response to RIN price. More broadly, it is vital that the Agency start taking a more dynamic analytical approach to assessing by far the most central component of RFS

implementation: the market's response to RFS implementation. These assessments should be far less complicated than predicting indirect land use change (iLUC) impacts of biofuels, which EPA enforces in the program, but are critical to setting RVOs that promote the market responsive, ambitious goals of the RFS. Suggesting that avoiding more cellulosic biofuel gallons saves consumers money based entirely on production cost – as the proposed rule does – is misleading because it leaves out the critical consumer costs of dependence on increasingly volatile global oil supplies. Other agencies have done this work. We respectfully ask that EPA do this work or conduct a literature review memorandum.

It is a testament to both the design and implementation of the RFS program that notwithstanding the global recession and the freezing of private capital markets since the date of RFS2 enactment, the program was hitting its benchmarks through 2013. EPA's careful administration of the RFS had allowed the marketplace to diversify with renewable fuels while simultaneously saving U.S. consumers money and creating American jobs. The biofuels industry continued to make progress notwithstanding a very difficult and uncertain regulatory environment from 2014-2016, then again in 2017 with SREs. While important adjustments must be made to re-anchor the RFS and optimize the program for advanced biofuels, we are confident that critical improvements will be made under new leadership that will reestablish the RFS as the global gold standard for advanced biofuel policy.

We would be happy to provide further information or answer any questions that EPA might have. The Council very much appreciates the opportunity to provide comment on the proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Brooke Coleman". The signature is fluid and cursive, with a long horizontal stroke at the end.

R. Brooke Coleman  
Executive Director  
Advanced Biofuels Business Council (ABBC)

## Addendum A: Methodology for Accelerating Commercialization of Cellulosic Biofuels

As discussed, the Council does not believe that EPA's current administration of the D3 compliance pool – either regarding its forecasting or its issuance of CWCs – comports with the statutory charge set forth in section 211(o)(7)(D)(iii). Aside from the law, top EPA officials have committed to doing everything they can to promote cellulosic biofuels, as called for by Congress. If this is the case, we would like to re-suggest some administrative modifications that would do just that.

EPA's current approach to administering the D3 pool is to: (1) try to forecast accurately the available supply of cellulosic biofuels for the upcoming year based on a survey of industry production minus a percentage deduction to account for possible issues and uncertainty in new industries; and, (2) make available CWCs on a 1-for-1 ratio with the cellulosic biofuel gallons contained in the RVO.

As discussed, we are deeply concerned about EPA's ongoing commitment to allow obligated parties to purchase unconditionally a CWC in lieu of a liquid cellulosic biofuel gallon. We believe that any basic understanding of the historical relationship between the oil industry and ethanol use, and the oil industry and the Clean Air Act (CAA), would suggest that this approach to CWC administration discourages oil companies from signing off-take agreements with cellulosic biofuel producers. We also suspect, however, that EPA's approach to administering CWCs is related to the difficulties of forecasting cellulosic biofuel production output from year-to-year. In other words, CWCs in unlimited quantities relieve angst among obligated parties when it comes uncertain early-state markets.

From a forecasting perspective, we would encourage EPA to more closely consider methodologies that would relieve the agency of the burden of forecasting the right number at the outset of the year, year-in and year-out. The ABBC, then acting as the Advanced Ethanol Council, submitted a document in early 2014 as part of its public comments on the proposed 2014 RVO that called for "rolling over" excess D3 RINs from year to year to ensure that cellulosic gallons are not stranded in the context of EPA's forecasts.<sup>24</sup> More recently, a former top economic advisor to President Obama (James H. Stock) published a paper detailing a proposal to "true up" the D3 pool after each compliance year.<sup>25</sup>

The concepts are similar. Both proposals focus on ensuring that any delta between EPA's forecasted cellulosic biofuel blending requirement and the actual amount of cellulosic biofuel available to obligated parties be accounted for so that obligated parties are not required to use a product that is not available (in the case of EPA overestimation) and cellulosic biofuel producers do not face the risk of stranded D3 gallons (in the case of EPA underestimation). While there are some minor differences in how the proposals are expressed and supported, the primary difference is the Stock proposal offers "true up" in the immediate wake of the compliance year in question while the 2014 (AJW) proposal rolls the excess D3 gallons (or RINs) into the RVO for the following year.

Generally, "true up" makes sense in several ways:

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<sup>24</sup> See <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0479-3830> at attachment A.

<sup>25</sup> See [http://scholar.harvard.edu/files/stock/files/administering\\_the\\_cellulosic.pdf](http://scholar.harvard.edu/files/stock/files/administering_the_cellulosic.pdf)

- **“True up” is consistent with the legal guidance provided by the D.C. Circuit Court.** In *API v. EPA*, the D.C. Circuit Court upheld the forward-looking aspect of the RFS that has EPA setting blending targets for cellulosic biofuels for future years.<sup>26</sup> But the court also put more pressure on the agency by holding that EPA’s methodology for determining the “projected volume of cellulosic ethanol” must yield “a prediction of what will actually happen,” as opposed to one that systematically overstates or understates projected volumes.<sup>27</sup> There is no better way to align the regulation with “what will actually happen” than to make a good faith projection of what will actually happen to provide guidance to obligated parties – as the agency does now – with a “true up” at the end of the year to ensure that the agency does not overestimate or underestimate the number of gallons available for compliance. This approach would ensure that EPA is always right when it comes to the eventual standard. Oil companies would have certainty and know that they would never be required to blend unavailable fuel. Obligated parties would also have certainty and not face the risk of stranded gallons in the event of underestimations by EPA.
- **“True up” is consistent with Section 211(o)(7)(D)(iii).** As discussed, EPA is in a situation in which the agency must waive a portion of the cellulosic biofuel standard on a year-to-year basis. There is a good public policy rationale for this: the standard is aggressive to reflect the tremendous commercial upside of the industry, but it is also waivable to reflect the tremendous uncertainty inherent with the commercial deployment of a new product in a non-competitive, largely monopolized marketplace. However, once waivers are needed, EPA is obligated to take a more careful, “hands on” approach to administering the D3 compliance pool, as prescribed by Section 211(o)(7)(D)(iii). Congress was very clear that EPA should administer the D3 compliance pool in such a way as “to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection.” In other words, Congress recognized that unique market circumstances would accompany any need to waive the cellulosic biofuel standard, and special attention must be paid to these circumstances to make the program work. More specifically, EPA has a special and explicit charge in the D3 compliance pool to foster market transparency, liquidity and certainty for both regulated entities and renewable fuel producers. We believe that the current system of making good faith but inherently uncertain forecasts and then flooding the market with the maximum allowable number of CWCs is inconsistent with Section 211(o)(7)(D)(iii). We believe that EPA should change their approach systemically to one that would allow the inherent uncertainties in this innovation marketplace to surface and be accounted for without causing D3 market uncertainty, transparency issues and illiquidity.
- **The perceived regulatory risks of retroactive “true up” are counter-balanced by the unique market constraint created by cellulosic waiver credits.** Unlike any other pool, D3 cellulosic biofuel producers face what amounts to a price collar on the premium it can receive for its product via the issuance of cellulosic waiver credits (CWCs) at a price set by statute. In essence, obligated parties have an alternative compliance pathway that allows them to buy CWCs – offered currently on a gallon-for-

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<sup>26</sup> 706 F.3d at 478.

<sup>27</sup> 706 F.3d at 479.

gallon basis to the RVO – instead of liquid D3 gallons at a set, government-backed price. CWCs only work for compliance if attached to another RIN (often D5). CWCs set the price signal (both the premium, via  $D5+CWC$ , and the collar) for cellulosic biofuel. One of the rationales that could be used to *oppose* “true up” is that year-to-year variability regarding RIN obligations, trading and price creates compliance flexibility, prevents RIN price spikes and stabilizes D3 markets. While this is true for other compliance pools, CWCs effectively collar the price of cellulosic biofuels (thereby curbing D3 RIN prices) to at or around the “ $D5+CWC$ ” pricing formula. In essence, CWCs (which cannot be traded, carried over or banked), rather than open market RINs, are the alternative compliance mechanism that collars price and stabilizes D3 markets. EPA can therefore administer D3 markets more aggressively to promote transparency, liquidity and certainty – as called for by statute – without concern that taking the “slack” out of D3 RIN markets will cause RIN price spikes or market instability.

- **“True up” will accelerate the commercial deployment of low carbon, advanced biofuels as called for by Congress.** Cellulosic biofuels are a featured part of the RFS for a reason. The statutory requirement for cellulosic biofuel is larger than any other single category, and the commercial promise of the cellulosic biofuels industry was a critical part of the policy rationale for expanding the RFS in 2007. Cellulosic biofuels are among the most sustainable, lowest carbon, most innovative motor fuels in the world. They are a focal point of the program because of their ability to simultaneously meet the many objectives of the EISA07 (GHG, energy security, economic development, sustainability). A “true up” methodology would alleviate EPA of the pressures of forecasting unknown markets; but most importantly, it would drive obligated parties into off-take agreements for any available, reasonably priced cellulosic biofuels. This market dynamic, in turn, would catalyze project finance in the industry and drive much larger commercial quantities of low carbon, cellulosic ethanol and advanced biofuels into U.S. markets. In addition, if EPA adopts a “true up” or “roll over” approach to administering the D3 pool, volumetric accuracy is assured, and EPA has more regulatory wiggle room to offer CWCs more conditionally (e.g. in limited number, in cases of high prices, upon affidavit for good faith bid, etc.). In simple terms, if obligated parties make a good faith effort to secure liquid D3 gallons and cannot, CWCs should be available. A “true up” approach would allow EPA to drop the protocol that allows obligated parties to avoid liquid D3 gallons if they so choose, which has subtle but clearly observable negative effects on oil industry engagement in off-take and prices offered, in favor of one that allows them to do so if these gallons are unavailable or are not reasonably priced against the CWC price.