



August 15, 2014

The Honorable Gina McCarthy  
Administrator, Environmental Protection Agency  
Air and Radiation Docket and Information Center  
Mailcode: 2822T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Docket ID No. EPA-HQ- OAR-2014-0575**

Dear Administrator McCarthy,

The Biotechnology Industry Organization (BIO) is pleased to have the opportunity today to provide non-adverse comment on the U.S. Environmental Protection Agency's (EPA) proposed rule: Regulation of Fuels and Fuel Additives: Extension of Compliance and Attest Engagement Reporting Deadlines for 2013 Renewable Fuel Standards<sup>1</sup> (hereinafter "proposed rule").

BIO is the world's largest trade association representing biotechnology companies, academic institutions, state biotechnology centers and related organizations across the United States and in more than 30 other nations. BIO members are involved in the research and development of innovative healthcare, agricultural, industrial and environmental biotechnology products.

BIO represents nearly 90 companies leading the development of new technologies for producing conventional and advanced biofuels. Through the application of industrial biotechnology, BIO members are improving conventional biofuel processes, enabling advanced and cellulosic biofuel production technologies and speeding development of new purpose grown energy crops. Our membership includes companies that will produce commercial gallons of cellulosic biofuels in 2014.

EPA's proposed rule will have a significant economic impact on a substantial number of renewable fuel producers. The uncertainty caused by EPA's delay in finalizing the 2014 Renewable Fuel Standard (RFS) rules and the agency's extension of the 2013 compliance deadline chills investment in advanced biofuel infrastructure. EPA's delays in other rulemakings, such as pathway petition approvals, are creating additional uncertainty for biofuel producers, as well as obligated parties. Further, EPA's delay in finalizing the 2014 RFS in conjunction with its extension of the 2013 compliance deadline closes the market to renewable fuels of all types, since EPA cannot retroactively require obligated parties to use more renewable fuel in 2014 than they have already. The market for renewable fuels is thus left in the hands of obligated parties who have a direct interest in blocking their access.

Further, EPA's extension of the 2013 compliance deadline is harmful to biofuels companies with the extension of the validity of 2012 Renewable Identification Numbers (RINs). Surplus RINs suppress the value of investing in new production capacity and infrastructure for

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<sup>1</sup> 79 Fed. Reg. 115, 34242. Monday, June 16, 2014.

biofuels, and data indicate that continued trade in 2012 RINs has suppressed the value of 2013 and 2014 RINs.

**a. EPA's proposed rule overbalances the regulatory policy in favor of some obligated parties.**

EPA previously stated that it is extending the 2013 compliance and attest engagement deadlines in order to "be helpful to obligated parties."<sup>2</sup> But biofuel producers are also regulated parties under the RFS and are affected by this rulemaking, as EPA elsewhere noted. EPA should be aware that this proposed rule will have a significant economic impact – in terms of reduced investment – on advanced biofuel producers.

BIO submitted comments to the 2014 Standards for the Renewable Fuel Standard Program<sup>3</sup> (hereinafter "2014 proposed rule") emphasizing the need for EPA to promulgate the final 2014 RFS standards quickly.

The rapid rise and subsequent fall in RIN prices during 2013 can be attributed in part to uncertainty associated with the timing of the annual rulemakings. Prices began to climb in late February 2013 as the compliance deadline for 2012 RVOs approached and finalization of the 2013 Renewable Volume Obligation (RVO) proposal was delayed. RIN prices declined in August as the 2013 RVO was finalized. RIN prices also dropped in October 2013 as a draft of the 2014 RVO was leaked to the press.<sup>4</sup> EPA subsequently has delayed the 2013 compliance deadline until after the release of the 2014 RVO to prevent a recurrence of price spikes, but has failed to consider the impact of suppressed RIN values on other regulated parties.

The 2013 rise in RIN prices can also be attributed in part to the ineffective strategies for meeting the RFS requirements that some obligated parties adopted.<sup>5</sup> These obligated parties erroneously believed that purchasing RINs as a primary means of compliance would be less costly than investing in infrastructure for renewable fuels.<sup>6</sup> EPA's 2014 proposed rule would clearly and unfairly benefit the obligated parties who adopted this ineffective strategy.<sup>7</sup>

Further, the claims of at least one of these obligated parties that high RIN prices caused undue hardship and higher prices for fuel should be examined more closely. In its 2Q 2013 earnings statement, filed with the Securities and Exchange Commission (SEC), Delta Airlines reported a loss of \$51 million at its wholly-owned subsidiary Monroe Energy, which it attributed primarily to RIN costs of \$50 million.<sup>8</sup> Yet Delta at the same time reported an allocation of \$25 million of losses for the quarter from Monroe Energy to the airline segment,

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<sup>2</sup> 79 FR 34242 (June 16, 2014), p.34242.

<sup>3</sup> 78 Fed. Reg. 230, 71732. Friday, Nov. 29, 2013

<sup>4</sup> Cezary Podkul, "EPA proposes big reduction in 2014 ethanol blend volume: document," Reuters, Oct. 10, 2013. <http://www.reuters.com/article/2013/10/10/us-epa-ethanol-idUSBRE9990VU20131010>.

<sup>5</sup> Monroe v. EPA. USCA No. 13-1265, decided May 16, 2014.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/C9795F1A4BA44BBB85257CD00050B9C1/\\$file/13-1265-1491576.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/C9795F1A4BA44BBB85257CD00050B9C1/$file/13-1265-1491576.pdf)

<sup>6</sup> Cezary Podkul, "The tally is in: Ethanol 'blend wall' cost refiners at least \$1.35 billion," Reuters, Mar. 31, 2014. <http://www.reuters.com/article/2014/03/31/us-rins-spike-costs-analysis-idUSBREA2U0PT20140331?feedType=RSS&feedName=everything&virtualBrandChannel=11563>.

<sup>7</sup> Cezary Podkul and Jeff Mason, "How 'Big Corn' lost the ethanol battle to Philadelphia refiners," Reuters, May 12, 2014. <http://www.reuters.com/article/2014/05/12/oil-ethanol-lobby-idUSL2N0NG2D220140512?feedType=RSS&feedName=everything&virtualBrandChannel=11563>.

<sup>8</sup> Delta Air Lines, Inc., Quarterly Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the quarterly period ended June 13, 2013. Commission File Number 001-5424, p.19.

reducing the reported losses for the refinery.<sup>9</sup> Without that reallocation, Monroe Energy's reported loss would have totaled \$76 million. Again, in its 3Q 2013 earnings statement, Delta reported a \$3 million profit for Monroe Energy and \$16 million in RIN costs, asserting, "The refinery's profit was reduced by the cost of RINs that far exceeded their historical averages."<sup>10</sup> Yet elsewhere in the earnings statement, Delta reported an allocation of \$36 million of gains from the refinery to the airline segment.<sup>11</sup> Without that reallocation, Monroe Energy's reported profit would have been \$39 million. Delta Airlines appears to have adjusted Monroe Energy's reported losses and profits to bolster its arguments about the undue impact of RIN costs.

Ongoing delays in enforcing compliance deadlines rewards obligated parties for the failure to prepare for compliance and eviscerates the RFS program's ability to drive adoption of the next generation of biofuels.

Consistently enforced policy and timely rulemakings would encourage obligated parties – who have control of fuel distribution – to invest in the infrastructure to offer more options to consumers to use biofuels. EPA should seek to eliminate uncertainty from the system by following past practice in establishing the RVOs, adhering to previous interpretations of the waiver authorities, and completing timely rulemakings.

#### **b. Inconsistent regulatory policy undercuts investment and impedes progress in advanced biofuels.**

The 2014 proposed rule and the proposed rule to extend the 2013 compliance schedule signal to the developers of advanced and cellulosic biofuels that there is no reliable expectation of a market for these fuels and to their investors that there is little assurance of a return on investment.

Advanced biofuel companies are deeply concerned that the 2014 proposed rule is a fundamental change in direction and sets a troubling precedent for the RFS in 2014 and beyond. By arbitrarily reversing the agency's well-established methodology for setting RVOs, the 2014 proposed rule creates an inconsistent regulatory climate that chills investment and undermines the development of advanced and cellulosic biofuels just as they are set to produce millions of commercial gallons and launch a rapid scale up. Even more damaging, the new methodology signals to biofuel producers and their investors there will be little to no market for advanced and cellulosic biofuels poised to come onto the market in the near future.

Stakeholders are making decisions now – based on EPA administration of the RFS – that will impact the types of renewable fuels produced and sold in future years. While cellulosic producers have made significant investments to initiate commercial production of this fuel, the uncertainty and instability introduced by EPA's 2014 proposed rule has caused additional investment and interest to evaporate.<sup>12</sup> Jim Collins, a senior vice president of DuPont, in December 2013 testified to the Senate Committee on Environment and Public Works, "If the

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<sup>9</sup> Ibid. p.6

<sup>10</sup> Delta Air Lines, Inc., Quarterly Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for the quarterly period ended September 30, 2013. Commission File Number 001-5424, p.21.

<sup>11</sup> Ibid. p.6.

<sup>12</sup> Clifford Krauss, "Dual Turning Point for Biofuels," New York Times, April 14, 2014.

<http://www.nytimes.com/2014/04/15/business/energy-environment/dual-turning-point-for-biofuels.html? r=0>.

RFS is administered in a way that keeps RINs cheap, then there will not be an incentive to create an efficient route to market for renewable fuel.”<sup>13</sup>

Continued delay in issuing the 2014 final RVO and the proposed rule extending the 2013 compliance deadline extends the period of uncertainty for biofuel producers and will also cause shortfalls in biofuel production capacity. Further, it encourages obligated parties to use lower volumes of renewable fuels during 2014 in order to force EPA to issue lowered RVOs for the year; EPA cannot retroactively order obligated parties to market and use more biofuel than they have already done, with the compliance year nearly at an end. EPA’s proposal to reduce RVOs in 2014 – compared to proven renewable fuel use in 2013 – could cause shortfalls in biofuel production capacity in future years.

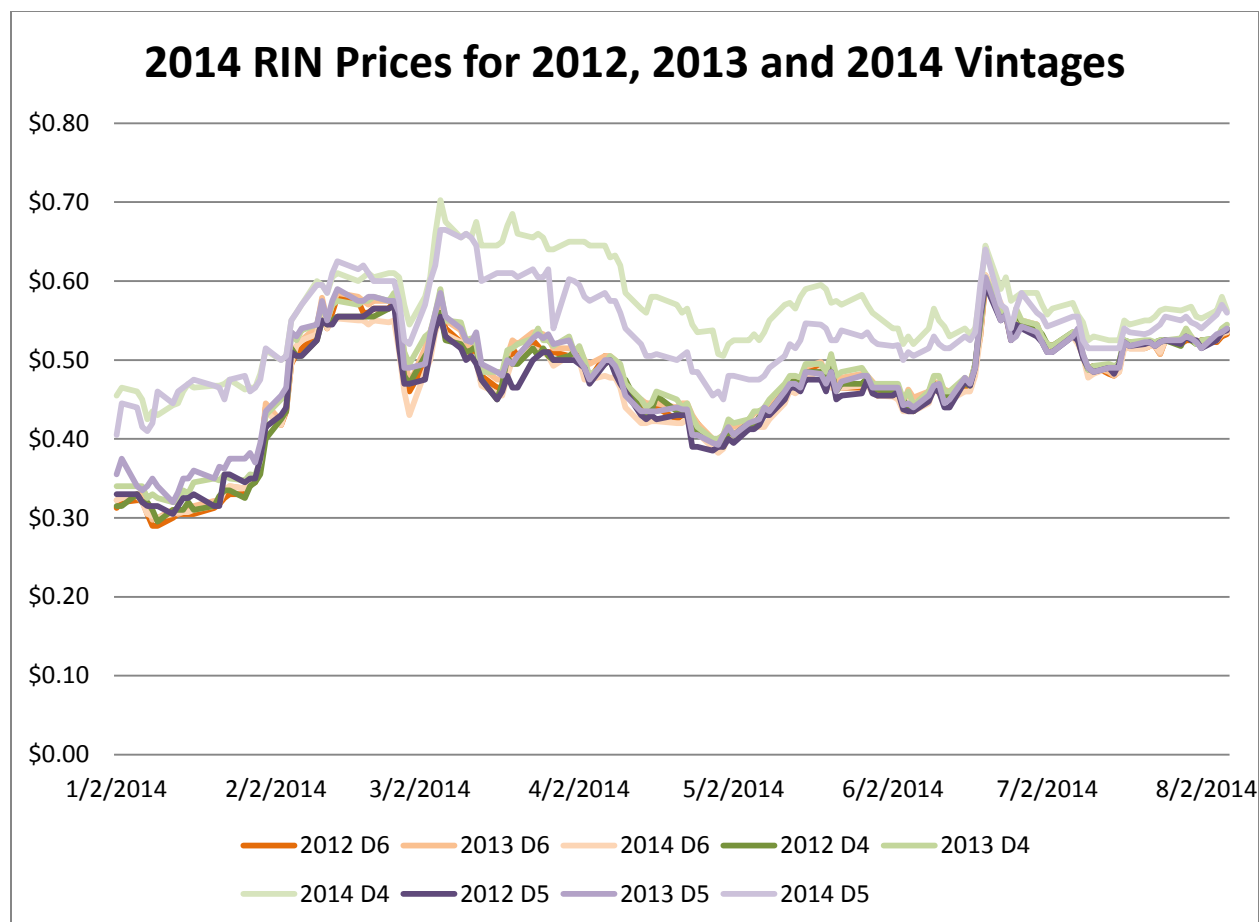
Further, because 2012 vintage RINs remain valid for meeting the 2013 RVO, they can and are still being traded for monetary value. This suppresses the value of 2013 vintage RINs, even though they will remain valid for meeting a portion of the 2014 RVO. Additionally, continued unfettered trading in 2012 vintage RINs is beginning to suppress the value of 2014 vintage RINs. In short, the oversupply of RINs that is a direct result of EPA’s delay of the 2014 RVO and its proposed rule extending the 2013 compliance deadlines is suppressing the value of investing in new production capacity and distribution infrastructure by artificially reducing the value of 2014 RINs.

The graph below, using data from the Oil Price Information Service End of Day Ethanol Assessment Reports, demonstrates that 2013 vintage RIN prices have been very tightly tied to 2012 vintage RIN prices throughout this year. Up until June 2014, the prices of 2014 vintage RINs in the D4 and D5 categories remained significantly above the prices of 2013 and 2012 vintage RINs. This higher price reflected the possibility that EPA would raise the 2014 RVOs to more closely match the proven production and domestic supply of these advanced biofuels. If EPA had enforced the 2013 compliance deadline on June 30, 2014, per the final 2013 Rule, it is likely that 2013 vintage RIN prices would have more closely matched the 2014 vintage RIN prices.

Since the start of the second half of 2014, the prices of 2014 vintage RINs have more closely matched the prices of 2012 and 2013 vintage RINs across all categories. This change reflects increasing certainty among obligated parties that EPA cannot at such a late date increase their obligation to use renewable fuels in 2014 from those contained in the proposed rule last November when much of the compliance year has already passed.

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<sup>13</sup> Statement of James C. Collins, Jr., Senior Vice President, Industrial Biosciences, Performance Polymers and Packaging & Industrial Polymers, DuPont. Oversight Hearing on Domestic Renewable Fuels, Committee on Environment and Public Works, Dec. 11, 2013. [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=659cadf2-0420-4480-b9d8-d32c7735128a](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=659cadf2-0420-4480-b9d8-d32c7735128a).



Consistent implementation of the RFS using the methodology established in prior rulemaking can readily grow the supply of biofuels in the market and overcome the blend wall by allowing RINs to reflect their market value. RIN values also help drive the market and encourage retailers to adopt new infrastructure. EPA’s delay and its proposed rule to extend the 2013 compliance deadline – which allows continued trading in 2012 vintage RINs that would have otherwise expired more than five months previously – has demonstrably and artificially lowered RIN values and discouraged such necessary investments. EPA’s proposed rule does have and has already had a significant negative economic impact on renewable fuel producers who are subject to these regulations.

**c. Ongoing pathway approval delays chill investment in advanced biofuel production.**

EPA has received 62 petitions for new pathway approvals since April 2010. To date, EPA has addressed 27 of the petitions, denying only two of them. Fifteen petitions received approval during 2013, but only three have received a determination so far in 2014. Thirty-five petitions are still awaiting completion – either approval or denial – and the average time that those companies have waited now exceeds 19 months.

Companies filing cellulosic biofuel pathway petitions have faced the longest wait times for resolution. Among the six that have been approved, the average wait time was 760 days (more than two years). At least two companies (BP Biofuels and Terrabon, Inc.)

discontinued plans for commercial cellulosic projects while awaiting approval. The cellulosic petitions still awaiting a decision have been waiting an average of 883 days.

EPA is also delaying approval of new feedstocks. Feedstocks such as corn, soy, and energy cane have received approval for all pathways. Yet, other feedstocks such as sweet sorghum have only been approved as part of specific production pathways. The favored position of approved feedstocks translates to a market preference for using those feedstocks, thereby discouraging adoption of new advanced dedicated energy crops.

Such lengthy wait times for approval of new pathways discourage investment in commercial development of advanced and cellulosic biofuels. Without a pathway to the fuel market, companies find it difficult to attract investment necessary to complete the construction and startup of new facilities.

Further, EPA's delay in approving pathways prevents the industry from generating RINs to meet the RVOs. EPA should expedite the pathway approval process in order to increase the available supply of fuels to meet the RVOs. In much the same way, EPA's delays in setting the annual RVOs discourage investment in production capacity to generate new RINs.

#### **d. Conclusion**

In oral arguments of the *Monroe v EPA* case earlier this year, the U.S. Court of Appeals for the District of Columbia Circuit questioned EPA's timeliness in setting the rules. Judge Cornelia Pillard asked Department of Justice (DOJ) lawyer Brian H. Lynk, "At some point, don't these deadlines mean something? Can't regulated entities rely on them?"

The plain fact is that advanced biofuel producers must rely on these rules to continue to open the U.S. fuel market to their products. EPA's delays – by causing and prolonging uncertainty in the market – undermine their ability to plan, attract investment, and deploy new production capacity. Worse, the delays undermine advanced and cellulosic biofuel developers' ability to generate RINs, turning low production projections into self-fulfilling prophecies.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent Erickson". The signature is fluid and cursive, with a prominent initial "B" and a long, sweeping underline.

Brent Erickson, Executive Vice President  
Biotechnology Industry Organization