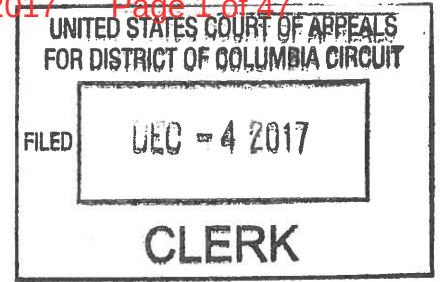


**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

333 Constitution Avenue, NW  
Washington, DC 20001-2866  
Phone: 202-216-7000 | Facsimile: 202-219-8530



Case Caption: Bob Neufeld  
Petitioner

v.

Case Number: 17 - 1255


Environmental Protection Agency  
Respondent

**PETITION FOR REVIEW OF AN AGENCY DECISION**

Notice is hereby given this 1<sup>st</sup> day of December, 2017 that petitioner Bob Neufeld hereby petitions the United States Court of Appeals for the District Columbia Circuit for review of the order of the respondent(s) Environmental Protection Agency entered the 22<sup>nd</sup> day of November 2017 and titled

Notice of Denial of Petitions for Rulemaking To Change the RFS Point of Obligation (82 Fed. Reg. 56779, November 30, 2017)  
Denial of Petitions for Rulemaking to Change the RFS Point of Obligation (EPA-420-R-17-00, November 2017)

Attorney for Petitioner(s)/Pro Se Party,

  
Warren R. "Bob" Neufeld

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**Appearing Pro Se**

### Certificate of Service


I hereby certify I have served on this day, by certified mail, return receipt requested, a copy of the foregoing Petition for Review of an Agency Decision on each of the following persons:

Attn: E. Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
Headquarters  
Ariel Rios Building  
1200 Pennsylvania Av, NW  
Mail Code: 1101A  
Washington, DC 20460

Attn: Kevin S. Minoli  
Acting General Counsel  
U.S. Environmental Protection Agency  
Headquarters  
Ariel Rios Building  
1200 Pennsylvania Av, NW  
Mail Code: 2310A  
Washington, DC 20460

December 1, 2017

Respectfully Submitted,

  
Bob Neufeld, Esq.  
Pro Se

paragraph (d) of this section. Under paragraph (f) of this section, A may claim the \$100 withholding tax paid by Partnership pursuant to § 301.6226-2(h)(3)(i) as a credit under section 33 against A's income tax liability on his 2023 return.

\* \* \* \* \*

■ Par. 6. Section 301.6227-2 is amended by adding paragraphs (b)(3) and (4) to read as follows.

**§ 301.6227-2 Determining and accounting for adjustments requested in an administrative adjustment request by the partnership.**

\* \* \* \* \*

(b) \* \* \*

(3) *Coordination with chapters 3 and 4 when partnership pays an imputed underpayment.* If a partnership pays an imputed underpayment resulting from adjustments requested in an AAR under paragraph (b)(1) of this section, the rules in § 301.6225-1(a)(4) apply to treat the partnership as having paid the amount required to be withheld under chapter 3 or chapter 4 (as defined in § 301.6225-1(a)(4)).

(4) *Coordination with chapters 3 and 4 when partnership elects to have adjustments taken into account by reviewed year partners.* If a partnership elects under paragraph (c) of this section to have its reviewed year partners take into account adjustments requested in an AAR, the rules in § 301.6226-2(h)(3) apply to the partnership, and the rules in § 301.6226-3(f) apply to the reviewed year partners that take into account the adjustments pursuant to § 301.6227-3.

\* \* \* \* \*

**Kirsten Wielobob,**  
*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2017-25740 Filed 11-29-17; 8:45 am]  
BILLING CODE 4830-01-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[EPA-HQ-OAR-2016-0544; FRL-9971-36-OAR]

**Notice of Denial of Petitions for Rulemaking To Change the RFS Point of Obligation**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Denials of rulemaking requests.

**SUMMARY:** The Environmental Protection Agency (EPA) is providing notice of its denial of several petitions requesting that EPA initiate a rulemaking process to reconsider or change 40 CFR 80.1406, which identifies refiners and importers

of gasoline and diesel fuel as the entities responsible for complying with the annual percentage standards adopted under the Renewable Fuel Standard (RFS) program.

**DATES:** November 30, 2017.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2016-0544. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734-214-4131; email address: [macallister.julia@epa.gov](mailto:macallister.julia@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On March 26, 2010, the EPA issued a final rule (75 FR 14670) establishing regulatory amendments to the renewable fuel standards ("RFS") program regulations to reflect statutory amendments to Section 211(o) of the Clean Air Act enacted as part of the Energy Independence and Security Act of 2007. These amended regulations included 40 CFR 80.1406, identifying refiners and importers of gasoline and diesel fuel as the "obligated parties" responsible for compliance with the RFS annual standards. Beginning in 2014, and continuing to the present, some obligated parties and other stakeholders have questioned whether 40 CFR 80.1406 should be amended, and a number of them have filed formal petitions for reconsideration of the definition of "obligated party" in 40 CFR 80.1406, or petitions for rulemaking to amend the provision. On January 27, 2014, Monroe Energy LCC ("Monroe") filed a "petition to revise" 40 CFR 80.1406 to change the RFS point of obligation, and on January 28, 2016, Monroe filed a "petition for reconsideration" of the regulation. On February 11, 2016, Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Lion Oil Company; Ergon-West Virginia, Inc.; Hunt Refining Company; Placid Refining Company

LLC; U.S. Oil & Refining Company (the "Small Refinery Owners Ad Hoc Coalition") filed a petition for reconsideration of 40 CFR 80.1406. On February 12, 2016, Valero Energy Corporation and its subsidiaries ("Valero") filed a "petition to reconsider and revise" the rule. On June 13, 2016, Valero submitted a petition for rulemaking to change the definition of "obligated party." On August 4, 2016, the American Fuel and Petrochemical Manufacturers ("AFPM") filed a petition for rulemaking to change the definition of "obligated party." On September 2, 2016, Holly Frontier also filed a petition for rulemaking to change the definition of "obligated party."

The petitioners all seek to have the point of obligation shifted from refiners and importers, but differed somewhat in their suggestions for alternatives in their petitions. Some requested in their petitions that EPA shift the point of obligation from refiners and importers to those parties that blend renewable fuel into transportation fuel. Others suggested that it be shifted to those parties that hold title to the gasoline or diesel fuel immediately prior to the sale of these fuels at the terminal (these parties are commonly called the "position holders"), or to "blenders and distributors". All petitioners argued, among other things, that shifting the point of obligation to parties downstream of refiners and importers in the fuel distribution system would align compliance responsibilities with the parties best positioned to make decisions on how much renewable fuel is blended into the transportation fuel supply in the United States. Some of the petitioners further claimed that changing the point of obligation would result in an increase in the production, distribution, and use of renewable fuels in the United States and would reduce the cost of transportation fuel to consumers.

On November 22, 2016, EPA published a notice in the **Federal Register** announcing its proposed denial of all petitions seeking a change in the definition of "obligated party" in 40 CFR 80.1406, and soliciting comment on its draft analysis of the petitions and proposed rationale for denial. (81 FR 83776). EPA opened a public docket under Docket ID No. EPA-HQ-OAR-2016-0544, where it made its draft analysis available. EPA received over 18,000 comments on the proposed denial, including comments from the petitioners, stakeholders, and individuals supporting the request that EPA change the point of obligation for the RFS program, as well as from many stakeholders and individuals supporting

EPA's proposed denial and reasoning. In comments, petitioners were in agreement that the point of obligation should be moved to "position holders."

## II. Final Denial

The final decision document describing EPA's analysis of the petitions seeking a change in the definition of "obligated parties" under the RFS program and our rationale for denying the petitions is available in the docket referenced above (Docket ID No. EPA-HQ-OAR-2016-0544). In evaluating this matter, EPA's primary consideration was whether or not a change in the point of obligation would improve the effectiveness of the program to achieve Congress's goals. EPA does not believe the petitioners or commenters on the matter have demonstrated that this would be the case. At the same time, EPA believes that a change in the point of obligation would unnecessarily increase the complexity of the program and undermine the success of the RFS program, especially in the short term, as a result of increasing instability and uncertainty in programmatic obligations.

We believe that the current structure of the RFS program is working to incentivize the production, distribution, and use of renewable transportation fuels in the United States, while providing obligated parties a number of options for acquiring the RINs they need to comply with the RFS standards. We do not believe that petitioners have demonstrated that changing the point of obligation would likely result in increased use of renewable fuels. Changing the point of obligation would not address challenges associated with commercializing cellulosic biofuel technologies and the marketplace dynamics that inhibit the greater use of fuels containing higher levels of ethanol, two of the primary issues that inhibit the rate of growth in the supply of renewable fuels today. Changing the point of obligation could also disrupt investments reasonably made by participants in the fuels industry in reliance on the regulatory structure the agency established in 2007 and reaffirmed in 2010. While we do not anticipate a benefit from changing the point of obligation, we do believe that such a change would significantly increase the complexity of the RFS program, which could negatively impact its effectiveness. In the short term we believe that initiating a rulemaking to 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 of the majority of the statutory volume increases in future years is expected.

In addition, changing the point of obligation could cause restructuring of the fuels marketplace as newly obligated parties alter their business practices to avoid the compliance costs associated with being an obligated party under the RFS program. We believe these changes would have no beneficial impact on the RFS program or renewable fuel volumes and would decrease competition among parties that buy and sell transportation fuels at the rack, potentially increasing fuel prices for consumers and profit margins for refiners, especially those not involved in fuel marketing. In addition, we note that in comments on EPA's proposed denial, commenters favoring a change in the definition of "obligated party" were predominantly in favor of designating position holders as obligated parties. However, position holders are not all refiners, importers or blenders. Therefore, EPA believes the petitioners' proposal is not well aligned with the authority provided EPA in the statute to place the RFS obligation on "refineries, importers and blenders, as appropriate."

A number of parties that either petitioned EPA to change the definition of "obligated party," or commented favorably on those petitions also challenged the rule establishing RFS standards for 2014, 2015 and 2016, alleging both that EPA had a duty to annually reconsider the appropriate obligated parties under the RFS program and that it was required to do so in response to comments suggesting that it could potentially avoid or minimize its exercise of the inadequate domestic supply waiver authority if it did so. In a recent ruling in that litigation, the United States Court of Appeals for the District of Columbia Circuit declined to rule on the matter, and instead indicated that EPA could address the matter either in the context of a remand of the rule ordered on other grounds, or in response to the administrative petitions that are the subject of this notice. See *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017) ("*ACE*"). As noted above, EPA is denying the petitions seeking a change in the definition of "obligated parties." EPA also is re-affirming that the existing regulation applies in all years going forward unless and until it is revised.

EPA does not agree with the petitioners in the *ACE* case that the statute requires annual reconsideration of the matter and, to the extent that EPA has discretion under the statute to undertake such annual reevaluations, EPA declines to do so since we believe the lack of certainty that would be associated with such an approach would undermine success in the program.

EPA has determined that this action is nationally applicable for purposes of CAA section 307(b)(1). since the result of this action is that the current nationally-applicable regulation defining obligated parties who must comply with nationally applicable percentage standards developed under the RFS program remains in place. In the alternative, even if this action were considered to be only locally or regionally applicable, the action is of nationwide scope and effect for the same reason, and because the action impacts entities that are broadly distributed nationwide who must comply with the nationally-applicable RFS percentage standards, as well as other entities who are broadly distributed nationwide that could potentially have been subject to such requirements if EPA had elected to grant the petitions seeking a change in the definition of obligated parties.

Dated: November 22, 2017.

**E. Scott Pruitt,**

*Administrator.*

[FR Doc. 2017-25827 Filed 11-29-17; 8:45 am]

BILLING CODE 6560-50-P

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 67

[Docket ID FEMA-2017-0002; Internal Agency Docket No. FEMA-B-1170]

### Proposed Flood Elevation Determinations for Snohomish County, Washington and Incorporated Areas

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is withdrawing its proposed rule concerning proposed flood elevation determinations for Snohomish County, Washington and Incorporated Areas.

**DATES:** The proposed rule published on January 7, 2011 at 76 FR 1125 and the



# Denial of Petitions for Rulemaking to Change the RFS Point of Obligation

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## Executive Summary

The Environmental Protection Agency (EPA) has received several petitions requesting that the EPA initiate a rulemaking process to reconsider or change 40 CFR 80.1406 identifying refiners and importers of gasoline and diesel fuel as the entities responsible for complying with the annual percentage standards adopted under the Renewable Fuel Standard (RFS) program. This “point of obligation” for the RFS program was established through a notice-and-comment rulemaking in 2010 based on the statutory direction in Section 211(o)(3)(B)(ii)(I) and (C) of the Clean Air Act (CAA) to impose the renewable fuel obligation on “refineries, blenders and importers, as appropriate,” while also “prevent[ing] the imposition of redundant obligations.” This statutory provision also allows EPA to modify the point of obligation if the designated parties are no longer appropriate. While evaluating petitions on the RFS point of obligation, EPA also evaluated whether the current obligated parties remain the appropriate obligated parties under CAA 211(o)(3)(B)(ii)(I). EPA has concluded that it is appropriate to retain the current regulatory requirement designating refiners and importers as the parties responsible for compliance with RFS standards because we again believe refiners and importers are the appropriate obligated parties.

In their initial petitions, the petitioners all asked to have the point of obligation shifted from refiners and importers, but they differed somewhat in their suggestions for alternatives. Some requested that the EPA shift the point of obligation from refiners and importers to those parties that blend renewable fuel into transportation fuel. Others suggested that it be shifted to those parties that hold title to the gasoline or diesel fuel immediately prior to the sale of these fuels at the terminal (these parties are commonly called the “position holders”), or to “blenders and distributors.” All petitioners argued, among other things, that shifting the point of obligation to parties downstream of refiners and importers in the fuel distribution system would align compliance responsibilities with the parties best positioned to make decisions on how much renewable fuel is blended into the transportation fuel supply in the United States. Some of the petitioners further claimed that changing the point of obligation would result in an increase in the production, distribution, and use of renewable fuels in the United States and would reduce the cost of transportation fuel to consumers.

On November 10, 2016, the EPA published a proposed denial of requests to initiate a rulemaking process to reconsider or change the regulations at 40 CFR 80.1406. See Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-HQ-OAR-2016-0544, hereinafter “proposed denial.” The EPA solicited comment from interested stakeholders on the proposed denial. Acting on the request of stakeholders, the EPA extended the public comment period to February 22, 2017. The EPA received over 18,000 comments submitted to the docket. The EPA’s response to significant and relevant comments is provided within this document. Notwithstanding the different suggestions for shifting the point of obligation that were expressed in the initial petitions, in their comments, all petitioners suggested that the definition of “obligated party” in 40 CFR 80.1406 should be changed to put the obligation for compliance with the RFS percentage standards on “position holders.”<sup>1</sup>

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<sup>1</sup> The Small Refiners Coalition and others, in comment, argued in the alternative that the point of obligation could be placed on blenders if the EPA lacks the authority to place the point of obligation on “position holders.”

In addition, changing the point of obligation could disrupt investments reasonably made by participants in the fuels industry in reliance on the regulatory structure the agency established in 2007 and confirmed in 2010. It could also lead to restructuring of the fuels marketplace as newly obligated parties alter their business practices to avoid compliance obligations. For example, if the point of obligation were changed to "position holders," we believe that parties who previously were "position holders" may choose to instead purchase fuel under contract "below the rack" instead of "above the rack" to avoid the overhead compliance costs associated with being an obligated party under the RFS program. We believe these changes would have no beneficial impact on the RFS program or renewable fuel volumes and would decrease competition among parties that buy and sell transportation fuels at the rack, potentially increasing fuel prices for consumers and profit margins for refiners, especially those not involved in fuel marketing.

A. Market Participants Have Made Significant Decisions on the Basis of the Existing Regulations..... 79

B. If the Point of Obligation is Changed, Parties Would Be Expected to Reposition Themselves to Avoid or Minimize RFS Obligations..... 80

VI. Other Comments..... 83

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other grounds, or in response to the administrative petitions.<sup>8</sup> As noted above, the EPA is denying the petitions seeking a change in the definition of “obligated parties.” The EPA also is re-affirming that the existing regulation applies in all years going forward unless and until it is revised. The EPA does not agree with the petitioners in the *ACE* case that the statute requires annual reconsideration of the matter and, although the EPA has the discretion under the statute to undertake such annual reevaluations, the EPA declines to do so since we believe the lack of certainty that would be associated with such an approach would undermine success in the program.<sup>9,10</sup>

It appears that the petitions for reconsideration of 40 CFR 80.1406 do not meet the statutory criteria for such petitions set forth in CAA 307(d)(7)(B).<sup>11</sup> However, for purposes of this decision document, we will treat all petitions suggesting a change in the RFS point of obligation as petitions for a rulemaking to accomplish the change(s) requested.<sup>12</sup> This evaluation provides a consolidated response to all petitions (however styled) and other requests we have received that seek a change in the RFS point of obligation. For the reasons stated herein, we are denying all requests to initiate a rulemaking to change the current regulation.

In considering the petitions to change the point of obligation in the RFS program, the EPA has reviewed the large amount of information submitted by the petitioners and has met with those who requested meetings and other interested parties. The EPA has also met, and heard from, other participants in the RFS program, including other obligated parties, manufacturers of renewable fuel, and fuel retailers, who are opposed to revising the regulations. The EPA received over 18,000 comments submitted on its proposed denial, and has reviewed and considered the information submitted. Many of these comments were part of mass comment campaigns, and contained similar messages; however, the EPA received approximately 350 unique comments. See Docket EPA-HQ-OAR-2016-0544. Many commenters presented similar arguments to those put forth by petitioners in their initial requests for reconsideration or rulemaking. EPA also received many comments supporting EPA’s proposed denial. Where significant new arguments or information were presented in comments, the EPA has addressed

<sup>8</sup> See *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017) (“*ACE*”).

<sup>9</sup> The EPA interprets the CAA to allow the designation or redesignation of “appropriate” obligated parties to occur at any time, as the phrase “as appropriate” is broad and confers significant discretion. While the statute specifies that the percentage standards must be applicable to refineries, importers, or blenders as appropriate, it does not say that EPA must annual reevaluate the matter.

<sup>10</sup> Nevertheless, the EPA could consider changes to the definition of “obligated party” in the future, based on significant new facts or analysis. Given the time pressure associated with its annual standards rulemakings, EPA expects that any such consideration would not occur in the context of those rulemakings.

<sup>11</sup> Petitioners had an opportunity to submit comments on the point of obligation in both the 2007 and 2010 rulemakings when the current approach was adopted. The possible impact of this decision on incentivizing growth in renewable fuel use, including incentivizing growth after the clearly anticipated widespread use of ethanol at E10 levels, could have been raised in comments on those rules. Furthermore, to the extent the petitions are based on grounds arising more than 60 days after promulgation of the rule, such grounds are not a proper basis for a petition for reconsideration under CAA 307(d)(7)(B).

<sup>12</sup> We take no position at this time on whether petitions associated with judicial challenges to the RFS2 rule satisfy the criterion in CAA 307(b)(1) that they be “based solely on grounds arising after” the 60-day period following notice of promulgation of CAA rules, or whether the petitions for review were filed within 60 days after new grounds arose. We have considered the substance of the administrative petitions filed with the Agency whether or not the criteria specified in CAA 307(b)(1) for late challenges to Agency rules are satisfied.

While petitioners generally claim that changing the point of obligation would result in the increased production, distribution, and use of renewable fuels in the United States, petitioners and commenters have failed to provide data that confirms these claims. We continue to believe that changing the point of obligation would at best result in a negligible increase in the production, distribution, and use of renewable fuels in the United States, and would more likely result in a decrease in the production, distribution, and use of these fuels. The EPA is also not persuaded, based on the record before us, by arguments that, under the current regulatory structure, merchant refiners are disadvantaged compared to integrated refiners in terms of their costs of compliance, nor that other stakeholders are receiving windfall profits. The costs of the RFS program are apportioned to all refiners and importers as a function of their production volume and generally are passed on to consumers. Finally, we believe that changing the point of obligation would do nothing to incentivize the research, development, and commercialization of cellulosic biofuel technologies critical for the growth of the RFS program in future years. Each of these issues is discussed in greater detail below.

#### A. Relevant Parties in the Fuel Market

Gasoline and diesel fuel are produced at domestic refineries or imported to the United States. There are a wide variety of paths and associated business models by which fuel reaches consumers. Refineries distribute some of the fuel they produce by truck directly from the refinery's loading rack. Refineries generally distribute their remaining production from the "refinery gate" through pipeline, barge, or rail, to distribution terminals. This fuel may be sold by the refinery when it leaves the "refinery gate" or at a location downstream from the refinery on its distribution path. All transportation fuel produced in the United States moves through the "rack."<sup>14</sup> The "rack" refers to the truck loading facility at a distribution terminal or refinery. Generally, wholesale purchasers, marketers or distributors receive fuel at the refinery or terminal rack and distribute that fuel to end users or retailers.<sup>15</sup> These parties may purchase fuel upstream of the terminal rack (e.g., directly from the refinery) and handle the logistics of fuel distribution themselves. They may instead purchase fuel at product terminals (either above or below the rack), relying on the refiner or other entity to handle all of the logistics and blending requirements, generally under contract. A "rack seller" is a party who owns fuel immediately before "the rack." The Internal Revenue Service collects excise tax from rack sellers. It defines rack sellers at the refinery rack as "refiners" and rack sellers at the terminal rack as "position holders." For simplicity, we have elected in this document to refer to all parties the IRS considers to be refiners or position holders as "position holders." All subsequent references to "refiners" in this document are to parties that refine petroleum products, whether or not they are rack sellers.

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<sup>14</sup> For fuel imported into the United States, transportation fuel can move through a rack, or is tracked through registration as an "entrant."

<sup>15</sup> The term "fuel marketers" generally refers to parties that sell fuel to distributors or end users at the rack. "Fuel wholesalers" refers to parties that buy fuel in bulk, generally above the rack, and sell this fuel to retail station owners or end users, or distribute the fuel to retail stations they own. Fuel distributors refers to parties that transport fuel from the rack (either at terminals or refineries) to retail stations. Many different parties, including refiners, can operate as marketers, wholesalers, and/or distributors depending on market conditions, and the terms overlap considerably.

a subsequent owner of the fuel who is an obligated party or a renewable fuel blender. Once separated, the RINs can be freely traded as a separate commodity from the renewable fuel. Obligated parties accumulate RINs over the course of the year, either by buying renewable fuel with assigned RINs that they separate and retain for compliance, or by buying RINs that others have separated on the open market.

The annual RVOs for a given obligated party are calculated by multiplying the obligated party's total annual production and import of gasoline and diesel fuel by the four annual percent standards.<sup>17</sup> Each obligated party must obtain sufficient RINs of each category to demonstrate compliance with its individual RVOs for the four annual standards. Compliance is accomplished on an annual average basis, through a single annual compliance report to the EPA identifying the RINs acquired and retired for that year's compliance. Thus, compliance under the RFS program requires the obligated parties to understand how to calculate their individual obligations based on the four standards, and then to plan for their annual compliance demonstration through RIN acquisition, through trading or through blending, over the course of the year. There are also associated registration, reporting and recordkeeping requirements.

### C. Statutory and Regulatory History of the Point of Obligation

On July 29, 2005, Congress passed the Energy Policy Act of 2005 ("EPAAct"), amending the Clean Air Act to create a statutory obligation for the use of renewable fuel in gasoline. The statute envisioned EPA adoption of annual percentage standards designed to increase renewable fuel use over time, and specified that the obligation for compliance with those standards would fall on "refineries, blenders, and importers, as appropriate." PL 109-58 August 8, 2005 and CAA 211(o)(3)(B)(ii)(I).

On September 22, 2006, the EPA published a proposed rule to establish the regulatory framework to implement the RFS program. The EPA proposed that obligated parties responsible for compliance with the annual percentage standards would be parties producing or importing gasoline: i.e., refiners and importers. The EPA specified that those blenders who only added renewable fuel to gasoline would not be obligated parties.<sup>18</sup> The EPA noted that there were approximately 1,200 ethanol blenders, as compared to 100-200 refiners and importers and stated that making ethanol blenders obligated parties would "greatly expand the number of regulated parties and increase the complexity of the RFS program beyond that which is necessary to carry out the renewable fuels mandate under the Act."<sup>19</sup>

The EPA received comments supportive of the EPA's proposed definition of obligated parties from the Society of Independent Gasoline Marketers of American and the National Association

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<sup>17</sup> There are separate, but nested, standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuel.

<sup>18</sup> 71 Fed. Reg. 55552, 55573-4. Blenders who produce gasoline through combining blendstocks are considered refiners under EPA regulations and would therefore be obligated parties.

<sup>19</sup> Ibid at 55573.

the EPA noted that the approach adopted under RFS1 was based on an expectation that there would be an excess of RINs at low cost, and that they would be freely traded between parties needing them such that obligated parties would have ample opportunity to acquire them. The EPA also explained that in adopting the approach under RFS1, the EPA had found that the designation of ethanol blenders as obligated parties would have greatly expanded the number of regulated parties and increased the complexity of the program beyond that which was necessary to carry out the fuels mandate required by the program. The EPA questioned whether, with the expanded mandates required under EISA, parties with excess RINs would tend to retain them for future compliance rather than sell them freely, and also hypothesized that most or all blenders would be regulated as RIN holders under the new program and questioned whether also making them responsible for compliance with the percentage standards could involve only a small additional burden. The EPA indicated that under the expanded program, there might be disparities in the ability of various obligated parties to acquire RINs. As a result of these considerations, and in light of the more complicated obligations required under RFS2, although proposing to retain the definition of obligated party (refiners and importers) from RFS1, the EPA also solicited comment on whether a change in that definition might be appropriate, and would more evenly align a party's access to RINs with that party's obligations under the RFS2 program.<sup>25</sup>

On March 26, 2010, the EPA issued a final rule establishing the amended RFS program structure reflecting the EISA amendments.<sup>26</sup> The EPA summarized the comments it had received on the point of obligation issue, noting that some refiners favored a change from the proposed approach of retaining the obligation on refiners and importers, while others did not. In contrast to the RFS1 proposal, EPA received many differing comments from interested stakeholders on this issue. Several parties suggested that blenders or other downstream parties should become obligated parties because they control blending and that without such a change refiners and importers would find it difficult to acquire RINs. Still others suggested that the obligation should be placed on parties who supply finished transportation fuels. Downstream blenders and other downstream parties, as well as renewable fuel producers and some members of the petroleum industry, generally opposed a change, citing the burden such a change would pose to small businesses, and the added unnecessary complexity it would add to the RFS program. The EPA concluded that the concerns expressed in the NPRM and in comments suggesting a change in the definition of obligated party, did not, on balance, warrant a change, stating:

We continue to believe that the market will provide opportunities for parties who are in need of RINs to acquire them from parties who have excess. Refiners who market considerably less gasoline or diesel than they produce can establish contracts with splash blenders to purchase RINs. Such refiners can also purchase ethanol from producers directly, separate the RINs and then sell the ethanol without RINs to blenders. Since the RFS program is based upon ownership of RINs rather than custody of volume, refiners need never take custody of the ethanol in order to separate RINs from volumes that they own. Moreover, a change in the designation of obligated parties would result in a significant change in the number of obligated

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<sup>25</sup> 74 Fed. Reg. 24904, 24963.

<sup>26</sup> 75 Fed. Reg. 14670.



that a change in the point of obligation would have the positive effect suggested by Commenters. and we do not believe that the current point of obligation is “hindering growth.”

The CAA dictates that the point of obligation should be placed on refineries, importers, or blenders as appropriate. EPA has considered the petitions and comments submitted and finds, for the reasons stated herein, that refiners and importers remain the appropriate parties.

## II. The Current Program Structure Appears to Be Working to Achieve the Goals of the RFS Program

Petitioners and some commenters discuss several perceived shortcomings of the RFS program. The petitioners generally attribute these shortcomings, in whole or in part, to the EPA’s decision to place the point of obligation on the refiners and importers of gasoline and diesel fuel, rather than parties downstream of the refiners and importers. These claimed shortcomings include, among others, the failure of the RFS program to achieve the statutory volumes of renewable fuel (requiring the use of EPA’s waiver authorities) and higher than anticipated RIN prices leading to higher fuel prices for consumers, negative impacts on merchant refiners, and windfall profits for unobligated blenders of renewable fuel. The petitioners conclude that the RIN market, and by extension the RFS program, is not operating as intended, and therefore the EPA should re-visit the point of obligation in the RFS program.

After reviewing the information submitted by the petitioners and commenters, along with additional information gathered by the EPA, we disagree with a number of the assertions and arguments put forward by the petitioners, and do not agree with their policy arguments that changing the point of obligation would enhance the effectiveness of the RFS program to achieve Congress’s goals. Evidence suggests that despite the necessary use of EPA’s waiver authorities in recent years, the RIN market, and the RFS program as a whole, are generally working to increase supplies of renewable fuel, albeit at a pace slower than Congress envisioned, and that a change in the point of obligation is not likely to enhance the achievement of the program’s goals. The RFS program is providing a significant incentive for the continued growth in the production, distribution, and use of renewable fuels in the transportation fuel market in the United States, and changing the point of obligation would not enhance that incentive. With the exception of cellulosic biofuels, renewable fuel production and use in the United States have increased significantly, and are projected to meet or exceed the statutory volumes for non-cellulosic biofuels in 2017. RIN prices themselves have not resulted in appreciably higher transportation fuel prices for consumers or disproportionate harm for merchant refiners.<sup>30</sup> Finally, the record does not support claims that merchant refiners have resorted to the extreme measures suggested by the petitioners, such as decreasing fuel production or exporting the fuel they produce.<sup>31</sup> in an

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<sup>30</sup> While RIN prices are expected to impact the price of fuels with relatively greater or lesser renewable content (increasing the price of fuels with low renewable content such as E0 or B0 and decreasing the price of fuels with high renewable content such as E85 or B20), on balance they are not expected to increase the total cost of fuel to consumers.

<sup>31</sup> While gasoline and diesel exports have increased in recent years we believe that these increases are attributable to favorable crude oil and natural gas prices in the United States relative to the rest of the world, rather than an effort to avoid RIN costs. To date EPA has not been provided with evidence that demonstrates that merchant refiners



production facilities, many stakeholders have regularly cited the RFS program as a primary reason for making investments in both the production and distribution of renewable fuels.<sup>36</sup>

Despite these successes, in recent years the EPA has exercised the statutory waiver authorities to reduce the renewable fuel volumes from those specified in the statute, largely due to the shortfall in cellulosic biofuel production.<sup>37</sup> While the EPA relied on the use of the general waiver authority in 2014-2016, reductions in the 2017 final rule and proposed 2018 rule were made using only the cellulosic waiver authority. Reductions using the cellulosic waiver authority in 2017, and those proposed for 2018, can be attributed to lower production of cellulosic biofuels than envisioned by Congress resulting from challenges experienced with the development and commercialization of cellulosic biofuel production technologies. The projected production and use of non-cellulosic renewable transportation fuels in 2017 and again in 2018 meets or exceeds the volume envisioned by Congress in EISA.<sup>38</sup> Similarly, required biodiesel volumes for 2017 are 100% greater than the statutory prescribed minimum volume, and for 2018 the required volume is 110% greater than the statutory minimum.<sup>39</sup> The petitioners generally focused on the limitations to the distribution and use of renewable fuels, claiming that changing the point of obligation would address these limitations and allow for greater volumes of renewable fuels to be used. We note, however, that these issues were not the basis for reducing the RFS standards in 2017, nor for the proposed reductions in 2018. In the rule establishing the renewable volume obligations for 2017, and again in our proposed rule for 2018, the EPA determined that the supply of conventional biofuel is sufficient to meet the implied statutory target of 15 billion gallons. We also found that the supply of non-cellulosic advanced biofuels was sufficient to meet or exceed the implied statutory requirements for these fuels.<sup>40</sup> As discussed further below, the primary factor limiting the production of cellulosic biofuels, including cellulosic ethanol, is the slower than expected development and commercialization of technologies that can reliably and economically produce these fuels.

Some commenters suggested that changing the point of obligation would provide benefits to the cellulosic biofuels industry, whereas other comments agreed with EPA's proposed assessment that changing the point of obligation would not positively impact the cellulosic biofuel industry.

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<sup>36</sup> For example, see comments on the proposed RFS standards for 2017 from the National Biodiesel Board, EPA-HQ-OAR-2016-0004-2904; and Dana Gustafson of Marquis Energy, EPA-HQ-OAR-2016-0004-3498; and a Letter from RaceTrac to Administrator McCarthy, received August 17, 2016.

<sup>37</sup> For a full discussion of EPA's waiver authorities see the preamble to the Final Rule establishing the 2014-2016 RFS standards (80 FR 77420, Dec. 14, 2015).

<sup>38</sup> The statutory volumes for total renewable fuel, advanced biofuel, and cellulosic biofuel in 2017 are 26.0, 11.0, and 7 billion gallons respectively. Therefore, the implied statutory targets for conventional biofuel (the difference between the required volumes of total renewable fuel and advanced biofuel) and non-cellulosic advanced biofuels (the difference between the statutory volumes of advanced biofuel and cellulosic biofuel) are 15.0 billion gallons and 4 billion gallons respectively. The volumes proposed by EPA in our July 2017 proposed rule for 2018 for total renewable fuel, advanced biofuel, and cellulosic biofuel are 19.24, 4.24 and 0.238 billion gallons respectively, with an implied volume of 15.0 billion gallons of conventional biofuel and 4 billion gallons of non-cellulosic advanced biofuel.

<sup>39</sup> Compare CAA 211(o)(2)(B)(v) (1 billion gallon minimum) with the required volumes of 2.0 and 2.1 billion gallons of biomass-based diesel in 2017 and proposed in 2018 respectively.

<sup>40</sup> EPA calculates the implied statutory target for non-cellulosic advanced biofuels by subtracting the statutory volume for cellulosic biofuel from the statutory volume for advanced biofuels for each year.

2016, the EPA does not believe that the D6 RIN prices<sup>44</sup> observed in recent years are indicative of a dysfunctional RIN market.<sup>45</sup> Rather, there are structural reasons why D6 RIN prices increased. In 2013 the required volumes under EPA's RFS standards exceeded levels that could be met via the relatively simple blending of 10% ethanol into gasoline (in addition to the blending of other biofuels such as biodiesel). Increased demand for RINs (due to higher standards), and the comparative difficulty of increasing the supply of RINs through the blending of ethanol at levels *beyond* 10% (or alternatively the purchase of more expensive non-ethanol renewable fuels) drove D6 RIN prices higher. Rather than reflecting a dysfunctional RIN market, higher RIN prices simply reflect the increasing cost of supplying additional renewable fuels to the marketplace through higher level ethanol blends and/or non-ethanol renewable fuels along with the increasing demand for RINs that results from higher RFS standards.<sup>46</sup> In other words, higher RIN prices reflect the greater degree of difficulty (and cost) of getting ever-greater volumes of renewable fuel into the transportation fuel pool – the explicit goal of the RFS program.<sup>47</sup>

EPA does not believe that changing the point of obligation would significantly impact the economics of selling E85 or non-ethanol renewable fuels, nor would it significantly impact the supply of available RINs (for reasons discussed below). We therefore do not believe that changing the point of obligation would be likely to result in lower D6 RIN prices than would be expected to occur with the existing point of obligation, nor would such a change result in D6 RIN prices comparable to those observed in 2012 or earlier. The price of RINs will continue to vary in the marketplace in response to a variety of factors.

Several commenters disputed the EPA's statement in the proposed denial of petitions seeking a change in the RFS point of obligation that the observed RIN prices were not indicative of a dysfunctional RIN market. For example, one petitioner submitted a paper alleging significant friction in the RIN market related to the current point of obligation.<sup>48</sup> This paper cites several factors they claim are the sources of high friction in the RIN market: high RIN transaction costs (indicated by high bid-ask spreads), high RIN price volatility (which may be a sign of an illiquid market), poor availability of information on RIN prices, differing levels of access to renewable fuels and/or markets for renewable fuel blends among obligated parties, and the potential for RIN market manipulation.

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<sup>44</sup> Renewable fuel producers generate different types of RINs, depending on a number of factors including the feedstocks and production processes they use to produce renewable fuels, the type of fuel they produce, and the GHG reductions for these fuels relative to the gasoline and diesel fuel they replace. D6 RINs are generated for conventional biofuel, the vast majority of which is corn ethanol, with some additional D6 RINs being generated for biodiesel from grandfathered facilities and other fuels. Prior to 2013, D6 RIN prices were generally less than 5 cents per RIN. D6 RIN prices rose significantly in 2013, and have remained higher than the prices observed prior to 2013.

<sup>45</sup> See "A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effect," Dallas Burkholder, Office of Transportation and Air Quality, US EPA, May 14, 2015, and Letter from API to EPA Administrator McCarthy, August 18, 2016.

<sup>46</sup> Uncertainty, whether related to the level of the RFS standards for any given year or the RFS program as a whole, can further serve to increase the volatility of RIN prices in the market. Some volatility may be inevitable, but increased volatility could be one outcome of changing the point of obligation.

<sup>47</sup> We note that RIN prices are influenced by a variety of factors, including underlying commodity market prices such as corn, ethanol, oil, and gasoline prices. Another factor influencing their price, as described, is the level of the standard and the ease with which higher-level ethanol blends can be produced and used in the market.

<sup>48</sup> Charles River Associates *RINs Market Frictions and the RFS Point of Obligation*, February 2017.

not had a significant impact on retail gasoline (E10) prices.<sup>54</sup> When RIN prices rise, the market price of the petroleum blendstocks produced by refineries also rise to cover the increased RIN costs, in much the same way as they would rise in response to higher crude oil prices. The effective price of renewable fuels (the price of the renewable fuel with attached RIN minus the RIN price), however, *decreases* as RIN prices increase. When renewable fuels are blended into petroleum fuels these two price impacts generally offset one another for fuel blends such as E10 with a renewable content approximately equal to the required renewable fuel percentage standard. Higher RIN prices also generally result in higher prices for fuels with lower renewable content (such as E0 or petroleum diesel) and lower prices for fuels with higher renewable content (such as E85 or B20). The cost of the RIN therefore serves as a cross-subsidy, reducing the price of renewable fuels and increasing the price of petroleum based fuels in transportation fuel blends, thus incentivizing increased blending of renewable fuels into the transportation fuel pool. In this way the RINs also help provide a price signal to consumers to help achieve the Congressional goals of greater renewable fuel production and use. Fuels with higher renewable content are relatively cheaper to consumers than they would be absent high RIN prices, while fuels with lower renewable content are relatively more expensive when RIN prices are high.<sup>55</sup> The higher the RIN prices are, the more significant the potential price discounts for fuels with higher renewable content. This retail price discount for fuels with a relatively high renewable content is enabled by higher prices for fuel blends with little or no renewable fuel content.

C. The Current Regulations do not Appear to Disproportionately Impact Merchant Refiners or Provide Windfall Profits for Unobligated Blenders

In requesting that the EPA change the point of obligation petitioners claim that the current point of obligation negatively impacts refiners that do not blend renewable fuels and/or do not sell fuel at the rack. They generally claim that this negative impact is due to these refiners incurring a high cost for RINs purchased to comply with their RFS obligations. They contrast this with what they say is the situation facing integrated refiners, whom they state are acquiring RINs for free by blending renewable fuels. Petitioners also argue that unobligated fuel blenders (such as large retail fuel chains or fuel distributors and refiners that market more fuel at the rack than they refine or import) are selling excess RINs and generating windfall profits. Several other parties have submitted documents to the EPA disputing these claims.<sup>56</sup>

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<sup>54</sup> Knittel, Christopher R., Ben S. Meiselman, and James H. Stock. The Passthrough of RIN Prices to Wholesale and Retail Fuels Under the Renewable Fuel Standard. Working Paper 21343. NBER Working Paper Series. Available online <<http://www.nber.org/papers/w21343.pdf>>.

<sup>55</sup> Even when RIN prices are relatively high fuels with high renewable content may not be cheaper than fuels with lower renewable content on an energy-equivalent basis. For example, despite relatively higher RIN prices since 2013, the national average price discount for E85 relative to E10 has never reached or exceeded 22% (the price discount needed for achieve parity between E85 and E10 on an energy equivalent basis). See also "A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects," Dallas Burkholder, Office of Transportation and Air Quality, U.S. EPA, May 2015, and "An Assessment of the Impact of RIN Prices on the Retail Price of E85," Dallas Burkholder, Office of Transportation and Air Quality, U.S. EPA, November 2015.

<sup>56</sup> See Letter from RaceTrac to Administrator McCarthy, August 17, 2016; Letter from QuikTrip to Administrator McCarthy, August 17, 2016; Presentation from Murphy USA to EPA, August 16, 2016.

petroleum blendstocks sold at the refinery gate. Stated another way: merchant refiners can indeed expend significant funds to purchase RINs needed to demonstrate compliance with the RFS program, but the cost is offset by a corresponding increase in the market price of the fuel they sell that is attributable to the RFS obligations. The market price they receive for the gasoline and diesel fuel they sell reflects the cost of RINs. While high RIN prices increase the market price of petroleum blendstocks, they generally do not increase the market price of fuels blended with renewable fuels, as the blenders use the value of the RIN to reduce the price of the blended fuels. The same dynamic applies to all gasoline blendstocks and diesel fuel produced by both merchant and integrated refiners alike. Further, many merchant refiners blend a portion of the gasoline and diesel they produce with renewable fuels and directly market this fuel (while selling the majority to other parties for marketing), while many integrated refiners sell a portion of the gasoline and diesel they produce as unblended blendstocks to other fuel marketers. There are not two prices in the market for petroleum fuels based on whether or not they are intended to be marketed directly to consumers or sold to a downstream marketer, but rather separate prices for petroleum blendstocks and blended fuels.

The EPA also examined the available data to assess whether or not obligated parties that acquire RINs by purchasing separated RINs, rather than blending renewable fuels, are able to recover the cost of these RINs in the price of the petroleum blendstocks they sell. In their petition, Valero acknowledges this ability for refiners to recover the cost of acquiring RINs through higher prices for gasoline and diesel they produce than would be the case with lower RIN prices.<sup>60</sup> Empirical data also support this argument. Data clearly show higher market prices for RFS-obligated fuels (gasoline and diesel blendstocks sold for use in the United States) when compared to those of unobligated fuels that are very similar (such as gasoline and diesel sold for export, or heating oil and jet fuel).<sup>61</sup> Before accounting for any potential RIN price impacts, one would expect obligated and unobligated fuels to have very similar market prices because of their very similar fuel properties. Gasoline is nearly identical whether used domestically or sold for export, and heating oil and diesel are also very similar chemically. However, in recent years, as RIN prices have become elevated, data show a gap opening up between the price of domestic gasoline and exported gasoline, and between the price of diesel and heating oil. The price of the obligated fuels is higher and the gap corresponds, for the most part, with RIN prices. Obligated parties – whether they are merchant refiners or integrated—are charging more for domestic gasoline and diesel to ensure they recoup the costs associated with RIN prices. So while a merchant refiner is directly paying for the RINs they buy on the market, they are passing that cost along in the form of higher wholesale gasoline and diesel prices.

Several commenters submitted assessments of the fuels market disputing the EPA's claim that merchant refiners were generally able to recover the cost of RINs through the higher prices for the products they sell. Some of these studies referred to this as an inability to "pass-through" the cost of the RFS program to consumers. After careful review of the information submitted, the EPA does not find these assessments convincing. All obligated parties, including merchant

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<sup>60</sup> Valero Petition for Rulemaking, June 13, 2016. Page 18.

<sup>61</sup> See "A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effect," Dallas Burkholder, Office of Transportation and Air Quality, US EPA, May 14, 2015 and Letter from QuikTrip to Administrator McCarthy, August 17, 2016.



wholesale price of gasoline and diesel is determined by the relative supply and demand of these products, and the supply curves for refined products reflects all relevant costs, including crude oil costs, labor and capital costs, and RFS compliance costs.

The EPA also received numerous comments from a variety of stakeholders, including refiners, retailers, and academic researchers supporting our assessment that merchant refiners generally recover the cost of the RINs they purchase through higher prices for the petroleum based fuels they produce.<sup>67</sup> Along with the assessments cited in the discussion above, we believe two related papers by Knittel et al and a paper prepared by Argus Consulting Services, all of which were submitted in comments to our proposed denial, present compelling evidence that merchant refiners are able to recover the cost of RINs.<sup>68</sup> All of these papers examined the wholesale prices of petroleum fuels that are very similar with the exception of whether or not the producers of these fuels incurred an RFS obligation (for example, diesel fuel and jet fuel prices from the U.S. gulf coast). Unlike other studies that examined indirect indicators that are susceptible to many factors outside of the RFS program such as blender margins or crude oil crack spreads, this methodology allows the authors to directly assess the impact of RIN prices on fuels that are very similar both physically and chemically.<sup>69</sup> The authors of these papers concluded that the RIN cost was generally included in the sales prices of obligated fuels. Knittel et al further found that the RIN pass through, or the ability of the merchant refiners to recover the cost of RINs was complete (not statistically different than 100%) and occurred quickly (within 2 business days).<sup>70</sup>

Multiple commenters critiqued methods used by Knittel et al in these papers.<sup>71</sup> These critiques generally focused on 3 issues: the removal of Brent crude based spreads from the assessment, the addition of a NYH CBOB – Rotterdam EBOB spread, and the pooling approach used by the authors. The removal of the Brent crude based spreads improves rather than diminishes the assessment presented by Knittel et al. We believe the impact of the RIN price on the wholesale price of refined products is most clearly seen by comparing pairs of refined products rather than comparing crude prices to refined product prices, as many compounding factors can and do influence the price relationship between crude oil and refined products. Further, while there may be concerns related to the appropriateness of the decisions by the authors to include an additional refined product price spread and pool the results of the various comparisons, EPA does not believe these decisions had a significant impact on the conclusions of the paper. Even if the EPA excludes consideration of the additional refined product pair and assesses the five original

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<sup>67</sup> For example, see comments submitted by Marcia Pica Karp, Chevron, EPA-HQ-OAR-2016-0544-0209; David Masuret, Cumberland Farms, EPA-HQ-OAR-2016-0544-0160; C.R. Knittel et al. EPA-HQ-OAR-2016-0544-0280.

<sup>68</sup> Knittel, Christopher R., Meiselman, Ben S., and Stock, James H. *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard*. November 2016.; Knittel, Christopher R., Meiselman, Ben S., and Stock, James H. *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard. Analysis of Post-March 2015 Data*. November 23, 2016.; Argus Consulting Services. *Do Obligated Parties Include RIN costs in Product Prices?* February 2017.

<sup>69</sup> Argus Consulting Services also examined the average price ratio between RBOB and ULSD to crude prior to 2013 and between 2013 and 2016 which, while not conclusive on its own, similarly indicated that refiners were reflecting RIN costs in the prices of RBOB and ULSD. Argus also noted that both Argus and Platts include RVO cost considerations in their pricing methodology.

<sup>70</sup> Ibid.

<sup>71</sup> Charles River Associates. *Review of Updated Pass-Through Analysis of Knittel, Meiselman and Stock*. February 2017.



market reality, stating that the RIN prices supported a negative “spot-to-rack margin.”<sup>77</sup> They are purchasing petroleum blendstocks from refiners for a higher price than they can recover for this product when sold at the rack as blended E10 but maintaining profitability through RIN sales. This observed market practice supports the findings by the EPA and other parties that despite the higher prices of petroleum blendstocks resulting from higher RIN prices, the costs of transportation fuel to consumers have not increased as Valero has claimed.<sup>78</sup>

While the EPA continues to believe that refiners, including merchant refiners, are generally able to recover the cost of RINs through the prices they receive for the petroleum blendstocks they sell, we also acknowledge that there are many diverse factors that impact each individual refiner’s profitability and their ability to recover their full cost of production (including crude oil costs, labor costs, capital costs, regulatory and compliance costs, etc.). These factors include, but are not limited to, the refinery’s location, their access to various types of crude oil, the local demand and competition for refined products. In recent years, a number of factors have led to an oversupply of refined gasoline and diesel in the United States. In such a market we would expect significant pressure on refining margins as the supply of refined products outpaces demand and refiners compete with one another to find markets for their products (potentially including exports) and maintain market share. These market conditions are expected to result in reduced profit margins for refiners, and in some cases refiners may struggle to remain profitable.<sup>79</sup> In evaluating whether or not to change the point of obligation, however, it is important to consider whether these challenges are caused by the current point of obligation in the RFS program (rather than more broad market conditions), and whether changing the point of obligation would be expected to address these challenges. Based on the information discussed above, we do not believe the challenges faced by some refiners in the current market are the result of their designation as obligated parties in the RFS program.

The EPA also examined claims made by the petitioners that unobligated blenders were reporting windfall profits by selling RINs. The petitioners primarily supported these claims by referencing the financial statements of companies that acquire RINs by blending renewable fuels and who sell these RINs to obligated parties, but are not obligated parties themselves.<sup>80</sup> EPA does not believe that the information presented by the petitioners substantiates their claims that unobligated blenders are generating windfall profits from RIN sales. First, we note that the fact that companies report income for RIN sales does not indicate that these companies are receiving a windfall from the RFS program. This is equivalent to claiming a company’s reported sales are

<sup>77</sup> See Presentation from Murphy USA to EPA, August 16, 2016.

<sup>78</sup> “A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effect,” Dallas Burkholder, Office of Transportation and Air Quality, US EPA, May 14, 2015 and Knittel, Christopher R., Ben S. Meiselman, and James H. Stock. The Passthrough of RIN Prices to Wholesale and Retail Fuels Under the Renewable Fuel Standard. Working Paper 21343. NBER Working Paper Series. Available online <<http://www.nber.org/papers/w21343.pdf>>. While these papers demonstrate that the cost of transportation fuel to consumers does not increase due to higher RIN prices, EPA acknowledges that higher renewable fuel obligations can lead to higher transportation fuel prices for consumers if renewable fuels cost more than the petroleum based fuels they displace.

<sup>79</sup> See *2017 US Refining Forecast: Lean Times Ahead*, Opportune LLP, December 7, 2016. Available online: <https://www.lexology.com/library/detail.aspx?g=b7ae9ac1-1c7d-466e-92a8-13b91c005722>. In recent years, US refinery profitability has benefited from exporting excess refined products given their favorable economics situations compared to many foreign refiners.

<sup>80</sup> The parties most commonly cited by the petitioners are Murphy USA and Casey’s General Stores.

Further, statements from Casey's General Stores and Murphy USA contradict the notion that RIN sales represent windfall profits for unobligated blenders. Murphy USA reported that in the third quarter of 2014 income received from RIN sales offset negative product supply and wholesale margins.<sup>87</sup> This statement is in line with statements from Murphy USA cited above and EPA's view of the market explained in the preceding paragraph, that companies that blend renewable fuels with petroleum blendstocks to produce finished transportation fuel must purchase petroleum blendstocks at a higher price that reflects the cost of the RIN, and sell blended transportation fuel at a lower price that reflects their ability to separate and sell the RINs associated with the renewable fuel, to offer finished fuel at a competitive price. In effect, these parties sell the finished transportation fuel at a loss (or a much smaller margin than would be sustainable in a market without RIN obligations) in order to obtain RINs. In their annual report filed in June 2015, Casey's General Stores directly stated that their general pricing practice is to price to their competition.<sup>88</sup> a practice the EPA has repeatedly stated we expect is the general practice in competitive markets. We believe this competitive pricing behavior is incompatible with the windfall profits suggested by the petitioners.

Many commenters addressed the issue of the potential for unobligated blenders to earn windfall profits from RIN sales and the competitive advantages these RIN sales could provide relative to small retailers that do not blend renewable fuels. Many commenters, including several large retailers and unobligated blenders, agreed with the EPA's assessment of the market and affirmed that unobligated blenders are not realizing windfall profits from RIN sales.<sup>89</sup> One commenter provided data from their local market including the prices of ethanol, gasoline blendstocks, RINs, and other costs associated with supplying blended transportation fuel demonstrating that the value of the RIN was indeed reflected in the wholesale price of E10 and was not withheld by the fuel blender.<sup>90</sup> This commenter presented further information demonstrating that despite their status as a largely unobligated blender, the RIN prices had no impact on their retail fuel margins from August 2008 through August 2016.<sup>91</sup>

Other commenters, however, questioned this finding, with several submitting papers or public statements made by representatives of unobligated blenders supporting their views.<sup>92</sup> Two primary references often cited by commenters, which are generally representative of comments received on this issue, are a report on the estimation of the margins of large retailers by Ramon

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<sup>87</sup> *Murphy USA Inc. Reports Third Quarter 2014 Results*. Yahoo! Finance, November 5, 2014. Available online <<http://finance.yahoo.com/news/murphy-usa-inc-reports-third-220006760.html>>.

<sup>88</sup> Casey's General Stores, Inc., Annual Report (Form 10-K) (June 26, 2015).

<sup>89</sup> For example, see comments from Casey's General Stores, Inc, EPA-HQ-OAR-2016-0544-0268, NATSO EPA-HQ-OAR-2016-0544-0282, SEI Fuels and 7-Eleven, EPA-HQ-OAR-2016-0544-0133, Murphy USA, EPA-HQ-OAR-2016-0544-0372, QuikTrip, EPA-HQ-OAR-2016-0544-0198, and KwikTrip, EPA-HQ-OAR-2016-0544-0105.

<sup>90</sup> See comments from Cumberland Farms, EPA-HQ-OAR-2016-0544-0160. As part of their comment Cumberland Farms also submitted a screen shot of the software they use to calculate and account for E10 fuel costs. The value of the RIN is directly taken into account in their pricing calculations.

<sup>91</sup> *Ibid*.

<sup>92</sup> For example, see comments from Valero, EPA-HQ-OAR-2016-0544-0274, Small Retailer Coalition, EPA-HQ-OAR-2016-0544-0344, Buffalo Services, Inc., EPA-HQ-OAR-2016-0544-0184, Friendly Mart Food Stores, EPA-HQ-OAR-2016-0544-0387.

to sell when the prices are most favorable.<sup>96</sup> None of these factors are the result of the point of obligation in the RFS program, nor would any of them change if EPA were to change the point of obligation as the petitioners suggest.<sup>97</sup>

After reviewing the comments submitted on our proposed denial of the petitions to change the point of obligation in the RFS program, the EPA reaffirms the position stated in our proposed denial. We do not believe the available data indicates that large retailers or unobligated blenders are realizing windfall profits as the result of their access to RINs. On the other hand, a contrary finding is well supported by the data presented here and the supporting comments submitted by many with direct knowledge and experience on this issue. While we recognize that many small retailers may be facing significant economic hardship, we do not believe this hardship is primarily or even materially caused by the current point of obligation in the RFS program, but rather by a number of broader market factors (see Section II.D for a further discussion of this issue).

#### D. The Current Regulations Do Not Appear to Negatively Impact Small Retailers

The EPA received comments from the Small Retailers Coalition, an organization created in 2016 representing over 200 owners of gas stations and convenience stores, as well as comments from a number of parties that own and operate retail fuel stations.<sup>98</sup> EPA also received comments from the National Black Caucus of State Legislators echoing many of the concerns raised by the Small Retailers Coalition, contending that independent gasoline retail stations are harmed by the current point of obligation.<sup>99</sup> These comments suggested that the current point of obligation is harming small retailers by allowing their competitors to obtain and sell RINs which allow their competitors to more competitively price their fuels. They contend that their competitors are gaining a \$0.10-\$0.15 per gallon advantage over small and medium suppliers. Commenters further suggest that this pricing advantage is available to their competitors as a result of their ability to realize windfall profits from RIN sales and that the disparity will likely result in the closure of a large number of the stores owned by single-store owners and medium sized gas stations and convenience stores. According to some commenters, such closures could lead to lower levels of competition among parties that sell gasoline and diesel at the retail level, ultimately leading to higher fuel prices for consumers. Some commenters suggested that because large retailers are realizing such significant profits from RIN sales they have no incentive to invest in infrastructure to expand the availability and use of renewable fuels, and in some cases

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<sup>96</sup> See comments from the Small Retailers Coalition, EPA-HQ-OAR-2016-0544-0344.

<sup>97</sup> These advantages are related to the company's ability to acquire renewable fuels at lower prices than their competitors or their ability to sell renewable fuel blends at higher prices than their competitors. To the degree these advantages exist, they are highly unlikely to be impacted by a change in the point of obligation.

<sup>98</sup> For example, see comments from the Small Retailer Coalition, EPA-HQ-OAR-2016-0544-0344; Short Stop, EPA-HQ-OAR-2016-0544-0174; L & L Stores, EPA-HQ-OAR-2016-0544-0426. EPA also received a series of comments from the Petroleum Marketers Association of America (PMAA). Initial comments from PMAA indicated support for maintaining the current point of obligation, however in subsequent correspondence PMAA stated it was taking a neutral position on where the point of obligation should be placed due to growing concerns for unfair competition in the retail market. EPA believes these concerns are adequately addressed in this section.

<sup>99</sup> Comment from National Black Caucus of State Legislators, EPA-HQ-OAR-2016-0544-0166.

E. The EPA Has Not Seen Evidence That High RIN Prices Have or Will Force Refiners to Decrease Production or Increase Exports

In their petition, Valero suggested that if the EPA does not change the point of obligation of the RFS program it could lead to obligated parties, particularly merchant refiners, decreasing their production of obligated fuels or increasing their exports of refined products in an effort to minimize the RFS obligations.<sup>103</sup> As discussed above, both merchant refiners and integrated refiners experience RIN acquisition costs, and both recover these costs through the price of the petroleum products they sell. The RFS program therefore does not impact merchant refiners in a way that would make them more or less likely than integrated refiners to decrease production of gasoline and diesel or increase exports of these fuels. Rather, decisions to decrease production or increase exports are driven by broader market factors, which effect both merchant and integrated refiners.

We also note that the idea that the RFS program could result in a reduced supply of gasoline and diesel to the United States through lower production volumes or increased exports is not new, as obligated parties have been suggesting that this could be a potential outcome of increasing RFS standards since the beginning of the program. Despite these warnings, and even with increasing vehicle fuel efficiency in the United States in previous years, the significant increase in both the RFS standards and RIN prices have not resulted in obligated parties taking these actions, as seen in the following graph.<sup>104</sup> Were high RIN prices to have this effect, one would expect to have seen a drop in fuel supply beginning in 2013, when RIN prices spiked.

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<sup>103</sup> One commenter (NERA) claimed that since RIN costs are reflected in the wholesale price of gasoline blendstocks high RIN prices would encourage gasoline exports, as exported gasoline could receive the value of the RIN without incurring the RIN obligation. This commenter ignored the fact that the market price for exported gasoline is discounted relative to gasoline sold for the domestic market, and that this discount reflects the cost of the RIN obligation (for further discussion of this issue, see Section II.C above).

<sup>104</sup> The EPA also performed a separate analysis of refinery closures, derating, and expansions from 2013-2017. See Section III.G for a further discussion of the impact of the RFS program on refining capacity.



distillate in the United States has increased significantly since 2010<sup>106</sup> due to a number of factors including access to low cost crude oil and natural gas and high refinery utilization rates. During this same time period, demand for refined products in the United States has been fairly constant.<sup>107</sup> Refiners seeking export markets for their products at a time when supply increases have outpaced domestic demand for their products is a natural response, and is unrelated to the RFS program.

#### F. A Relatively Small Number of Obligated Parties is Generally Advantageous

In the 2007 RFS1 rule, the EPA indicated that it considered it preferable to place the point of obligation on a smaller number of refiners and importers rather than on a larger number of downstream blenders. This is primarily because placing the obligation on a smaller number of parties with significant assets generally results in a more efficient, and therefore more effective program. In the proposed RFS2 rule, we noted that blenders would likely be regulated as RIN holders under the expanded program, and questioned whether also making them obligated parties would significantly increase their regulatory burden. After considering comments, we chose in the final RFS2 rule to maintain the RFS1 approach, noting, among other reasons, that changing the point of obligation to include blenders could lead to disruption of the program in the transition of RFS1 to RFS2. After promulgating the final RFS2 rule we gained additional experience implementing the program that further supports our decision to maintain the current approach. Under the current system, it is renewable fuel producers who generate RINs, for gallons of biofuel produced, and it is the refiners and importers of gasoline and diesel fuel who must retire the RINs to demonstrate compliance. While the EPA is engaged in compliance and enforcement activities to address instances of invalid RINs in the marketplace, the sheer volume of RINs and RIN transactions makes it critical to also leverage the participation of obligated parties in policing the RIN market. In addition, refiners and importers are subject to significant requirements related to environmental, safety, and health concerns, and the expertise they have developed in maintaining compliance contributes to the success of the RFS program.

Refiners and importers generally have greater resources that enable them to provide oversight of the RIN generators to help ensure that the RINs being traded in the marketplace are valid. They have invested significantly since the finalization of the RFS regulations to develop compliance processes and expertise in these markets. Changing the point of obligation would potentially disrupt the systems developed by these parties, strand their investments, and would require that newly obligated parties make the necessary investments to enable compliance with their new RFS obligations. This could take a significant amount of time and represent a significant

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<sup>106</sup> See EIA data on U.S. Refinery and Blender Net Production of Distillate Fuel Oil (<https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MDIRPUS1&f=N>) and U.S. Refinery and Blender Net Production of Finished Motor Gasoline

(<https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MGFRPUS1&f=M>).

<sup>107</sup> See EIA data on Weekly U.S. Product Supplied of Distillate Fuel Oil

(<https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=WDIUPUS2&f=W>) and Weekly U.S. Product Supplied of Finished Motor Gasoline

(<https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=WGFUPUS2&f=W>).



place the RFS obligation on larger companies with greater resources who are better positioned to comply with the RFS standards.<sup>109</sup>

Several commenters contested the EPA's statements that changing the point of obligation to the "position holders" would increase the number of obligated parties.<sup>110</sup> These commenters further argued that parties with enough capital and expertise to purchase fuel in bulk above the rack would be able to comply with RFS obligations. However, based on information from the IRS (discussed briefly above and further in Section IV.A and IV.B), we determined that if the point of obligation in the RFS program were placed on the "position holders," the number of obligated parties would increase significantly, and that many of these parties sell relatively small volumes of gasoline and diesel.

We note that if we had compelling evidence in front of us that placing the RFS obligation on a larger number of renewable fuel blenders or "position holders" would significantly increase the production, distribution, and use of renewable fuels, then a potentially higher number of obligated parties on its own would not likely be a reason to retain the current point of obligation. In light of the reasons discussed above, however, and because we do not think shifting the point of obligation would lead to higher renewable fuel production and use, and for other reasons discussed in this document, we believe that placing the obligation on the smaller number of refiners and importers is preferable.

#### G. The Current Program Structure Does Not Require Market Repositioning to Achieve Compliance

One of the petitions the EPA received requesting a change in the point of obligation in the RFS program took issue with language in previously published EPA documents suggesting that one potential avenue for obligated parties to acquire RINs is the purchase or construction of downstream blending assets.<sup>111</sup> The petitioner emphasized the challenges associated with the acquisition of such assets. They further claimed that this suggestion reflects a lack of understanding of the complexities of the fuel market, and implicitly suggests that investment in blending infrastructure is the only solution for merchant refiners to comply with the RFS.

The EPA strongly disagrees with the petitioner's assessments of the EPA's previous statements. In the document referenced by the petitioner, the EPA notes that the acquisition of downstream assets is merely one option open to obligated parties who seek an alternative to purchasing separated RINs necessary for compliance. The fact that ownership of positions at terminals and

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<sup>109</sup> While the evidence before EPA demonstrates that the cost of RINs are generally recovered by the obligated parties, larger companies with greater resources are significantly more likely to have expertise related to complying with EPA regulations (including, but not limited to their RFS obligations), ensuring the validity of RINs, etc.

<sup>110</sup> For example, see comments submitted by Valero, EPA-HQ-OAR-2016-0544-0274; AFPM, EPA-HQ-OAR-2016-0544-0360; Monroe Energy, EPA-HQ-OAR-2016-0544-0368

<sup>111</sup> See Valero Energy Corp. Petition for Rulemaking, June 13, 2016, 16-17. Valero referred to statements made by EPA in *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* (May 14, 2015), written by Dallas Burkholder.

Some commenters suggested that third party speculators (parties that are not involved in the production or blending of renewable fuels and are not obligated parties) and RIN-long parties are withholding RINs to drive up prices. They allege that third parties and RIN-long parties<sup>116</sup> are profiting from these actions at the expense of small and merchant refiners. These commenters have not provided sufficient evidence to support their claims that integrated refiners or unobligated blenders (who would likely be RIN long) are intentionally withholding RINs from the market in an effort to manipulate RIN prices. As discussed further in Section II.B above, we do not believe that current RIN prices reflect successful efforts by some parties to artificially inflate RIN prices, but rather that they are reflect the costs associated with producing additional volumes of renewable fuel (in the case of biodiesel) or the financial incentives needed to sell additional volumes of higher level blends of renewable fuel (in the case of ethanol).

The EPA received some other comments that changing the point of obligation to the “position holders” would reduce fraud in the RFS program. These parties generally claimed that “position holders” are better equipped to ensure the validity of RINs because they are closer to the actual point of blending. In response to these comments, EPA notes that the majority of the RIN fraud seen in the RFS program to date has been for RINs associated with biodiesel. The majority of biodiesel is blended with diesel downstream of the rack. Therefore, “position holders,” who by definition transfer ownership of the fuel at the rack, may be in no better position to monitor biodiesel blending than a refiner. Under the current Part 80 regulations, each obligated party incurs an RVO for both diesel and gasoline, even if they are only producing one of the two types of fuel. Likewise, if the point of obligation moved to “position holders,” even “position holders” that only blend ethanol into gasoline would still incur an RVO for diesel and would still be required to acquire RINs from biodiesel blending.

Several commenters pointed to comments from Doug Parker indicating that the chain of custody between producer, blender, and refiner has led to fraud within the RIN market. As an initial matter, historically, EPA has seen fraud within the RIN market at locations upstream of the point of compliance and the point of obligation. Generally, defendants in the majority of the RIN fraud cases brought to date generate RINs for fuel that is never produced, generate RINs for fuel that is not used for a qualifying purpose (transportation fuel, heating oil or jet fuel), or export renewable fuel without retiring the appropriate RINs. These cases have resulted in significant criminal convictions and a substantial number of associated civil enforcement cases. The EPA believes that our enforcement actions and increased due diligence by RIN purchasers have helped to deter these types of violations, and note that these fraud cases are unlikely to have been prevented by a different point of obligation due to the nature of the fraud.

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price possible. Unlike market speculation, market *manipulation* involves a deliberate (and illegal) attempt to interfere with the free and fair operation of the market and create artificial, false or misleading appearances with respect to the price of, or market for, RINs.

<sup>116</sup> RIN-long parties are those who obtain more RINs through blending than their obligation under the RFS program; i.e., they are “long” on RINs as compared to their obligation.

gain, but EPA disagrees that moving the point of obligation will reduce the price of RINs as discussed in this section and in Section III.

In arguing for a change in the point of obligation, Monroe Energy suggested that under the current definition of “obligated party,” blenders and non-obligated parties who sell RINs have no incentive to ensure that their RINs are valid, and that refiners and importers are the only parties at risk when purchasing potentially fraudulent RINs. The EPA notes that Monroe’s statement is inaccurate since parties who sell RINs must register under the RFS program, and can be held liable if the RINs they sell are deemed invalid or fraudulent. Therefore, they do indeed have an incentive to ensure that RINs they purchase and sell are valid. However, we also believe that larger entities, with more assets at risk and more resources to devote to compliance, are more likely to engage in in-depth due diligence investigations into RIN validity than smaller, less sophisticated parties. Therefore, a scheme that eliminated many larger refiners and importers from the obligation to acquire RINs, and shifted RIN responsibilities to smaller entities such as many “position holders” and blenders, would be more likely to result in an increase, rather than a decrease in instances of RIN fraud. BP and others who do not favor a change in the point of obligation suggested that smaller parties who could become obligated if the point of obligation were changed may not have the capability to conduct due diligence to ensure that the RINs they acquire are valid. Once the relaxation of RIN verification occasioned by such a change in the point of obligation were noticed, the change could encourage the generation of fraudulent RINs.

### III. Changing the Point of Obligation in the RFS Program Is Not Expected to Result in the Increased Production, Distribution, and Use of Renewable Fuels

We have discussed in the previous section several significant concerns about the impact changing the point of obligation would have on the RFS program. Given these concerns, and our overall obligation to implement the RFS program in a way that most fully achieves Congress’s goal of increasing renewable fuel use, the point of obligation should only be changed if it would be expected to lead to net benefits. As we discuss in this section, we do not believe that the record before us indicates that this is the case.

In their petitions submitted to the EPA requesting a change to the point of obligation in the RFS program the petitioners claim that changing the point of obligation could result in greater production, distribution, and use of renewable fuels in the United States. The petitioners suggest that changing the point of obligation could therefore reduce or even eliminate the need for the EPA to exercise our waiver authorities. The petitioners generally offer only theoretical arguments to support these claims. In this section we describe our evaluation of petitioners’ claims that changing the point of obligation would increase the production, distribution, and use of renewable transportation fuels in the United States.

The use of the EPA’s waiver authorities to reduce the required volume obligations from the statutory levels in recent years is primarily the result of the delay in the commercialization of cellulosic biofuels and resulting shortfall in cellulosic biofuel production volumes relative to the statutory targets. In addition to the shortfall in cellulosic biofuel production, the EPA also noted challenges associated with increasing the supply of renewable fuel to consumers associated with

Additionally, the EPA notes that the agency did not exercise the general waiver authority on the basis of inadequate domestic supply in establishing the 2017 RFS standards, and did not propose to do so for the 2018 standards. Thus, EPA established for 2017, and proposed for 2018 EPA, volume reductions that are attributable to insufficient production of cellulosic biofuel. We do not believe that this type of shortfall would be reduced or alleviated by a change in the point of obligation. Thus, the focus of the petitioners on potential impacts of a change to the point of obligation on distribution and use of renewable fuels such as ethanol and biodiesel is not even directed at the primary hurdles facing renewable fuel growth under the RFS program going forward. Finally, the United States Court of Appeals for the District of Columbia Circuit recently ruled that EPA's interpretation of the "inadequate domestic supply" portion of its waiver authority in developing the 2016 total renewable fuel standard was inappropriate, and that in the future EPA may only consider "supply-side factors: in assessing if an "inadequate domestic supply" of renewable fuel exists.<sup>128</sup> Therefore, to the extent that petitioners claim that a change in the point of obligation would overcome constraints in the distribution of renewable fuel from refiners, importers or blenders to consumers, or in the use of renewable fuel by consumers, it does not appear that this would lead to a difference in EPA's use of the inadequate domestic supply waiver authority under the direction EPA recently received from the DC Circuit. For these and other reasons, as discussed below, contrary to the petitioners' claims, the EPA believes that the production, distribution, and use of renewable transportation fuels is unlikely to be positively impacted by changing the point of obligation in the RFS program.

Before assessing the potential impacts on renewable fuel production, distribution, and use in the subsections that follow we first address the EPA's statutory authority to place the point of obligation on various suggested parties.

A. Some of the Proposed Changes to the Point of Obligation Are Inconsistent with the CAA

EPA believes that certain of the proposed changes to RFS point of obligation are inconsistent with the Clean Air Act. Although we note these inconsistencies here, we emphasize that our denial of the petitions is not dependent on this legal analysis. For the reasons described elsewhere in this document, the EPA would deny the petitions seeking a change in the point of obligation even if it concluded that it had legal authority to enact the suggested changes.

In its petition for reconsideration, the Coalition recommends that the EPA move the point of obligation to "blenders and distributors" without addressing EPA's authority to do so consistent with CAA 211(o)(3). See Coalition Petition, p. 14. In its petition, the Coalition cites text from CAA 211(o)(2)(A)(iii) indicating that the regulations EPA establishes to implement the RFS program "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate." The Coalition suggests that including "distributors" in this list of entities regarding which compliance provisions may be established would authorize the EPA to establish the point of obligation for compliance with the RFS annual standards on distributors. However, the Act includes a different provision specifically identifying the parties that may be

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<sup>128</sup> See *Americans for Clean Energy v. Environmental Protection Agency*, No. 16-1005, Slip Op. 31-32 (D.C. Cir. July 28, 2017) ("ACE").



“blender” in CAA 211(o) as describing anyone who is in a position to choose whether or not to engage in blending, but rather as describing those parties who actually engage in blending.<sup>135</sup> EPA also does not believe it would be appropriate to redefine the terms “refiners” and “importers” to include “position holders” who do not engage in any refining or importing. Such an approach would not be consistent with EPA’s existing regulatory definitions or common industry usage. In sum, EPA does not interpret the CAA as authorizing it to place the point of obligation on all “position holders” or distributors, since they are not all refiners, importers or blenders. Of course, EPA does have authority to place the point of obligation on blenders (which would include the majority of the “position holders”), but for reasons discussed further below we continue to find it appropriate not to do so.

B. Renewable Fuel Production, Distribution, and Use Does Not Appear to Be Significantly Limited by Blending Infrastructure

One of the ways that the petitioners claim renewable fuel production, distribution, and use could be positively impacted by changing the point of obligation in the RFS program is by increasing the incentive for the installation and expansion of renewable fuel blending infrastructure, especially at terminals. The petitioners claim that the current point of obligation results in a number of parties that are either “naturally long on RINs,” because they are obligated parties that blend renewable fuels at volumes above their RFS obligations (generally because they blend renewable fuel into more petroleum products than they refine or import), or because they blend renewable fuels but are not obligated parties under the RFS program. According to the petitioners and some commenters, these parties have an incentive to oppose the installation and expansion of infrastructure needed to increase the blending of renewable fuels into transportation fuel in an effort to restrict RIN availability and drive up RIN prices.<sup>136</sup> The EPA has investigated these claims and does not find them to be supported. We acknowledge that some parties may be hesitant to contribute financially towards the addition of new infrastructure at terminals to increase the availability of higher level blends of renewable fuels due to insufficient local demand for these fuels (in the case of E85) or previous investment in infrastructure to offer these blends outside of the terminal (in the case of biodiesel). As discussed further in Section III.C below, we do not believe the addition of such infrastructure would be likely to increase the availability of RINs to such a degree that it would appreciably impact the price of RINs. It is therefore highly unlikely that any opposition to additional blending infrastructure at terminals is driven by a desire to restrict RIN availability which could theoretically result in higher RIN prices.

The EPA spoke with several terminal owners/operators to assess the current status of renewable fuel blending infrastructure at terminals.<sup>137</sup> Currently all, or nearly all, terminals contain the necessary infrastructure for the onsite storage of ethanol and the blending of ethanol with

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<sup>135</sup> A decision to treat people as having engaged in an activity simply because they have the opportunity to engage in it would be quite unusual. For example, a landowner not making active use of their land would not normally be considered a “farmer” simply because they could decide in the future to engage in farming.

<sup>136</sup> For example, see *Effects of Moving the Compliance Obligation under RFS2 to Suppliers of Finished Products*, NERA Economic Consulting, July 27, 2015.

<sup>137</sup> See Magellan Meeting Notes, December 16, 2015; Independent Fuel Terminal Owners Association meeting notes, January 8, 2016; Kinder Morgan meeting notes, January 22, 2016.



distribution, providing another opportunity for biodiesel blending.<sup>143</sup> In these cases it is unclear what impact, if any, changing the point of obligation to “position holders” would have on the availability of biodiesel blends as the current regulations appear to be providing a substantial incentive for parties to invest in biodiesel infrastructure, both at terminals and at other downstream locations.<sup>144</sup> As noted earlier, the required volume of biomass based diesel for 2017 is twice the statutory minimum volume. To the extent that renewable fuel use may be currently constrained by insufficient blending infrastructure we do not believe that changing the point of obligation would result in the additional investments claimed by the petitioners, as many of the parties that would become obligated if the petitioners’ requests were granted are already investing in blending infrastructure. While the EPA continues to believe that there may be parts of the country that have limited or no access to biodiesel or biodiesel blends, this is generally the result of the higher expense and logistical complications associated with transporting biodiesel or biodiesel blends long distances to areas with little or no local biodiesel production, rather than an inability or unwillingness to invest in the necessary blending infrastructure, either at or downstream of the terminals. Furthermore, such cases continue to decline as a result of the continuing investment in biodiesel distribution infrastructure.

The EPA received comments claiming that changing the point of obligation would likely increase investment in biodiesel blending infrastructure at terminals, and that this would lead to higher biodiesel use in the United States.<sup>145</sup> Commenters claim that the most cost effective point to blend biodiesel is at the terminal, but that currently obligated parties with sufficient RINs and/or unobligated blenders are blocking the installation of additional biodiesel blending infrastructure at terminals. If the point of obligation were changed, they argue that the equal obligations at the rack would result in greater investment in biodiesel blending infrastructure at the rack. In his comments Mr. Jobe, president of Rockhouse Advisors, argues that because most biodiesel blending currently takes place downstream by a relatively small number of large companies this allows these companies to realize significant profits by keeping biodiesel prices low and/or keeping D4 RIN prices high.<sup>146</sup> He further argues that the current point of obligation discourages domestic biodiesel by encouraging the import of biodiesel at a lower cost, and that moving the point of obligation could benefit domestic producers by moving the demand for biodiesel away from the coasts to the approximately 1,000 terminals around the country.

The EPA believes it is highly unlikely that the many claimed benefits to the biodiesel industry associated with changing the point of obligation would occur. All or nearly all of these claimed benefits are dependent on additional investment in biodiesel blending at terminals. However, as Mr. Jobe notes in his comments, the response to increasing RFS requirements for biomass-based diesel and advanced biofuel has primarily been to increase biodiesel blending capacity downstream of the terminals. This is likely occurring because the parties that are currently blending the majority of the biodiesel have determined that it is more cost effective to blend

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<sup>143</sup> Ibid.

<sup>144</sup> However, changing the point of obligation to “blenders” would make every truck stop or fuel retailer that blends biodiesel subject to the RFS. This could result in a reduction in downstream blending of biodiesel (as these parties concluded it was no longer worthwhile to engage in blending), or else could bring a large number of small entities, with little relevant compliance experience, into the RFS program.

<sup>145</sup> See, e.g., comments submitted by Joe Jobe, President of Rockhouse Advisors, LLC, EPA-HQ-OAR-2016-0544-0271.

<sup>146</sup> Ibid.

expensive compliance option. If instead unobligated blenders are able to block the installation of the necessary infrastructure to blend biodiesel at terminals, it seems unlikely that changing the point of obligation will cause the large downstream blenders to abandon their presumably profitable downstream blending operations in favor of participating in infrastructure investments at the rack.

Even if changing the point of obligation were to increase biodiesel blending infrastructure at terminals, the benefits to domestic biodiesel producers that Mr. Jobe claims would result seem highly unlikely. Additional blending infrastructure at terminals would not cause biodiesel blenders to suddenly purchase higher volumes of domestic biodiesel if imported biodiesel continues to be available at lower prices. Demand for biodiesel is much more likely to be impacted by the price of biodiesel (relative to petroleum based diesel) than the availability of blending infrastructure at terminals. As long as significant volumes of low cost imported biodiesel are available we anticipate imported biodiesel will preferentially be purchased and blended over higher priced domestic product, particularly near large ports. In this scenario, obligated parties that sell significant volumes of fuel in the interior of the United States would likely purchase separated RINs to meet their compliance obligations, rather than purchasing and blending relatively high cost domestic biodiesel.

Based on the above information, it appears that renewable fuels and renewable fuel blends are currently widely available across the United States. Ethanol is available at all or nearly all terminals and while much of the blending infrastructure may not currently be optimized to produce higher level ethanol blends, it is capable of such optimization. Biodiesel blending infrastructure is more varied, with many terminals having blending infrastructure on-site, some receiving pre-blended biodiesel, and much biodiesel being blended downstream of terminals. Where biodiesel blending infrastructure does not exist we believe it is primarily the result of the higher expense associated with transporting biodiesel to locations with limited or no local biodiesel production.

In any case, we do not believe that the lack of proper incentives to expand blending infrastructure is a primary factor limiting the production or use of renewable fuels in the transportation sector. While blending infrastructure is not universal at all terminals, the primary issues limiting the production and use of renewable fuels are the status of the production technologies to economically produce cellulosic fuels and to a lesser degree the limited consumer demand for higher level ethanol blends.<sup>151</sup> Given the observed sufficiency of blending infrastructure, and the apparent ability of the current regulatory program to incentivize installation of blending infrastructure (whether at or downstream of fuel terminals), the record before us does not support the allegations of petitioners that changing the point of obligation would result in increased use of renewable fuels in the United States as a result of additional incentives or motivation for the installation of blending infrastructure.

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<sup>151</sup> While low consumer demand for higher level ethanol blends did not require the use of EPA's general waiver authority to reduce the implied statutory volume of conventional biofuel in 2017, or in EPA's proposed rule for 2018, low demand for these fuels could theoretically result in higher RIN prices than would be realized if consumer demand for these fuels were greater. However, as discussed throughout this document, the record before EPA does not demonstrate that changing the point of obligation is likely to result in greater sales volumes of higher level ethanol blends.

the EPA examined the potential for higher RFS standards, and the higher RIN prices that could be expected as a result of higher standards, to incentivize lower E85 retail prices and higher sales volumes.<sup>158</sup> In this document we concluded that a lack of competition among E85 retail stations limited the ability for RIN prices to effectively impact retail E85 prices, ultimately limiting the ability of the RFS standards to incentivize a significantly greater supply of E85 to consumers in the near term.

In their requests to change the point of obligation of the RFS program, the petitioners argue that if the EPA changed the point of obligation the RFS standards would have a greater ability to impact the retail price of E85 and incentivize greater use of this fuel. In comments, petitioners and others suggested that obligating downstream parties like “position holders,” and increasing obligations for currently RIN-long parties, could result in more price discounting. We find no basis for the claim that changing the point of obligation would have this effect, nor did commenters submit any data that would support this conclusion. Rather we believe changing the point of obligation would be unlikely to impact the retail pricing of E85. We believe the primary factors inhibiting the RFS program from significantly increasing the supply of E85 to consumers are the limited number of retail stations selling E85 and the relative pricing of E85 versus E10. Further, we believe that the generally non-competitive pricing of E85 at retail is not due to the pricing of E85 at the wholesale level, but is instead the result of the non-competitive retail market for E85. This non-competitive market often results in a not unexpected E85 pricing strategy by retail stations that seeks to maximize fuel margins through withholding RIN value and leading to greater profitability, rather than a strategy that seeks to maximize sales volumes through lower retail prices by passing a greater portion of the RIN value through to consumers. Changing the point of obligation to renewable fuel blenders or “position holders” at the rack is not expected to affect these underlying market fundamentals at retail stations.<sup>159</sup>

One of the arguments made by the petitioners, in their petitions and in comments, for changing the point of obligation in the RFS program is that the current point of obligation creates a disincentive for parties with excess RINs (un-obligated blenders and parties that sell more gasoline and diesel fuel blended with renewable fuel than they refine or import) to increase the use of renewable fuels by offering fuel blends with high renewable content at attractive pricing. They argue that because these parties profit from selling RINs they are incentivized to keep the RIN prices as high as possible by restricting the blending of additional renewable fuel and/or pricing fuels with higher renewable content such as E85 at levels that are unattractive to consumers, thereby restricting the supply of RINs. According to the petitioners, if the EPA were to change the point of obligation in such a way that RFS obligations were proportional to the volume of gasoline and diesel fuel that a party blends with renewable fuel and/or sells at the rack, rather than the volume of gasoline and diesel a party refines or imports, these parties would have a greater incentive to pass the RIN value through to retail station owners, who would then pass the value on to E85 consumers, ultimately reducing the retail price of E85 and increasing E85 sales.

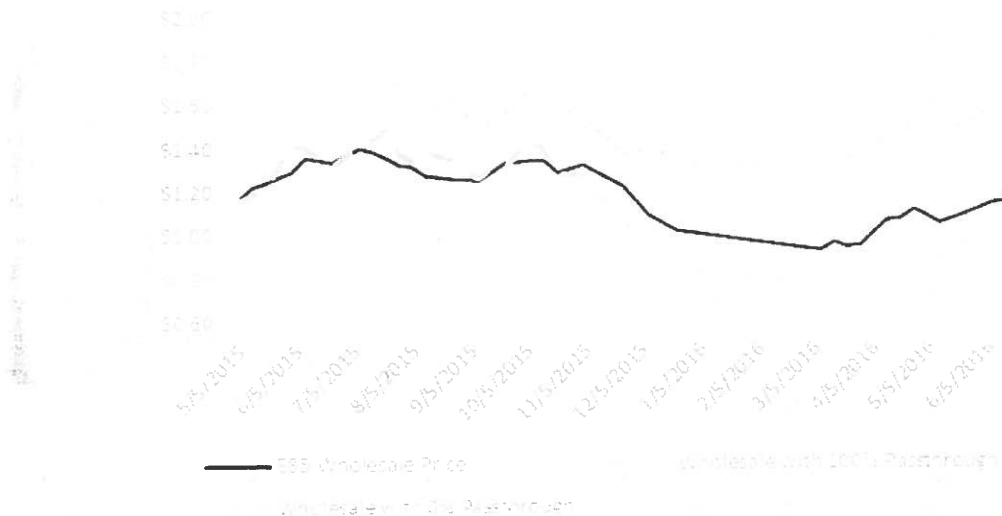
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<sup>158</sup> “An Assessment of the Impact of RIN Prices on the Retail Price of E85,” Dallas Burkholder, Office of Transportation and Air Quality, US EPA, November 2015.

<sup>159</sup> Even if EPA changed the point of obligation to “position holders” retail station owners would generally not be obligated parties, and thus the change is unlikely to directly impact retail fuel pricing decisions.

level, however, was much smaller than the average discount for E85 relative to E10 at the wholesale level (See Figure 3 below). Further, the average retail price discount for E85 was less than the discount needed to make up for the lower energy content per gallon of E85 relative to E10 (approximately 22%) during much of this time period. If the wholesale E85 pricing data collected in Iowa are representative of the wholesale pricing for E85 nationwide, which we believe is likely, then the wholesale prices for E85 already reflect the majority of the RIN value and there is very little to no additional RIN value to be passed through at the wholesale level. Even if the nationwide wholesale E85 pricing generally does not reflect the RIN value, and changing the point of obligation could improve the pricing of E85 at wholesale, the data collected from Iowa suggest that significant discounts at the wholesale level would not necessarily be expected to be passed on to the retail level. The available data further support the view that changing the point of obligation in the RFS program is unlikely to result in a greater portion of the RIN value being reflected in the wholesale price of E85, and ultimately the retail price of E85, and will not be an effective mechanism for increasing E85 sales volumes.

Figure 2  
Observed vs. Theoretical E85 Wholesale Price in Iowa



Wholesale prices with 100% and 0% pass-through calculated using E10 and ethanol prices from the following sources and assuming the effective ethanol price is discounted by 100% and 0% of the RIN value respectively  
 E85 and E10 wholesale prices are the average price of all wholesale sellers reported by the Iowa Renewable Fuel Association (Available online at <http://iowarfa.org/retailer-center/iowa-wholesale-e85-price-listing-services/>)  
 Ethanol price from Agricultural Marketing Resource Center (<http://www.agmrc.org/renewable-energy/ethanol/midwest-ethanol-cash-prices-basis-data-and-charts-for-selected-states/>)  
 RIN Prices from OPIS and Argus Media



generate an additional 110 million RINs per year,<sup>166</sup> or approximately one half of one percent of the total number of RINs generated in 2016. We believe this number provides a perspective on the likelihood that the additional RINs that might be able to be generated by additional sales of E85 would significantly reduce the overall price of RINs. Additionally, in 2016 approximately 240 million D6 RINs were supplied from grandfathered biodiesel and renewable diesel.<sup>167</sup> It is very likely that these were the marginal cost D6 RINs as the RIN price associated with these fuels is governed by the high price of feedstocks used to produce these fuels relative to petroleum. Even if additional RINs could be generated by supplying greater volumes of E85, these additional RINs would only be expected to appreciably reduce the D6 RIN price after displacing these marginal conventional biodiesel and renewable diesel RINs. Since petitioners and commenters provide insufficient information to demonstrate that changing the point of obligation would result in enough additional low cost D6 RINs to displace the high cost D6 RINs currently provided by conventional biodiesel and renewable diesel, the claim that potential additional RINs generated from increased E85 blending would depress the overall D6 RIN price is unsupported.

If any additional RINs supplied to the market through increased sales volumes of E85 are not expected to significantly reduce the market price of RINs, then any parties that profit from E85 and/or RIN sales would maximize their profit by selling as much E85 (and the associated RINs) as possible. This appears to be the case in the current marketplace; parties currently separating RINs in excess of their RFS obligations are seeking to acquire as many RINs as possible as long as the cost of doing so is less than the value they can recover through the sale of the RIN. Although the EPA does not believe that RIN sales by un-obligated blenders lead to windfall profits, to the extent petitioners believe otherwise their own logic would suggest that these parties should currently be incentivized to undertake efforts to increase the sale of renewable fuel blends to increase the number of RINs sold at a profit. If this were the case, changing the point of obligation to blenders could therefore reduce such sales, since blenders would retain RINs for compliance, thereby removing an incentive for them to increase renewable fuel sales and profits.

In summary, the EPA does not find the arguments made by the petitioners compelling, as they do not address what we believe to be the fundamental challenges to significantly increasing the use of renewable fuels in the near term. As discussed in previous sections, the evidence available to the EPA does not indicate that changing the point of obligation would result in greater availability or price discounts for cellulosic biofuels or biodiesel blends. With respect to higher level ethanol blends, supply of E85 to consumers is currently inhibited by the number of retail stations selling E85, the geographic distribution of these stations, and the relative pricing of E85 versus E10 at the retail level. For the reasons discussed in this section, it appears highly unlikely that changing the point of obligation would influence the relative pricing of E85 versus E10. In the next section, we discuss why the EPA does not believe that data support the position that changing the point of obligation would increase the availability of E85 at retail stations.

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<sup>166</sup> An additional 150 million gallons of E85 contain approximately 110 million gallons of ethanol (assuming an average ethanol content of 74% for E85) and would therefore generate approximately 110 million RINs.

<sup>167</sup> See *2016 RIN Supply*.

stations (E85 stations not affiliated with any type of obligated party, and therefore affiliated with parties that are by definition “RIN-long” due to their lack of an RFS obligation) despite the fact that these stations outnumber stations affiliated with obligated parties. EPA further notes that Mr. Minsk does not convincingly address the source of motivation that the “RIN-short” obligated parties may have for encouraging their affiliated stations to offer E85. As discussed above, the potential market for E85 is not sufficient to generate enough RINs to drive down the price of D6 RINs. This is especially true as a high RIN price is currently necessary to incentivize E85 sales, and the D6 RIN price is likely currently determined by the marginal gallon of conventional biofuel which we believe is currently conventional biodiesel rather than ethanol sold as E85. If increasing the number of retail E85 stations is unlikely to result in lower D6 RIN prices it is reasonable to question whether there are other factors, unrelated to whether an E85 station is affiliated with a RIN-long or RIN-short obligated party, that may explain why E85 is more likely to be offered at branded stations affiliated with some obligated parties than others. After reviewing the data EPA concludes that retail stations owned by a large company are much more likely to offer E85 than retail stations owned by a party owning a single, or small number of retail, regardless of whether the station is affiliated with a RIN-long or RIN-short obligated party or if the station is branded or not. We do not find this surprising, as installing E85 infrastructure is a capital intensive project and therefore much more likely to occur at stations with significant access to capital (such as stations owned by large companies) rather than at stations owned by single-station owners. We further conclude that the higher prevalence of E85 stations affiliated with RIN-short parties (vs. RIN long parties) is the result of a higher rate of direct ownership of retail stations among RIN-short obligated parties, rather than a desire by RIN-long obligated parties to restrict the availability of D6 RINs.

The four parties categorized by Mr. Minsk as RIN-long (BP, Chevron, Shell, and Exxon) directly own an estimated total of just 458 stations out of the approximately 41,000 affiliated stations.<sup>181</sup> Conversely, direct ownership of retail stations is more common among the parties characterized by Mr. Minsk as RIN-short. Through its Speedway brand Marathon directly owns 2,730 retail stations, substantially more than all of the RIN-long parties combined.<sup>182</sup> Similarly Western Refining and MAPCO directly own most or all of their affiliated stations.<sup>183</sup> While Valero does not currently own many retail stations, the vast majority of the stations affiliated with Valero that offer E85 are owned by CST, a large company that owns approximately 3,000 retail stations.<sup>184</sup> Additionally, a relatively large number of the stations affiliated with Valero (43 of 107) added E85 prior May 2013 when Valero spun off its retail operations to CST brands, meaning these stations may have been directly owned by Valero at the time they added E85.<sup>185</sup> Altogether, of the 893 E85 stations affiliated with RIN-short obligated parties we estimate that over 500 of these stations are directly owned by a RIN-short obligated party or a large retail brand formerly

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<sup>181</sup> NACS. Who sells America's Fuel? Available online at:

[http://www.nacsonline.com/YourBusiness/FuelsReports/GasPrices\\_2013/Pages/WhoSellsGas.aspx](http://www.nacsonline.com/YourBusiness/FuelsReports/GasPrices_2013/Pages/WhoSellsGas.aspx)

<sup>182</sup> <https://www.speedway.com>About>. The vast majority of the stations affiliated with Marathon that offer E85 (321 out of 367) are Speedway stations. See *EPA assessment of E85 stations affiliated with Marathon*.

<sup>183</sup> See <http://www.wnr.com/about-us> and <https://www.mapcorewards.com/about>. Based on these websites we estimate that Western Refining owns 429 retail stations (approximately 75% of their total affiliated stations) while MAPCO owns 345 stations (over 95% of their total affiliated stations).

<sup>184</sup> <http://www.cstbrands.com/en-us/OurCompany>. See also *EPA assessment of E85 stations affiliated with Valero*.

<sup>185</sup> See also *EPA assessment of E85 stations affiliated with Valero*.

if we were to change the point of obligation. The value of the RIN that is generated when renewable fuels are produced allows fuel blends that contain renewable fuels to be sold at lower prices than would otherwise be possible in the absence of the RFS program. Terminal owners and operators, as well as parties that blend renewable fuels downstream of terminals, are already incentivized to invest in blending infrastructure in an effort to offer their customers the lowest cost fuels possible. Retailers are similarly incentivized to invest in the equipment necessary to offer renewable fuel blends to enable them to offer the widest range of fuel choices. In cases where a lack of competition may inhibit the full value of the RIN from being reflected in the retail price of the fuel, the RIN value can instead provide higher profit margins to the retail station owner to offset their investment in expanding renewable fuel infrastructure. This may ultimately result in more competing retail stations investing in the equipment necessary to offer E85, and with the increased competition retail prices for E85 would be expected to decrease (relative to E10) over time.

Some commenters cited to language in the 2014-2016 final rule indicating that high RIN prices would only result in modest increases in volumes of E85 as evidence that RIN prices cannot drive renewable fuel blending.<sup>188</sup> These commenters take this language out of context. In the 2014-2016 final rule, the EPA was attempting to assess the degree to which an annual volume standard could incentivize additional E85 sales in a single year, not the degree to which the RFS program as a whole can incentivize long term investments that could result in increased renewable fuel availability and use. EPA continues to believe that the RIN value is incentivizing investments to increase renewable fuel use.

#### F. Changing the Point of Obligation Would Not Be Expected to Increase Cellulosic Biofuel Production

While there continue to be challenges related to the distribution and use of renewable fuels in the United States, the largest single challenge to meeting the RFS program's statutory volumes is the shortfall in cellulosic biofuel production. The supply of cellulosic biofuel for 2018 was projected in the 2018 annual rule proposal to be only 3.4% of the statutory volume for these fuels. The importance of cellulosic biofuels to achieving the overall goals of the RFS program only increases in future years, as over 90% of the growth in the statutory volumes from 2018 to 2022 is expected to come from cellulosic biofuel. Changing the point of obligation would not be expected to address the current research, development, and commercialization challenges that will need to be overcome to enable the production of significant volumes of cellulosic biofuel in future years. Instead, to the degree that it reduces the incentive of the refiners to participate in the commercialization of cellulosic biofuels, changing the point of obligation from primarily refiners, who have significant financial resources and experience in commercializing new fuel production technologies on a large scale, to include many smaller downstream parties without such financial resources or experience may negatively impact the ability of the cellulosic

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<sup>188</sup> See, e.g., Comments from CVR, EPA-HQ-OAR-2016-0544-0396, citing *Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,459 (Dec. 14, 2015).

in cellulosic biofuels, yet even the commenters acknowledge this is not the case. It appears it is likely that those integrated refiners that reduced their investment in cellulosic biofuel did so after determining that these investments were unlikely to result in long term profits, or that whatever profits could be realized were less than alternative investment opportunities. Finally, we note that because the cellulosic waiver authority in CAA 211(o)(7)(D) requires that EPA establish the cellulosic biofuel volume requirement at the level projected to be produced (if this volume is lower than the statutory volume) and to make cellulosic waiver credits available as an alternative means of compliance when the statutory volume is not in effect, the design of the RFS program provides limited encouragement for parties of any type to invest in cellulosic biofuels. Obligated parties, like all parties, are only expected to invest in cellulosic biofuel to the degree that they believe these investments will be profitable in the long term. We believe that changing the point of obligation to the “position holders,” and thereby placing a greater burden on integrated refiners would be highly unlikely to significantly impact integrated refiner’s investments in cellulosic biofuels.<sup>193</sup>

#### G. Changing the Point of Obligation Would Not Be Expected to Increase Energy Security

As mentioned above, one of the stated goals of EISA and the RFS program is to increase energy security. Many commenters suggested that the EPA should consider how modifying the definition of obligated party could increase energy security and proposed several ways obligating “position holders” may result in increased energy security. These commenters often cited to comments by Commander Kirk S. Lippold, who suggested that the RFS program is harming US energy security.<sup>194</sup> Commander Lippold claims that the current point of obligation threatens the viability of some refiners, increases fuel costs to the military and other domestic consumers, and stimulates demand for foreign biofuels. EPA finds insufficient factual basis for these claims.

Some commenters suggested that the reason the U.S. has become a net exporter of petroleum fuel in recent years is that obligated parties were exporting fuels to avoid the RIN obligation. Some of these commenters conceded that the RFS played only some part in this, however others attributed the export of petroleum fuel to the RFS program. We do not believe these statements to be accurate, as the decision to export gasoline and diesel from the United States is driven by a desire to realize the maximum profits for these products in the global refined product market. There are no fuel shortages within the United States, so the exported fuel is not being exported at the expense of domestic use, but to find a market offering higher prices for these fuels than the domestic market. (See also Section II.E. for a further discussion of this issue). Changing the point of obligation to “position holders” would not alter these fundamental market dynamics.

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<sup>193</sup> Some commenters suggested that changing the point of obligation could also increase development and investment in advanced biofuel production and use. These commenters did not provide any reasons why a change would result in these increases, and therefore EPA does not find these arguments compelling for similar reasons expressed above regarding cellulosic biofuel. See, e.g., Comments from CVR Energy, EPA-HQ-OAR-2016-0544-0396. In fact, EPA received comments suggesting that a change to the point of obligation would negatively impact ongoing efforts to increase advanced biofuel production. See Comments from Tesoro, EPA-HQ-OAR-2016-0544-0244.

<sup>194</sup> Letter from Cdr. Kirk S. Lippold, to U.S.EPA, EPA-HQ-OAR-2016-0544-0143.



Table III.G-1  
Refinery Closures (2013-2017)

Company Name	Location	Date of Shutdown	Total Atmospheric Crude Distillation Capacity (bbl/cd)	Asphalt Plant
Hess Corporation	Port Reading, NJ	3/2013	0	No
Axeon Specialty Products LLC	Savannah, GA	12/2014	28,000	Yes
Ventura Refining and Transmission LLC	Thomas, OK	11/2014	12,000	No
Trigeant LTD	Corpus Christi, TX	12/2014	0	Yes
Pelican Refining Company LLC	Lake Charles, LA	1/2015	0	Yes
Antelope Refining LLC	Douglas, WY	12/2016	3800	Yes
Flint Hills Resources LP	North Pole, AK	6/2014	126,535	No

A review of the list of refinery closures that occurred between 2013 and 2017 does not provide a compelling case for hardship caused by the RFS program. Four of the seven refineries are asphalt refineries which do not produce transportation fuels and are therefore not affected by the RFS program. The Flint Hills refinery is located in Alaska, which is exempt from the RFS program. According to a journal article covering the Hess refinery closure, the Hess management attributed the refinery closure to dwindling demand on the East Coast along with heating oil sulfur standards which were phasing in there.<sup>197</sup> The last refinery on the list of refinery closures is the Ventura refinery in Thomas, OK. Reviewing the gasoline production information provided by this company to EPA does not show that the Ventura refinery produced gasoline when this refinery was operating, although the refinery may still have had to comply with RFS program if the refinery produced diesel fuel.<sup>198</sup>

While there were very few refinery closures from 2013-2017 (and only one small refinery for which the available information is insufficient to discount attribution to the RFS program), refineries added additional capacity at their refineries. Between 2013 and 2017, the EIA data shows that the U.S. refining industry increased its atmospheric crude oil throughput capacity from about 19 million barrels per stream-day to 19.8 million bbl/stream-day, an increase of more than 4%.<sup>199</sup> A portion of this change in crude oil distillation capacity was for condensate

<sup>197</sup> Bell, Deborah: Hess Port Reading Refinery to Permanently Close Next Month. Woodbridge Patch, January 28, 2013. Available Online: <https://patch.com/new-jersey/woodbridge/hess-port-reading-refinery-to-permanently-close-next-month>.

<sup>198</sup> EPA conducted an analysis looking farther back in time in the draft regulatory impact analysis supporting the proposed Tier 3 emission standards, EPA-420-D-13-002, March 2013. Refineries closed at a far greater rate in years past. For comparison 102 refineries closed over the decade from 1982-1992, 46 from 1992-2002, and 2 from 2002 to 2012.

<sup>199</sup> Table 6 Operable Production Capacity of Petroleum Refineries, January 1, 1988 to January 1, 2017 <https://www.eia.gov/petroleum/refinerycapacity/table6.pdf>

Table III.G-2  
Refinery Expansions, Closures, and Derating (2013-2017)  
Million Barrels per Stream-Day

Refinery Name	Expansions	Closures/Derating	Net Expansion
ALON USA ENERGY INC	4,000	0	4,000
AMERICAN REFINING GROUP INC	1,300	0	1,300
BIG WEST OIL CO	3,000	0	3,000
BP	4,000	0	4,000
CALCASIEU REFINING CO	25,000	0	25,000
CALUMET	36,000	0	36,000
Chalmette Refining LLC	2,000	0	2,000
CHEVRON	17,000	0	17,000
CHS MCPHERSON REFINERY INC	9,500	0	9,500
CITGO REFINING	0	1,500	-1,500
COUNTRYMARK COOPERATIVE INC	2,600	0	2,600
DELEK REFINING LTD	10,000	0	10,000
ERGON	3,300	0	3,300
EXXONMOBIL	31,000	0	31,000
Flint Hills Resources LP	30,000	0	30,000
HERMES CONSOLIDATED LLC	4,000	0	4,000
HOLLYFRONTIER	27,020	0	27,020
HOUSTON REFINING	0	6,000	-6,000
LIMA REFINING COMPANY	15,000	0	15,000
MARATHON	120,500	0	120,500
MONROE ENERGY LLC	18,000	0	18,000
Motiva	20,000	0	20,000
PASADENA REFINING SYSTEMS INC	9,200	0	9,200
PDV Midwest Refining LLC	5,200	0	5,200
PHILADELPHIA ENERGY SOLUTIONS	0	5,000	-5,000
PHILLIPS 66	31,156	0	31,156
PLACID REFINING CO	23,500	0	23,500
PREMCO REFINING GROUP INC	5,000	0	5,000
SHELL CHEMICAL LP	10,500	0	10,500
Silver Eagle Refining	100	0	100
SINCLAIR WYOMING REFINING CO	5,000	0	5,000
ST PAUL PARK REFINING CO LLC	19,200	0	19,200
SUNCOR ENERGY (USA) INC	500	0	500
TESORO	27,600	0	27,600
TOLEDO REFINING CO LLC	13,000	0	13,000
TORRANCE REFINING CO LLC	2,000	0	2,000
VALERO	276,500	18,000	258,500
VENTURA REFINING & TRANSMISSION	0	14,000	-14,000
WESTERN REFINING	5,000	0	5,000
WRB REFINING LP	3,000	0	3,000
TOTAL	819,676	44,500	775,176

The review of the individual refinery atmospheric crude capacity changes from 2013 to 2017 does not indicate hardship on the part of the US refining industry, and in fact, suggests that the market conditions in this time period promoted growth. Refiners are generally making investments in their refineries to expand their throughput capacity, suggesting that the US

reasoning, we noted once again that changing the point of obligation would likely result in a significant increase in the number of obligated parties under the program.

Several of the petitions received by the EPA cite text from the 2010 Final Rule acknowledging that one of the initial justifications given for placing the obligation on refiners and importers of gasoline and diesel, rather than on parties that are “downstream” of the refineries, was a desire to minimize the number of regulated parties in the RFS program.<sup>203</sup> As the EPA stated in the 2010 Final Rule and Summary and Analysis of Comments, as a matter of regulatory design and implementation, it is desirable both to limit the number of obligated parties, and to limit burdening small businesses.<sup>204</sup> These considerations favored placing the point of obligation on the limited number of refiners and importers, rather than the larger number of blenders.

Additionally, as the EPA projected in the proposed RFS2 rule, virtually all downstream blenders are currently subject to RFS registration, recordkeeping and reporting requirements associated with their role as RIN owners. The EPA asked in that proposal whether, in light of this fact, it would be difficult administratively to move the obligation to these parties. The petitioners generally argue that moving the point of obligation to downstream parties would not be difficult, since they are already regulated in some fashion. However, while it is likely the case that all, or nearly all downstream blenders are now regulated parties under the RFS program due to the increased blending of renewable fuels required by the RFS program, the majority of these downstream parties are not refiners or importers and therefore are currently not obligated parties under the RFS program. There is a significant distinction between being a “regulated party” and being an “obligated party” under the RFS program.<sup>205</sup>

A. The Number of Obligated Parties Would Increase if the Point of Obligation was shifted to “Position Holders” or “Blenders”

Petitioners generally propose to change the point of obligation to “positions holders” and argue that doing so would involve a similar number of obligated parties or could reduce the number of obligated parties as compared to the number of obligated party refiners and importers that exist today. Petitioners provided EPA with an analysis to support their argument. Petitioners also argue that this proposed change would be relatively easy to implement because the number of

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<sup>203</sup> 75 Fed. Reg. 14721 (March 26, 2010).

<sup>204</sup> Ibid.; Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, EPA-420-R-10-003 (February 2010), at 3-216.

<sup>205</sup> Downstream blenders who blend renewable fuel into transportation fuel and own RINs at blending must report the quantity of RINs purchased, separated from renewable fuel, and sold according to the reporting requirements under 40 CFR 80.1451(c). They must also register with the EPA under 80.1450 and keep records as required under 80.1454. Small blenders can also shift the compliance burdens if they qualify under 40 CFR 80.1440. Obligated parties must meet all of these requirements and also calculate an annual renewable volume obligation, acquire the appropriate number of RINs in the market, practicing due diligence to ensure their validity, file annual compliance reports demonstrating compliance, and maintain records to that effect.

During and after the comment period, the EPA engaged with the IRS to obtain more concrete information about the count of “position holders.” Since several of the petitioners and commenters suggested changing the point of obligation to the “position holders,” this information would allow EPA to determine the number of obligated parties that would result from changing the point of obligation to the “position holders.” IRS reviewed the data it maintains on “S” registrants, which is defined by the IRS to include, using their definitions, enterers, position holders, refiners, terminal operators, or throughputters of gasoline, diesel fuel (including a diesel-water fuel emulsion), or kerosene, or industrial users of gasoline.<sup>208</sup> The IRS noted that they cannot identify which type of actor an “S” registrant is (enterer, position holder, refiner, etc.). The EPA notes that, utilizing IRS definitions, refiners (those that break bulk at a refiner gate), position holders (those that break bulk at a terminal), and enterers (those that import fuel through means other than at a terminal such as truck) are the actors that would become obligated parties if the point of obligation shifted to “position holders” as proposed by petitioners and as the term is used in this document. Terminal operators and throughputters would not become obligated parties if the point of obligation shifted to “position holders” as proposed by petitioners, as these parties do not hold title to the gasoline or diesel fuel immediately prior to the sale of these fuels at the terminal.<sup>209</sup> If a terminal operator or throughputter “breaks bulk,” in a given quarter, they are categorized for that quarter as a position holder or refiner. “S” registrants file Form 720, the Quarterly Federal Excise Tax Return, to report the quantity of fuel they own. EPA requested the number of “S” registrants who paid taxes as owners of gasoline or diesel, to represent the potential number of obligated parties if the point of obligation shifted to “position holders” as proposed by petitioners because the RVO applies to volumes of gasoline and diesel (“S” registrants that do not own any gasoline or diesel in any given year would not pay taxes or have an RFS obligation for that year).

Information received from the IRS included the following:

- For fiscal year 2015, there were 1,571 “S” registrants, of which 715 filed Form 720 tax forms.<sup>210</sup>
- In calendar year 2016, 443 of the Form 720 tax filers paid taxes as owners of gasoline or diesel.<sup>211</sup>
- There is approximately a 30 percent turnover in number of parties that pay taxes as owners of gasoline or diesel from year to year.<sup>212</sup>

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<sup>208</sup> The IRS definition of “position holder” is different than how the term is used in this document, and how it is used by petitioners. The IRS definition applies only to parties who hold title to fuel above the terminal rack. Refiners who hold title to fuel above the refinery rack are a separate entity (“refiners”) under IRS definitions.

<sup>209</sup> Using IRS terminology, these parties do not “break bulk”

<sup>210</sup> Not all parties that filed a Form 720 tax form paid taxes as owners of gasoline or diesel

<sup>211</sup> Some of the 720 tax filers paid taxes on fuels other than gasoline or diesel, and therefore would not likely become obligated parties if EPA changed the point of obligation to the “position holder”

<sup>212</sup> This estimate of annual turnover was provided to EPA by IRS. It is not calculated using the information in the preceding bullets.



administrative burden. The EPA notes that its compliance monitoring and verification costs have little to do with the number of RIN transactions that occur. Rather, the EPA expends the majority of its oversight resources to monitor and provide compliance assistance for registration activities (including updates to registration after an ownership or personnel change), annual compliance report submissions, RIN retirements, and remedial actions for errors that have occurred. The oversight burden of these activities is directly related to the total number of obligated parties and not the total number of RIN transactions. Furthermore, the EPA notes that current obligated parties submit other compliance reports to EPA to meet other Part 80 requirements, and EPA uses these reports to help verify RFS volumes in the annual compliance reports. If the “obligated party” definition changes to “position holder,” EPA would no longer be able to utilize this data verification method and would need to develop other verification methods to ensure the integrity of the RFS program.

Another set of comments suggested that compliance costs would not increase with an increase in the number of obligated parties because the EPA could get the list of obligated parties along with their verified gasoline and diesel volumes directly from IRS.<sup>217</sup> In light of these comments, the EPA discussed at length with IRS whether a data sharing agreement could be developed to allow the EPA to obtain this type of detailed IRS data on “position holders.” The IRS stated that tax returns and tax return information are confidential and may be disclosed only as authorized under Internal Revenue Code section 6103(a). “Return information” is broadly defined to include any information gathered with regards to a taxpayer’s liability under the Code, including a taxpayer’s identity. As such, the IRS stated that even a mere list of “position holders” would constitute return information and could not be provided to the EPA without the consent of each “position holder.” Therefore, the EPA has concluded that the commenters’ argument is incorrect and that EPA would be unable to obtain the information it would need from the IRS to identify the “position holders” and determine their obligated volumes of gasoline and diesel and would instead need to develop its own systems to identify obligated parties and track their obligated fuel volumes.

Some commenters argued that “position holders” would have very little compliance burden as obligated parties because they would simply utilize the measurements, calculations, and records already in place to meet IRS requirements.<sup>218</sup> Likewise, they argued that EPA could simply change its RVOs requirements to equal the volumes reported on Form 720. However, based on a detailed comparison of IRS requirements to RFS requirements, the EPA has concluded that the volumes reported on Form 720 are different than the volumes used to calculate RVOs. Most notably, ethanol and biodiesel that is blended into gasoline and diesel fuel at the terminal upstream of the rack are included in the Form 720 gasoline and diesel volumes, while those biofuels must be excluded from gasoline and diesel volumes used to calculate RVOs. In addition, home heating oil volumes, kerosene, fuel used by ocean going vessels, volumes used in Alaska and the Territories, and volumes that cross a rack a second time are reported on Form 720, while

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<sup>217</sup> See, e.g., Comments from CVR Energy, EPA-HQ-OAR-2016-0544-0396; Comments from the Small Refiners Coalition, EPA-HQ-OAR-2016-0544-0406.

<sup>218</sup> Comments from Valero Energy Corporation, EPA-HQ-OAR-2016-0544-0274.

likely also increase the administrative burden on the EPA to help educate these entities to help them comply, and to ensure their compliance.

Further, in any rulemaking to modify the RFS point of obligation, the EPA would need to consider impacts to small entities, as it did in its prior rulemakings. Congress itself considered the relief appropriate for small refineries that are obligated parties, exempting them through 2010 and then allowing for an extension of their exemption if warranted by a DOE study or through the EPA's review of small refinery petitions alleging that their compliance would result in disproportionate economic hardship. The EPA used its discretion in the 2010 RFS2 rule to extend similar relief to the few additional small refiners that did not qualify as small refineries. The EPA convened a Panel under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) to consider whether additional relief to small refiners or refineries was warranted. Were we to propose changing the point of obligation, we would need to ensure that small businesses were aware of this proposed change and potential impact to their business by re-engaging in the SBREFA process. Since the statute contains no specific provisions providing relief for small entities that are "position holders" or blenders, the EPA's analysis in considering the need for, and fashioning appropriate relief would potentially be more complex. The SBREFA process includes a number of steps and would take some time to implement properly. For example, before beginning the formal SBREFA process, the EPA would need to engage in outreach with entities that would potentially be affected by the proposed change and provide the small businesses with an early opportunity to ask questions and discuss their concerns with the upcoming rulemaking. Furthermore, we reasonably expect that there would be strong interest from some stakeholders to exempt small businesses from RFS obligations. If exempted, these parties could have a (potentially significant) financial advantage over parties that do have RFS obligations and this dynamic could result in an increasing number of small businesses entering this market. Regardless of the outcome of the SBREFA process, it is clear that the RFS market would experience significant uncertainty in such a transition and that the uncertainty may last for some time.

We expect there would be more non-compliance if we changed the point of obligation because blenders and "position holders" are likely to have less experience and fewer resources to be able to comply with the registration, reporting and recordkeeping requirements under the RFS program. Further, we believe the number of obligated parties would significantly increase, which would place greater strain on limited resources to ensure compliance and conduct program oversight. In particular, the information received from the IRS after the proposed denial was issued has strengthened our rationale for why and how administrative costs and the potential for fraud and/or non-compliance would increase with a change in point of obligation to "position holder." Since there is an approximately 30 percent turnover from year to year in the 720 tax filers program, it would require significant resources to identify those new obligated parties and to verify that no other obligated parties are evading the requirements. It would also require an increase in resources to provide compliance assistance to those new obligated parties as they learn a new program for the first time, or become re-acquainted with it after a period of non-activity. Additionally, while current obligated parties typically have significant assets that could

accounted for over 95 percent of all volumes reported by all “position holders” paying excise taxes on gasoline and diesel in 2016. This suggests that the differences between the number of obligated parties under the current RFS regulations and “position holders” is not merely the result of company aggregation, as the proportion of total fuel represented by the 100 largest parties in each data set are similar.

The IRS data also showed that over 99.5% of all gasoline and diesel is sold by the 215 largest “position holders.” This means that the remaining 228 registrants<sup>222</sup> – a majority of “position holders” in fiscal year 2016 – together accounted for less than 0.5 percent of all volumes reported on the IRS Form 720. If EPA changed the point of obligation to the “position holders” of gasoline and diesel as requested by the petitioners, we would expect a large number of new obligated parties. For 2016 alone there would have been an additional 323 obligated parties.<sup>223</sup> However, since there is approximately 30 percent turnover from year to year in the identity of the “position holders” the total number of parties who would have the role of “obligated party” over the years could be significantly higher and the lack of stability in the pool of obligated parties would mean more difficulty in tracking and accounting for those parties. The EPA expects that a great many of the parties who would not consistently be obligated parties would be obligated for small volumes of gasoline and diesel, since the total volume of obligated fuel from the 228 “position holders” with the lowest volume of reported gasoline or diesel combined is projected to be less than 0.5% of the total obligated volume of gasoline and diesel sold in the United States. This data strongly supports EPA’s assessment that changing the point of obligation to the “position holders” would result in an obligation being placed on a large number of previously unobligated parties, and that many of these newly obligated parties are likely to be small businesses.<sup>224</sup>

### C. The EPA Would Need to Establish Transition Provisions

The current RFS regulations allow parties to satisfy up to 20% of any given RVO with RINs generated in the previous year, effectively allowing parties to “carry over” a limited number of RINs for use (by them or others to whom they may sell these RINs) in satisfying RFS compliance obligations the following year. Similarly, obligated parties that have an insufficient number of RINs to demonstrate compliance at the compliance deadline may carry forward the deficit into the following year without penalty, provided they satisfy both their deficit and full RVO the following year. Compliance data submitted to the EPA indicates that, in aggregate, parties carried over approximately 2.5 billion 2016 RINs into 2017. While smaller in magnitude,

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<sup>222</sup> This number is calculated by subtracting the 215 “position holders” responsible for 99.5% of all gasoline and diesel from the total number of 443 “position holders.”

<sup>223</sup> This number is calculated by subtracting the number of obligated parties under the current RFS regulations in 2016 (120) from the number of “position holders” that sold gasoline or diesel in 2016 (443)

<sup>224</sup> As discussed further in Section V.B., some parties who would become obligated under a change to the definition of “obligated party” may choose to adjust their business practices to avoid an obligation under the RFS program. If parties were to take this action, this could mitigate some of the concerns raised in this section, but would be unlikely to cause all parties to change their practices and would likely have other ramifications.

As discussed previously, shifting the point of obligation downstream could result in about 450 obligated parties in EMTS in any given year. This could result in an increase in EMTS transactions (transfers, separations and retirements) as a larger number of RIN batches (many of them likely of smaller volume) change hands between a greater number of obligated parties, without any increase to the total number of RINs in the system. The OTAQReg registration system would need to be modified to reflect the new definition of obligated party, and both existing non-obligated EMTS participants and new participants would need to register/re-register. Rights and access controls to EMTS would need to be revised to ensure proper reporting and oversight of RIN transactions.

In addition to changes to reflect the additional numbers and roles of registrants in EMTS, changing the point of obligation may require additional functionality for EMTS to take account of changes in business practices and additional potential for non-compliance, including avoiding compliance obligations, failure to identify as an obligated party, or not understanding RFS requirements. The EPA may find that the additional potential for non-compliance requires additional reporting of information not currently tracked in EMTS, such as accounting for movements of physical volumes of gasoline and diesel fuel between potential obligated parties, similar to a designate-and-track system, to ensure that RFS obligations are assigned to the proper parties. Such a system would include additional reporting by parties such as refiners, marketers, and blenders to ensure RFS goals are being met. Ancillary reports such as quarterly and annual compliance reports submitted to CDX and annual attest engagements would also increase in volume and complexity.

## V. Changing the Point of Obligation Could Cause Significant Market Disruption

In the petitions the EPA has received requesting a change to the point of obligation in the RFS program, the petitioners generally characterize their proposed changes to the point of obligation as minor or simple. The EPA disagrees with these characterizations and believes that changing the point of obligation would be a significant change for the RFS program, and would likely lead to significant changes in the fuels marketplace more generally.

### A. Market Participants Have Made Significant Decisions on the Basis of the Existing Regulations

When EPA first instituted the RFS program in 2007, and again when EPA significantly revised the RFS regulations in 2010 in response to the EISA amendments, the EPA requested and received many comments related to the point of obligation of the RFS program. These comments were carefully considered and the EPA specifically sought the input of the refining industry. The decision to place the point of obligation on refiners and importers in 2007, and to uphold that decision in 2010, was made with the support of much of the refining industry.

Since then all parties regulated in the RFS program have made significant investments and decisions about their participation in the program and their position in the market on the basis of the existing regulations, including the definition of obligated parties. Some parties sought to



In their letters to the EPA, these parties acknowledged that by moving below the rack they may give up a number of advantages that contribute to their profitability, such as the ability to purchase fuel in bulk at a slight discount, the ability to better control their fuel supply, and advantages related to the collection of taxes. Nevertheless, these parties stated that the expected costs associated with becoming obligated parties, primarily the costs associated with developing expertise necessary to manage their new RFS obligations and the documentation requirements, may very well outweigh any benefits currently experienced in their position as renewable fuel blenders and/or “position holders.” In their arguments these parties referenced their experience with California’s LCFS program, which allows compliance obligations to be passed on to the “position holders.” They stated that this has resulted in less competitive markets at the rack, increasing fuel prices for consumers, as many parties sought to purchase fuel below the rack, rather than above the rack, to avoid LCFS obligations. They claimed that this would be especially true for the many small entities currently engaged in the gasoline and diesel fuel spot markets. The EPA primarily spoke with and received written communication from larger businesses that are currently blenders of renewable fuels and/or “position holders,” however any overhead costs associated with being an obligated party would likely be proportionally more significant for small businesses.

If parties that would become obligated parties for the first time if the EPA were to change the point of obligation as requested by the petitioners react as they have claimed in discussions and written communication with the EPA, by adjusting their business practices to avoid becoming obligated parties under the new definition, this would significantly impact the expected results of such a change. Some of the concerns raised by the EPA, such as the large number of new parties that would become obligated parties under the new definition and the relatively small nature of these parties, would be mitigated, as these parties likely would adjust their businesses to avoid becoming obligated parties under the new definition. However, such market restructuring would likely have other market ramifications.

While it is uncertain which parties would ultimately have increased obligations if EPA were to change the point of obligation as requested by the petitioners and independent fuel marketers and retail station owners exit their current market positions as renewable fuel blenders and “position holders.” it is possible that the current obligated parties that do not sell gasoline and diesel at the rack, would take up these positions in an effort to find consumers for the fuel they produce and import. If this were to happen, the end result of this significant market restructuring would be that the RFS obligations would not substantially change from what they are under the current definition of obligated parties. Refiners and importers would likely take on terminal positions and the role of blending renewable fuels abandoned by the parties who currently satisfy these roles in the market. Ultimately, the RFS obligations may not be substantially different in this scenario than they are today, and if this were the case it is questionable if the benefits claimed by the petitioners would not be realized. During the time period when the EPA went through the rulemaking process to change the point of obligation, however, and as the fuels marketplace adjusted to the realities of the change in the point of obligation there would be significant market uncertainty and potential turmoil. To the degree that the EPA invests significant agency resources to enable the change in the point of obligation and fuels industry participants withhold significant investment decisions until the EPA’s final decision and the fallout from the decision

## VI. Other Comments

The EPA received comments contending that the RIN market is “illegal,” as the statute provides that transfer of credits must be “for the purpose of complying” with the RFS program, CAA section 211(o)(5)(B), and that unobligated blenders and RIN traders do not comply with the RFS program.<sup>230</sup> They also state that the “EPA allows entities to generate RINs from blending any volume of renewable fuel,”<sup>231</sup> and not just those quantities greater than the statutory volumes, as suggested by the statute.<sup>232</sup> In response, EPA notes that the RIN system was initially established through notice and comment rulemaking with considerable support from stakeholders in RFS1, and then reaffirmed with relatively minor adjustments in RFS2. Thus, the time to seek judicial review of the creation of the RIN compliance system is past. EPA did not reopen this matter in the context of its proposed denial of the petitions seeking a change in the point of obligation, so these comments are beyond the scope of this action. By means of explanation, and without intending by this response to open this resolved matter for further debate or consideration, we note that the RIN system serves two purposes: as a general compliance mechanism, and as a means of implementing the statutes’ credit provisions. These commenters ignore or minimize the compliance mechanism aspect of the RIN system, and EPA’s authority under CAA Sections 211(o)(2) and 301 to establish a compliance program which could include credit elements that extend beyond the specific elements required in CAA Section 211(o)(5).

Monroe Energy stated that the EPA had an obligation to conduct a jobs analysis under CAA section 321(a) before it denied the petitions for rulemaking, citing *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39 (N.D. W. Va. 2014). The company further stated that, had the EPA performed this jobs analysis, EPA would have recognized the threat of closures and job losses to merchant refineries. First, the EPA notes that on appeal of the district court decision cited by Monroe Energy, the Fourth Circuit Court of Appeals held that CAA section 321(a) does not impose a non-discretionary duty on the EPA. *Murray Energy Corp. v. EPA*, 861 F.3d 529 (4th Cir. 2017). Second, CAA section 321 does not, as this commenter suggests, specify that completion of a jobs analysis is a prerequisite to the Agency's authority to act on a petition for rulemaking or to take any other final agency action. Finally, the EPA has evaluated claims that the RFS program as currently structured harms merchant refiners, and disagrees with the commenter that this is the case. See Section II.C, *supra*.

The EPA received additional comments that are outside the scope of this determination. Some commenters suggested that conventional biofuels lack environmental and greenhouse gas benefits. Other commenters suggested that the RFS should incent co-processing of renewable feedstocks with petroleum at refineries.<sup>233</sup> The EPA also received comments suggesting a “diesel

<sup>230</sup> See, e.g., Comments from CVR Energy, EPA-HQ-OAR-2016-0544-0396; Comments from the Small Refiners Coalition, EPA-HQ-OAR-2016-0544-0406.

<sup>231</sup> Commenters’ suggestion that RINs may be generated from blending is inaccurate: RINs are generated at the point of renewable fuel production, and can be separated at the point of blending. See 40 CFR 80.1426-27.

<sup>232</sup> CAA section 211(o)(5)(A)(i)

<sup>233</sup> See Comments from UPS, EPA-HQ-OAR-2016-0544-0076.

obligated parties who must comply with nationally applicable percentage standards developed under the RFS program remains in place. In the alternative, even if this action were considered to be only locally or regionally applicable, the action is of nationwide scope and effect for the same reason, and because the action impacts entities that are broadly distributed nationwide who must comply with the nationally-applicable RFS percentage standards, as well as other entities who are broadly distributed nationwide that could potentially have been subject to such requirements if EPA had elected to grant the petitions seeking a change in the definition of obligated parties.