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Part II

## Environmental Protection Agency

40 CFR Part 80
RFS Renewable Identification Number (RIN) Quality Assurance Program; Proposed Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

**[EPA–HQ–OAR–2012–0621; FRL–9758–7]**

**RIN 2060–AR72**

## RFS Renewable Identification Number (RIN) Quality Assurance Program

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

**ACTION:** Proposed rule.

**SUMMARY:** Under the Renewable Fuel Standard (RFS) program, producers and importers of renewable fuel generate Renewable Identification Numbers (RINs) that are used by petroleum refiners and importers to demonstrate compliance with their renewable fuel volume obligations. Several cases of fraudulently generated RINs, however, have led to inefficiencies and a significant reduction in the overall liquidity in the RIN market. The result has been greater difficulty for smaller renewable fuel producers to sell their RINs. Today's action proposes additional regulatory provisions that would promote greater liquidity in the RIN market in a way that assures reasonable oversight of RIN generation and assures use of the required renewable fuel volumes. The proposal includes a voluntary quality assurance program and related provisions intended to meet these goals. The proposed program also includes elements designed to make it possible to verify the validity of RINs for all of 2013. Additionally, we are proposing a number of new regulatory provisions to ensure that RINs are retired for all renewable fuel that is exported and to address RINs that become invalid downstream of a renewable fuel producer.

**DATES:** Comments must be received on or before April 18, 2013.

*Hearing:* We will hold a hearing on March 19, 2013, Room 1153 EPA East, Washington, DC 20004, beginning at 10:00 a.m. local time.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0621, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2012–0621. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. 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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mary Manners, Office of Transportation and Air Quality, Compliance Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; Telephone number: 734–214–4873; Fax number: 734–214–4051; Email address: *manners.mary@epa.gov*, or the information line for the Office of Transportation and Air Quality Compliance Division; telephone number (734) 214–4343; Email address *complianceinfo@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

Entities potentially affected by this proposed rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol and biodiesel. Potentially regulated categories include:

| Category | NAICS [1] codes | SIC [2] codes | Examples of potentially regulated entities |
|---|---|---|---|
| Industry | 324110 | 2911 | Petroleum Refineries. |
| Industry | 325193 | 2869 | Ethyl alcohol manufacturing. |
| Industry | 325199 | 2869 | Other basic organic chemical manufacturing. |
| Industry | 424690 | 5169 | Chemical and allied products merchant wholesalers. |
| Industry | 424710 | 5171 | Petroleum bulk stations and terminals. |

| Category | NAICS [1] codes | SIC [2] codes | Examples of potentially regulated entities |
|---|---|---|---|
| Industry | 424720 | 5172 | Petroleum and petroleum products merchant wholesalers. |
| Industry | 454319 | 5989 | Other fuel dealers. |

[1] North American Industry Classification System (NAICS)
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is now aware could potentially be regulated by this proposed action. Other types of entities not listed in the table could also be regulated. To determine whether your activities would be regulated by this proposed action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the preceding section.

*B. What should I consider as I prepare my comments for EPA?*

1. Submitting CBI

Do not submit confidential business information (CBI) to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

**Outline of This Preamble**

## I. Executive Summary

The Renewable Fuel Standard (RFS) program began in 2006 pursuant to the requirements in Clean Air Act (CAA) section 211(o) which were added through the Energy Policy Act of 2005 (EPAct). The statutory requirements for the RFS program were subsequently modified through the Energy Independence and Security Act of 2007 (EISA), resulting in the publication of major revisions to the regulatory requirements on March 26, 2010.[1]

The RFS program requires that specified volumes of renewable fuel be used as transportation fuel, home heating oil, and/or jet fuel each year. To accomplish this, EPA publishes applicable percentage standards annually that apply to the sum of all gasoline and diesel produced or imported. The percentage standards are set so that if every obligated party (refiners and importers of gasoline or diesel transportation fuel) meets the percentages, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel, and advanced biofuel used are projected to meet the volumes required on a nationwide basis.

Obligated parties demonstrate compliance with the renewable fuel volume standards in one of two ways. Obligated parties can demonstrate compliance either by acquiring the required volumes of renewable fuels together with the associated Renewable Identification Numbers (RINs), which are assigned by the renewable fuel producer or importer to every batch of renewable fuel produced or imported, or by acquiring just the RINs without the associated fuel. Validly generated RINs show that a certain volume of qualifying renewable fuel was produced or imported. The RFS program also includes provisions stipulating the conditions under which RINs are invalid, the liability carried by a party that transfers or uses an invalid RIN, and how invalid RINs must be treated. The fundamental basis of the Agency's treatment of invalid RINs is the concept of buyer beware, in which all regulated parties must take steps to verify that the RINs they acquire are valid, and all parties are liable for transferring or using invalid RINs.

### *A. Purpose of This Action*

Several cases of fraudulently generated RINs have led some obligated parties to limit their RIN-related business relationships to those parties that they are confident are generating valid RINs. In order to ensure that RINs are validly generated, individual obligated parties are now conducting their own audits of renewable fuel production facilities. Given the time and effort to conduct such activities, as well as the large overall number of renewable fuel producers and importers, the result has been greater difficulty for some of the smallest renewable fuel producers to sell their RINs. Recently, the overall liquidity of the RIN market has been significantly reduced. These circumstances have also created inefficiencies in the RIN market, as some RINs have been treated as having more value and less risk than others. The purpose of today's action is to address these issues by proposing changes to the regulations that would promote greater liquidity in the RIN market in a way that assures reasonable oversight of the validity of RIN generation and assures use of the required renewable fuel volumes.

In today's action we are proposing a voluntary quality assurance program intended to provide regulated parties a structured way to assure that RINs entering commerce are valid. The proposed program would also provide an affirmative defense against liability for civil violations under certain conditions for the transfer or use of invalidly generated RINs, and would specify both the conditions under which invalid RINs must be replaced with valid RINs, and by whom. The voluntary program would enable smaller renewable fuel producers to demonstrate that their RINs are valid, reducing the risk that obligated parties believe is associated with such RINs. The proposed program includes elements to allow verification of RINs to occur at the beginning of 2013.

In today's action we are also addressing export issues and circumstances in which RINs may become invalid subsequent to the renewable fuel producer's introduction of the RINs into commerce. For instance, exporters of renewable fuel may not be retiring an appropriate number and type of RINs as required under the current regulations. In some cases parties may have exported diesel fuel containing amounts of biodiesel below levels that are currently required to be reported in other contexts, and are merely labeled as diesel fuel. Such exports would not be reported as containing renewable fuel, and thus no RINs would be retired. In other cases, exporters may report that renewable fuel has been exported, but might sell any RINs received and then go out of business before RINs are retired. The result of these circumstances could be a disparity between the RINs generated and the renewable fuel volume consumed in the U.S. We are proposing modifications to the regulations pertaining to exporters of renewable fuel to address these issues. We are also proposing a number of other modifications intended to address cases in which parties transfer or use RINs

[1] 75 FR 14670.

that have become invalid after the producer has introduced them into commerce.

*B. Summary of Major Provisions*

Today's action proposes two voluntary third party quality assurance program options for RINs that regulated parties may exercise as an alternative to the ''buyer beware'' liability as prescribed under existing regulations. The proposed program would provide a means for assuring that RINs are properly generated through audits of renewable fuel production conducted by independent third parties using quality assurance plans (QAPs), would provide an affirmative defense for the transfer or use of invalid RINs that had been verified under an approved QAP, and would provide for the replacement of such RINs. To this end, we are proposing the following:

- Minimum requirements for QAPs, including such things as verification of type of feedstocks, verification that volumes produced are consistent with amount of feedstocks processed, and verification that RINs generated are appropriately categorized and match the volumes produced.
- Qualifications for independent third-party auditors.
- Replacement instruments or other mechanisms that would provide assurance that invalid RINs are replaced with valid RINs.
- Requirements for audits of renewable fuel production facilities, including minimum frequency, site visits, review of records, and reporting.
- Conditions under which a regulated party could assert an affirmative defense to civil liability for transferring or using an invalid RIN.
- Identification of the party or parties who are responsible for replacing invalid RINs with valid RINs and the timing of such replacement.
- Changes to the EPA-Moderated Transaction System (EMTS) that would accommodate the quality assurance program.

The two options we are proposing to verify RINs through a QAP would provide flexibility in how parties choose to manage the risk of transferring or using invalid RINs and costs. We are proposing that the quality assurance program would be applicable at the beginning of 2013.

We are also proposing modifications to the exporter provisions of the RFS program. These modifications would ensure that an appropriate number and type of RINs are retired whenever renewable fuel is exported. Finally, we are proposing a number of changes to other aspects of the RFS regulations governing the transfer and use of RINs that become invalid downstream of the producer. We are interested in comments on all aspects of today's proposal.

*C. Impacts*

The quality assurance program would help to reduce the number of invalidly generated RINs in distribution, and thus ensure that valid RINs are traded and used for compliance. As a result, it would help to ensure that the renewable fuel volumes mandated by Congress are actually used. In this respect, then, there would be no change to the expected impacts of the RFS program as projected in the RFS2 final rulemaking [2] in terms of volumes of renewable fuel consumed or the associated GHG or energy security benefits. The primary impacts of the quality assurance program would be improved liquidity and efficiency in today's RIN market and improved opportunities for smaller renewable fuel producers to sell their RINs.

Likewise, the proposed changes to the regulations governing export of renewable fuel would ensure that the appropriate number and type of RINs are retired for every gallon of renewable fuel exported, consistent with the intent of the program.

The quality assurance program that we are proposing in today's action would be voluntary. As a result, there would be no required costs. There would likely be costs associated with an individual party's participation in the quality assurance program, and in Section IX we have provided estimates of some elements of the costs of participation. We have also provided cost estimates as provided by several potential third-party auditors. However, the fact that the quality assurance program would be voluntary means that a decision to participate will be made independently by each regulated party, and thus we cannot accurately project the costs that might be incurred for the nation as a whole. Furthermore, any costs incurred would only be borne if the industry believed that those costs were less than current costs in the marketplace resulting from efforts to verify, acquire, and trade, and use RINs and the risks associated with such activities.

## II. Background and Purpose

The structure of the RFS program, and in particular the regulatory provisions governing the generation and use of RINs, originated during the development of the initial RFS program required by the Energy Policy Act of 2005. Under the statute, refiners, blenders, and importers of non-renewable fuels were responsible for ensuring that specified volumes of renewable fuel were used in the transportation sector. During the process of developing the regulatory program, stakeholders made it clear that requiring each separate obligated party to physically blend renewable fuels into its own gasoline and diesel fuel would require significant and costly changes to the distribution system, fuels markets, and the activities of all involved in the fuel supply chain. At the request of stakeholders, EPA developed the RIN system as an alternative to a direct blending requirement. Finalized on May 1, 2007, the RIN system provides obligated parties with flexibility in satisfying their responsibility to ensure that a specified volume of renewable fuels is used as transportation fuel in the U.S. each year. It also permits renewable fuel producers to sell their fuels in a manner that best meets market demands without forcing sales of volumes directly to obligated parties.

Under the RFS program, each RIN is generated by the producer or importer of renewable fuel, and represents a volume of renewable fuel measured in terms of ethanol-equivalent gallons. RINs are used by obligated parties to demonstrate compliance with their Renewable Volume Obligations (RVO). This reflects EPA's judgment that production and sale of renewable fuel generally leads to its consumption as transportation fuel.[3] When a specified number of RINs are acquired and retired by an obligated party, EPA is confident that a certain volume of renewable fuel has been produced and blended for use as transportation fuel. This RIN-based approach to the development and implementation of the RFS program was developed in cooperation with stakeholders in the fuel production and distribution industries as part of a notice-and-comment rulemaking process.

The intended result of the RIN system is that every RIN used for compliance by an obligated party represents physical renewable fuel that meets the regulatory criteria and which is used in the United States for transportation fuel, heating oil or jet fuel. To ensure that this result is achieved, EPA specified the conditions under which RINs are invalid, how invalid RINs must be treated, and which parties are liable for transferring or using invalid RINs. These provisions were included in the RFS1 program and were carried into the revised RFS

[2] 75 FR 14670, March 26, 2010.

[3] See 72 FR 23929.

program required by the Energy Independence and Security Act of 2007.

The provisions concerning invalid RINs and the associated liability have recently come under scrutiny due to several cases of fraudulently generated RINs. The RFS regulations prohibit any person from transferring invalid RINs or using invalid RINs to demonstrate compliance with his/her RVOs. Thus, parties holding invalid RINs are prohibited from transferring or using these RINs to demonstrate compliance with their RVOs. Moreover, all parties holding invalid RINs are required to retire them. These circumstances prompted the market response described above that has led to the current reductions in the liquidity of the market for RINs, and the increased difficulty of small producers of renewable fuel, particularly smaller producers, to sell the RINs they generate. Concerns regarding the impact of fraudulently generated RINs also prompted requests from a broad spectrum of stakeholders for an additional, alternative regulatory mechanism that could more efficiently verify the validity of RINs. Some obligated parties also requested that the EPA place the burden for replacing invalid RINs solely on the parties that generate invalid RINs, and allow RINs that have been evaluated by independent third parties to be used for compliance, even if they are invalid. We address these requests more fully in Section III.

*A. Treatment of Invalid RINs Under the Current Regulations*

The RFS regulations identify the conditions under which RINs are invalid at § 80.1431(a). These include:

- A duplicate of a valid RIN.
- A RIN that was based on incorrect volumes or volumes that have not been standardized to 60 °F.
- A RIN that has expired (has not been used for compliance in the year it was generated or the following year).
- A RIN that was based on an incorrect equivalence value.
- A RIN that is deemed invalid under the regulations applicable to foreign renewable fuel producers.
- A RIN that does not meet the definition of renewable fuel.
- A RIN that was assigned an incorrect ''D'' code value.
- A RIN that was improperly separated.
- A RIN that was otherwise improperly generated.

While the underlying actions that cause RINs to be invalid vary, in all cases of invalid RINs the outcome is the same: Invalid RINs cannot be transferred to any person, and cannot be used to achieve compliance with the RVO of an obligated party or exporter. These restrictions on invalid RINs apply regardless of the party's good faith belief that the RINs were valid at the time they were acquired, transferred, or used for compliance. Parties that take ownership of RINs are responsible for the validity of the RINs they transfer and use, and are expected to take whatever measures they deem appropriate to reduce the risk that they have acquired invalid RINs.

The statute requires that EPA promulgate regulations so that the national volume mandates required by the statute are met through consumption of renewable fuel as transportation fuel, heating oil, or jet fuel, and specifies several provisions aimed at achieving this result. Based on this, the current regulations prohibit invalid RINs from being used for compliance with the applicable standards. This prohibition forces obligated parties to replace invalid RINs that they had intended to use for compliance with valid RINs.

The ''buyer beware'' approach to RINs in the RFS program is consistent with the approach EPA has taken in all previous mobile source fuel programs. Indeed, the regulatory language used to implement the buyer beware approach in the RFS program is essentially identical to that used in these other programs:

- Benzene credits generated under the reformulated gasoline (RFG) program—§ 80.67(h)(3).
- Gasoline sulfur allotment trading program—§ 80.275(d)(5)(i).
- Gasoline sulfur credits—§ 80.315.
- Sulfur credits generated under the MVNRLM diesel fuel program—§ 80.531–§ 80.536.

In these other fuels programs, the buyer beware approach to credits has proven to be an effective mechanism for ensuring that program goals are met. It encourages the industry to self-police the validity of the credits they use for compliance and allows the credit market to properly allocate any risk associated with the generation and transfer of invalid credits. Most importantly, the buyer beware approach maintains the environmental benefits of a program if the party that generates the invalid credits is not financially viable and able to replace the invalid credits, since other regulated parties would then be responsible for replacing invalid credits. In the recent cases of fraudulently generated RINs, it was this very process that ensured that society was getting the benefits promised by the RFS program, albeit at a cost to the regulated parties.[4]

We continue to believe that the buyer beware approach gives industry the greatest flexibility in determining how best to manage credit trading practices while providing society the assurance that the benefits of a program will materialize. However, we also recognize that there are some aspects of the RFS program that make it more difficult to implement a buyer beware approach. For instance, once RINs are generated and leave the producer, they can be fungibly assigned to any volume of renewable fuel, making it difficult to know what volume the RIN was intended to represent. As a result, it can be difficult to verify that the RIN was validly generated once it has left the producer. The use of RINs in the RFS program is also unique in ways that may make the buyer beware approach more challenging for regulated parties to implement in an efficient manner, while retaining market liquidity. Unlike other credit programs, RINs are not generated by the same group of parties that use them for compliance purposes. Instead, renewable fuel producers generate the RINs, and obligated parties acquire them. These circumstances make it more difficult for obligated parties to monitor RIN generation. The RFS program also allows an unlimited number of parties to own and trade RINs, whereas in other programs credit ownership and trading is limited to the parties that must demonstrate compliance with applicable standards. In recent months, obligated parties have taken actions to avoid the purchase of invalid RINs, including limiting their business relationships to those parties that they are able to confidently and efficiently project are generating valid RINs. This behavior has resulted in certain, often smaller, producers being excluded from opportunities to transact with obligated parties, creating inefficiencies in the RIN market, in particular the inclination of obligated parties to treat some RINs as having higher value and lower risk than others.

Our proposal for an additional, alternative mechanism for ensuring that RINs are appropriately generated is an attempt to address the inefficiencies that have arisen in the RIN market. We continue to believe that the integrity of the program depends on the scrutiny applied to it by regulated parties. However, in the specific case of the RFS program we also believe that it would be appropriate to provide additional

[4] California takes a similar approach for addressing invalid carbon offset credits under the state's Global Warming Solutions Act.

options for organizing and managing the private oversight of RIN generation in addition to the buyer beware approach.

*B. Recent Issues Regarding Liability for Invalidly Generated RINs*

While the RFS regulations governing liability for the transfer or use of invalid RINs were put in place on May 1, 2007, they have come under new scrutiny in 2011 and 2012 as the result of several cases of fraudulently generated RINs. To date, the EPA has alleged that three biodiesel production companies (Clean Green, Absolute Fuels, and Green Diesel) have generated a total of over 140 million biomass-based diesel RINs that did not represent qualifying renewable fuel.

On November 7, 2011, the EPA issued Notices of Violations (NOVs) alleging that Clean Green Fuels, LLC (Clean Green) generated invalid biomass-based diesel RINs. Clean Green's owner was found guilty of wire fraud, money laundering, and violating the Clean Air Act on June 25, 2012 in the United States District Court for the District of Maryland. The jury found that he ran a scheme in which he and his company generated and sold over 32 million RINs, but neither produced nor imported any renewable fuel.

The EPA issued Absolute Fuels, LLC an NOV on February 2, 2012. The NOV alleges the company generated over 48 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel and transferred the majority of these invalid RINs to others. On December 14, 2012, the owner of Absolute Fuels, LLC, and other corporate entities associated with Absolute Fuels pleaded guilty to an Indictment charging the owner of wire fraud, money laundering, and Clean Air Act false statements. The indictment alleges that this individual and his companies were involved in defrauding non-renewable fuels companies, brokers, and the EPA by falsely representing to EPA, through the RFS program electronic data base, that he was producing biodiesel when in fact he was not producing any fuel.

The EPA issued *Green Diesel, LLC* an NOV on April 30, 2012. The NOV alleges the company generated more than 60 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel and transferred the majority of these invalid RINs to others.

The 140 million invalid RINs from these three companies represented about 13% of the nationwide biodiesel volume in 2010 and 4% in 2011.[5] The EPA's Criminal Investigation Division and Office of Civil Enforcement have additional ongoing investigations concerning the potential generation of fraudulently or invalidly generated RINs.

Under the buyer beware approach, all regulated parties are responsible for determining the validity of RINs before they transfer those RINs to another party or use them for compliance. With respect to the RINs generated by the three companies listed above, many parties did in fact transfer and/or use these RINs. In subsequent discussions with these parties, most of them indicated that notwithstanding the buyer beware aspect of the regulations, they took little or no action to evaluate the validity of these RINs before they purchased or used them for compliance. In light of the widespread failure of obligated parties to conduct adequate oversight, the EPA implemented a streamlined approach for parties who used invalid RINs to correct civil violations and resolve their liability for those civil violations. The Interim Enforcement Response Policy[6] (IERP) for 2010 and 2011 biomass-based diesel RINs provided obligated parties who unknowingly used invalid RINs with the opportunity to resolve their civil violations by replacing invalid RINs with valid RINs and paying modest civil penalties. Almost all obligated parties that used RINs generated by Clean Green and Absolute Fuels have entered into settlement agreements consistent with the IERP to resolve their civil violations.

Obligated parties are required to replace invalid RINs that were used for compliance with valid RINs to ensure that they have sufficient valid RINs to comply with their Renewable Volume Obligations (RVOs). Many obligated parties who used invalid RINs for compliance purposes purchased replacement RINs for a substantial additional cost. Under the current buyer beware approach, many obligated parties have included indemnification clauses in their contracts with RIN suppliers to address situations in which invalid RINs must be replaced.

In light of the recent experience with invalid RINs, obligated parties have been taking steps to minimize their exposure to risk. In general, they have been treating RINs generated by smaller biodiesel producers as higher risk, and have been opting instead to purchase RINs primarily from the largest biodiesel producers who are better known, have been under production for a longer period of time, and/or have the resources to replace invalid RINs should their RINs be determined to be invalid. While the concerns directed at any particular biodiesel producer may or may not be legitimate, the net result of these actions is a general reduction in the liquidity of the biodiesel RIN market. While some biodiesel producers have been able to establish business relationships with obligated parties, many smaller biodiesel producers have not. These smaller producers have been forced to offer their RINs at a significant discount relative to RINs from larger producers, assuming they can find obligated parties or distributors willing to purchase them at all.

The buyer beware approach has succeeded in compelling regulated parties to conduct some oversight of RIN generation to ensure that the RINs they transfer and/or use are valid. However, in reaction to the fraudulent RIN cases, many regulated parties have reported that obligated parties have shifted their purchasing away from smaller producers. We believe it is appropriate to consider new regulatory provisions that could provide additional confidence in the validity of RINs without restricting access to the market by small producers.

*C. Industry Systems That Conduct Oversight of RIN Generation*

1. Existing Systems

While regulated parties are individually making efforts to ensure that the RINs they transfer and/or use are valid, a number of parties have developed more comprehensive systems that are intended to more efficiently meet the need for such oversight. Any party can opt to use one of these systems for a fee charged by the provider of the service. To varying degrees, these systems offer examples of the types of activities that EPA has evaluated in developing the proposed provisions for a quality assurance program. The systems of which we are currently aware include the following:

- Ecoengineers.
- GoldRIN, LLC.
- RIN Integrity Network by Genscape.
- RINPlus by EM Biofuels, LLC.
- RIN-tegrity Survey by Weaver.
- RINTrust, LLC.

[5] The statutory volume requirements for biomass-based diesel were 650 mill gal in 2010 and 800 mill gal in 2011.

[6] The Environmental Protection Agency's Interim Enforcement Response Policy to Resolve Violations Arising from the Use of Invalid 2010 and 2011 Biomass-Based Diesel Renewable Identification Numbers, March 2012, *http://www.epa.gov/compliance/resources/policies/civil/erp/erp-invalidrins.pdf.*

This is not meant to be a complete list, as the market response is still developing, nor is it intended to be an EPA endorsement of any particular auditing system or tool.

The systems currently being offered vary in the means, frequency, and degree of oversight of renewable fuel production and RIN generation. Most conduct some form of on-site audit including a review of production inputs such as feedstocks and process energy, and outputs including byproducts and renewable fuel production volumes. Some also provide services such as regulatory guidance, assessment of product quality, monitoring of sales transactions, and RIN tracking. In addition to validation of production processes and RIN generation, some also offer financial backing to the producer in the event that RINs are subsequently discovered to be invalid.

2. Sufficiency of Existing Systems

While each of these systems has elements designed to help ensure RIN validity, we believe it is important that all systems used to verify RINs contain a certain minimum number of elements. For instance, ideally each system would include an array of components to verify feedstocks, production processes and volumes, qualifying uses of renewable fuel, and generation of the appropriate number and type of RINs. However, not all systems address all these aspects of production and RIN generation, or address them in the same way. Because these systems are generally designed to benefit only the obligated party that contracts with it, the existence of multiple industry-run verification systems has also resulted in duplicative efforts wherein multiple auditors visit the same production facility and take the same actions to verify the same volume. Finally, the existence of these private systems has not completely resolved the reduction in liquidity in the market for RINs since they provide no assurances of an affirmative defense against a civil violation. Thus there is still a significant reluctance to purchase RINs from some smaller producers.

While these verification systems constitute a reasonable and encouraging response to the need to have effective and efficient oversight of RIN generation, we recognize that these initiatives on their own have not cultivated a market that facilitates reasonable oversight of RIN generation, adequate assurance that invalid RINs will be replaced, and a market for RINs where the opportunity to produce and sell RINs is spread broadly across producers, including small producers. Therefore, in today's Notice of Proposed Rulemaking (NPRM) we are proposing a set of voluntary regulatory provisions that leverage these private market products to achieve these goals. The new provisions would provide regulatory options for establishing quality assurance programs, provide an affirmative defense against civil violations for transferring or using invalidly generated RINs for compliance where the RINs were verified under an approved QAP, and would specify the conditions under which specific parties would be required to replace invalidly generated RINs with valid RINs. Moreover, we are proposing several options that would be available to regulated parties that would provide a range of approaches to replacement of invalidly generated RINs, and allow the market to select the level of oversight to match the perceived risk. We believe that the efficiency and certainty created by these proposed regulatory options would complement the private verification systems already offered in a way that would facilitate the broadening of the market for producers and increasing market liquidity that EPA and stakeholders are seeking.

*D. EPA Goals in Proposing New Regulatory Provisions*

As stated in Section II.B above, we continue to believe that the buyer beware approach is both appropriate and effective in ensuring the validity of RINs and the use of valid RINs representing real renewable fuel to meet compliance obligations. We are not proposing to change the buyer beware approach under the existing regulations. Nevertheless, the issues we highlighted in the previous section have led us to believe that it would be helpful to create an additional, voluntary set of regulatory provisions that could provide reasonable oversight to verify the validity of RINs. These provisions are intended to reduce the incidence of invalidly generated RINs entering the market, provide reasonable assurance of replacement of invalidly generated RINs, and increase liquidity in the RIN market. The proposed QAP provisions would serve as the major component for an affirmative defense against liability in the event that a party transferred or used invalidly generated RINs. With greater confidence in both the validity of RINs and the protection against civil liability that an affirmative defense affords, there may be less of a disparity in value between RINs generated by large and small renewable fuel producers. As a result, there may be renewed market liquidity and certainty.

To accomplish this, we believe that the new regulatory provisions should establish the minimum requirements for Quality Assurance Plans (QAPs) that would address all elements of the production of renewable fuel and the generation of RINs. These QAPs would in turn form the basis for audits of renewable fuel production at particular facilities to verify that RINs were being validly generated. Our intent in establishing a voluntary QAP audit process would be twofold:

(1) Any party taking ownership of RINs that had been verified as validly generated by an EPA-registered auditor using an EPA-approved QAP would have an affirmative defense against liability for a civil violation arising from the transfer or use of an invalid RIN as long as certain other criteria are also met.

(2) The burden for the replacement of invalidly generated RINs that had been verified by a registered auditor using an EPA-approved QAP and which were not replaced by the original RIN generator could be replaced by the auditor or obligated party depending on the type of RIN verification system and associated RIN replacement mechanism.

In short, the voluntary QAP audit process would help to ensure that the volume consumption goals of the statute are met while addressing the unique features of the RFS program that have resulted in inefficiencies and poor liquidity in the current RIN market.

## III. Overview of the Proposed Program

EPA is proposing to add two compliance options to the RFS program to achieve the goals described above. Each option contains provisions for quality assurance plans (''QAP'') that would be created by independent third-parties and used to verify the validity of RIN generation; provisions for an affirmative defense to civil liability for transfer or use of a verified RIN that is invalidly generated; and provisions addressing replacement of verified RINs that were invalidly generated. One of these options would also ensure that RIN owners could avoid liability for a civil violation for transferring or using invalidly generated RINs. These new options would be in addition to the current regulatory provisions, and EPA is proposing to adopt both options and to allow regulated parties to choose either one of the new options or instead to use the buyer beware approach in the existing regulations. The combination of the two new options, the elements in each option, and the ability to choose between options, is intended to achieve the program goals described above.

The civil liability protections afforded by these provisions would only apply to RINs that are invalidly generated. RINs

that become invalid after generation, for example by use for a nonconforming purpose or improper separation, would not be covered by the affirmative defense mechanism we are proposing today. However, we realize that RINs that become invalid ''downstream'' of the RIN generator may be problematic for obligated parties and the RIN system as a whole. Therefore, we have proposed regulatory changes to account for the problem of RINs that become invalid after generation. These changes are discussed in Section VIII of this preamble.

This proposal sets minimum requirements for QAPs that could be used to verify the validity of RINs. Verification by an independent third-party auditor using an EPA-approved QAP would provide the basis for a RIN-holder's affirmative defense if those RINs were found to have been invalidly generated. The affirmative defense is a defense only to the civil liability for the prohibited acts of transferring or using an invalidly generated RIN for compliance purposes.

At the same time, the Agency is responsible for ensuring that the statutory annual minimum volume requirements are met, so invalid RINs that are retired to fulfill a RVO must be replaced by valid RINs in order to make the system whole, even when a party has an affirmative defense to liability for a prohibited act. With the exception of some limited provisions that would reduce RIN replacement responsibilities under certain circumstances, the proposed rules provide a mechanism for the replacement of invalidly generated RINs to help ensure that the annual RFS volume mandates are met. However, the party responsible for replacement of invalid RINs varies between the two new options (''Option A'' and ''Option B'') that market participants may choose for any given RIN transaction.

The primary difference between these two options is that under Option A, when verified RINs are found to be invalidly generated, the third-party auditor that verified the RINs would be responsible for retiring valid RINs to replace the invalid RINs if the RIN generator does not do so. Under Option B, an obligated party would remain liable for replacing any invalidly generated RINs that it owns if the RIN generator fails to do so, even if the obligated party successfully asserted an affirmative defense. The current system would also remain in place after the proposed quality assurance program goes into effect, providing a third option for RIN buyers to purchase unverified RINs. In other words, the proposed regulations do not require that RINs used for fulfillment of an RVO must be verified. In summary, we are proposing new regulatory provisions that would create a total of three types of RINs in the RFS program:

(1) RINs verified by a third-party auditor, who would be responsible for replacing the RINs in the event that they were invalidity generated (''Option A''),

(2) RINs verified by a third-party auditor, where the obligated party would remain liable for RIN replacement (''Option B''), and

(3) Unverified RINs, where the obligated party remains liable for replacement (i.e. the current regulatory approach).

For both of the two new options we are proposing today (Option A and Option B), there are three main regulatory elements:

(A) Minimum requirements for a QAP to evaluate renewable fuel production and verify RINs,

(B) The required elements for an affirmative defense, and

(C) Identification of the party responsible for replacing invalid RINs and limitations on RIN replacement.

In this section we also discuss how and why the program amendments are proposed as voluntary, how the provisions would apply to any RINs transferred and sold prior to the effective date of the final rule, and an alternative structure for protecting against invalidity by prohibiting RIN generators from separating RINs from renewable fuel that they produce.

*A. Requirements for a Quality Assurance Plan and QAP Audits*

The regulations would set minimum requirements for the audit process used to validate the production of renewable fuel and verify the RINs generated at the production facility, even, for imported fuel, if the production facility is not in the United States. The proposed requirements would potentially apply to producers of renewable fuel and parties downstream of the producer that handle renewable fuel or RINs. Other parties that work with and support renewable fuel producers, such as feedstock suppliers, would not be subject to new requirements through the proposed quality assurance program. The proposed requirements for Option A and Option B QAPs are fully discussed in Sections IV.A and V.A, respectively. The proposed requirements for QAP auditors and audit procedures are fully discussed in Sections VI and VII of this preamble.

We would expect that different third-party auditors would develop different audit procedures and business models based on market demand, the type of fuel being audited, and many other factors. Therefore, the new provisions would require the third-party auditor to submit its QAP to the Agency for review and approval before using that QAP to audit renewable fuel production facilities. The regulations would also set both minimum requirements for third-party auditors at the time of registration and ongoing requirements that must be met as the third-party auditor continues to operate.

The requirements for Option A QAPs would be more detailed and involved than those required for Option B QAPs. The differing sets of requirements would correspond with the differing RIN replacement responsibility under the two QAPs.

The quality assurance program that we are proposing would also apply to RINs generated for foreign-produced renewable fuel. Foreign producers of renewable fuel must be approved by EPA and must meet all requirements applicable to non-foreign producers, i.e., the provisions of Subpart M. Such producers could engage a registered third-party auditor to audit their facility in accordance with the proposed quality assurance program. However, RINs generated from imported fuel would only be considered verified under the proposed quality assurance program if the associated foreign renewable fuel production facility is audited under an EPA-approved QAP. We request comment on the likelihood of such producers participating in the quality assurance program, any difficulties to participating they might encounter, and any issues that could affect the integrity of the proposed program.

*B. Requirements for an Affirmative Defense*

The affirmative defense mechanism would allow any party, other than the generator of an invalid RIN, who holds invalidly generated RINs verified through a QAP to avoid civil liability for a prohibited act involving the transfer or use of invalid RINs for purposes of fulfilling an RVO. This mechanism applies only to civil liability, and has no effect on any party's potential criminal liability. It is similar but not identical to the defense mechanisms used in other fuels regulation programs, such as the Diesel Fuel Sulfur Control regulations, 40 CFR 80.613(a) and the Reformulated Gasoline regulations, 40 CFR 80.79(b)(1). It is fully discussed in Sections IV.C and V.C for Options A and B, respectively. Under Option A, in order to establish this affirmative defense, a party would be required to prove five elements by a preponderance of evidence. Under Option B, in order

to establish an affirmative defense, a party would be required to prove one additional element.

First, a party would be required to show that the invalidly generated RINs in question were verified by an independent third-party auditor with an EPA-approved QAP that meets the applicable regulatory requirements.

Second, a party taking ownership of an invalidly generated RIN would be required to demonstrate it did not know or have reason to know of the invalidity. For Option A RINs, the RIN owner must not have had knowledge of the invalidity prior to the RIN being verified. For Option B RINs, the RIN owner must not have had knowledge of the invalidity at any time up to and including the time the RIN was transferred or used for compliance with its RVO, unless the RIN generator had implemented a remedial action per the regulations. See 40 CFR 80.1474. The difference between the two options reflects the difference in the party responsible for replacing invalidly generated RINs in the two new options. When the obligated party has the replacement obligation under Option B, it would not be appropriate for it to knowingly commit a prohibited act and be required to replace the invalid RINs, but still have an affirmative defense to civil liability. On the other hand, when the auditor has the RIN replacement responsibility under Option A, the obligated party's RVO would be backstopped by the auditor's replacement of the invalid RINs and therefore the obligated party should be able to submit the invalid verified RINs with the understanding that the RINs will be replaced and the RVO made whole by the auditor. Providing an affirmative defense to obligated parties under Option A even if the obligated party in question knows of the invalidity could help to address some of the market liquidity concerns described above, by limiting the risk to refiners who purchase these RINs. At the same time, if the obligated party knew of the invalidity prior to the RINs in question being audited and verified, it would have no defense to civil liability because it would have knowingly allowed invalid RINs to enter the marketplace, potentially placing other obligated parties at risk and diminishing the value of other RIN generators' valid RINs.

Third, we are proposing that any party attempting to establish an affirmative defense would be required to inform the Agency within the next business day of identifying RINs that were invalidly generated. This requirement would assure that invalidity is promptly reported when discovered and would eliminate any incentives or financial advantages that might be gained from intentionally hiding invalidity or waiting to report. The Agency's primary goal to maintain and meet the annual RFS volume mandates would be frustrated by delayed reporting of invalidly generated RINs. The reporting requirement would therefore be both an element of good faith and a practical safeguard to meet the annual RFS volume mandates. We seek comment on whether this time frame for informing the Agency is appropriate.

Fourth, a party attempting to establish an affirmative defense would be required to demonstrate that it did not cause the invalidity of the RIN in question.

Fifth, a party attempting to establish an affirmative defense would be required to demonstrate that it did not have any financial interest in the company that generated the invalid RIN. Requiring that the RIN owner did not have any financial interest in the RIN generator's company ensures that the RIN owner did not receive and had no intention of receiving a financial benefit from the generation of invalid RINs.

For Option B, a sixth element for establishing an affirmative defense would be to demonstrate that if the invalid B–RIN was used for compliance purposes, the party adjusted its records, reports, and compliance calculations as required per the regulations, unless a remedial action by the RIN generator was implemented.

*C. Replacement of Invalid RINs*

In order to ensure that the annual national RFS volume mandates are met, the current RFS program requires that only valid RINs may be used by obligated parties to demonstrate fulfillment of their RVO. To use an invalid RIN toward fulfilling the RVO is a prohibited act. An obligated party that knowingly or unknowingly uses an invalid RIN to comply with its RVO is required to revise its compliance report to subtract out the invalid RINs and instead use only valid RINs. The obligated party must then either carry forward a deficit or replace the invalid RIN with valid RINs to meet its RVO.

Under the two new proposed options, the party responsible for replacing the invalid RIN would depend on the type of QAP that verified the RIN, Option A or Option B. As noted above, both Option A and Option B would be available for market participants under the proposed rule. RIN replacement is fully discussed in Sections IV.D and V.D of this preamble for Options A and B, respectively.

We propose in this rule to create a self-implementing administrative mechanism to replace invalid RINs. In all cases, and regardless of whether the RINs in question are unverified or verified through Option A or Option B, the proposed administrative process for replacement of invalid RINs places initial responsibility to replace invalidly generated RINs on the RIN generator responsible for causing the invalidity. See § 80.1474 of the proposed regulations for details of the administrative process for replacement of invalid RINs. In the event the generator of the invalid RINs does not replace the invalidly generated RINs within the time frame set forth in the administrative process, either the third-party auditor or the obligated party that owns the invalid RINs would also be required to replace the invalid RINs, depending on whether the RINs were verified through an Option A or Option B audit, or whether the RINs were unverified. The RIN generator would always remain liable for replacing all invalid RINs that they generated. The third-party auditor or the obligated party would be required to replace the RINs in a specified time period after notification from EPA that the RIN generator failed to replace the invalid RINs. For invalidly generated RINs verified by an Option A QAP, the auditor would have the responsibility to replace the RINs, and the obligated party would have no responsibility for RIN replacement if it successfully established an affirmative defense. For invalidly generated RINs verified by an Option B QAP and for unverified RINs, the obligated party who owns the RINs would bear the replacement responsibility. In the event that regulated parties fail to implement the administrative process for replacement of any RINs, the EPA could bring an enforcement action against any or all of the parties that were required to replace the invalid RINs.

Additionally, the auditor's RIN replacement responsibility under Option A would be capped at a level equal to 2% of up to the last five years' of A–RINs verified by the auditor. This cap on RIN replacement is proposed for RINs generated in 2013–2015, and the cap may change from 2016 onward. Under Option B we are proposing that the obligated party would be given a temporary limited exemption for their replacement obligation, under which they would not be required to replace up to 2% of their RVOs for 2013 and 2014. These measures are intended to limit the auditors' and obligated parties' financial exposure, as further discussed

in Section IV of this preamble. We request comment on both the RIN replacement cap of 2% and the limited exemption of 2%. The generators of invalid RINs, on the other hand, would have neither a cap nor a limited exemption for their RIN replacement responsibility under the proposed program.

Furthermore, because third-party auditors are unlikely to have the same resources as renewable fuel producers, importers, or obligated parties to enable them to replace invalid RINs, we are proposing a requirement that auditors using Option A to verify RINs must maintain a RIN replacement mechanism capable of replacing a minimum percentage of the A–RINs they verify. There are a variety of replacement mechanisms possible as discussed in more detail in Section IV.B.

*D. Voluntary Participation*

We are proposing that the two new compliance options under the proposed quality assurance program would be voluntary. If an auditor chooses to participate in the proposed program, it would be required to register with EPA and apply to EPA for approval of its QAP, which would provide the framework for the auditor's verification process. Since the auditor would be responsible to implement the QAP as approved, verifying RINs without meeting the requirements of the EPA-approved QAP would be a prohibited act. At the same time, an auditor's failure to properly implement the QAP would not, by itself, render the RINs invalid or constitute a civil violation by the owner of the RIN. While auditors could voluntarily decide to obtain EPA approval to verify RINs, once they do so they would be responsible to implement the plan as approved, and under Option A to replace RINs as required.

Likewise, RIN generators would be under no obligation to have their RINs verified under an EPA approved QAP. RIN generators that do choose to have their RINs verified through the proposed quality assurance program would need to ensure that other parties with which they work closely, such as feedstock suppliers and fuel distributors, are providing the information needed by the auditor. Likewise, obligated parties would be under no obligation to purchase verified RINs. However, if verified RINs are purchased, the regulations would provide what requirements must be met to demonstrate an affirmative defense, and would specify who would be responsible for replacement of invalid RINs.

It has been suggested that if these provisions were mandatory for all obligated parties and only verified RINs could be used for compliance purposes, the overall stability of the RIN market might be improved because all RINs available in the market would be pre-approved by a QAP. This approach would benefit obligated parties by reducing their risk of purchasing an invalid RIN and decrease the likelihood of violations and need for enforcement actions. However, we believe that it is up to the obligated parties to determine how they wish to verify the RINs they purchase, balancing their risk tolerance against their ability and desire to pay for verified RINs. Also, we expect that most RINs purchased and used for compliance purposes will be QAP-verified even though the program is voluntary because most obligated parties in most situations will prefer not to take on the risk of using an unverified RIN. Therefore, making the program mandatory would provide only marginal gains in market stability when compared to a voluntary program. A mandatory program would also potentially drive up the overall cost of RINs by forcing all RIN generators to go through the QAP process, even in situations where there is little risk in the product being invalidly produced. Overall, we believe the proposed program would be adequate to achieve the goals described above, and additional requirements would bring increased costs that are not appropriate or necessary. However, we seek comment on whether the proposed compliance options should be voluntary or mandatory for RIN generators and obligated parties.

These proposed QAP options offer alternative ways for regulated entities to operate within and comply with the existing obligations of the RFS program. If regulated parties wish to conduct ''business as usual'' and not utilize the additional mechanisms proposed in these regulations, they would be free to do so and would be subject to the same obligations and penalty structure as currently exists. Whether or not to purchase and retire RINs verified by an EPA-approved QAP is a choice each obligated party would make on its own, depending on the level of risk it perceives in the market and in a given producer, and its own risk tolerance.

*E. Treatment of RINs Prior to Final Rule Promulgation*

The regulatory provisions proposed today would become effective only after we review comments submitted in response to this proposal, determine what if any changes may be appropriate, and subsequently publish a final rule. Following the effective date of the final rule, auditors could apply to EPA for registration and for approval of their QAPs under one or both of the two Options (A and B). Once EPA registered the auditor and approved the QAP plan, then the auditor would implement the plan. RIN verification would start once the elements of the plan were in place, including the execution of an initial site inspection and record review, and under Option A, the initiation of ongoing monitoring. At that point, RINs could be verified by the auditor. RIN auditors could, of course, operate without EPA approval, though the RINs they verified would not be eligible for the special treatment afforded to RINs verified by an EPA-approved QAP under the proposed rules.

However, in order to encourage the development and use of RIN verification processes, and to promote greater liquidity in the RIN market as soon as possible, the proposed provisions relating to the affirmative defense apply not only to RINs generated after promulgation of the final rule, but also to RINs generated from January 1, 2013 onward. This raises two separate issues on how the final regulatory provisions would apply to RINs generated prior to the effective date of the final rule. First, what would be the effect of an audit being performed in the interim period? Second, what QAP requirements would need to be met for a RIN audited prior to the final rule's effective date to be considered verified after the final rule's effective date?

Regarding the first question, for RINs generated prior to the final rule's effective date, EPA's approval process regarding verifications would be different than the process effective after the final rule, first because EPA cannot formally register an auditor or approve a QAP until the rule is in effect and second because there may be insufficient lead-time to implement the QAP requirements set out in the proposed rule and begin verifying RINs immediately upon publication of this NPRM. We recognize that RIN generators and buyers likely will want to know whether 2013 RINs generated and audited prior to the effective date of the final rule would receive the proposed benefits and treatment given to RINs verified after the rule is in effect.

EPA is ready to facilitate the verification of RINs generated in 2013 prior to the final rule's effective date through an informal ''pre-registration'' process. EPA will review auditors' registration information and proposed QAPs, and provide guidance on whether

the plans appear to satisfy the proposed requirements. The names of those auditors and QAPs whose submissions are consistent with the applicable requirements in the proposed regulations will be published on EPA's Web site. This will not signify a final agency decision or approval of any auditor or QAP and EPA will not be legally bound by this initial evaluation. It would instead be guidance to an auditor as to whether EPA has any concerns about its registration and QAP plan and whether they appear to be consistent with the requirements in the proposed regulations. Publication of the auditors' names and available QAPs would provide useful information for outside parties who are evaluating the risk associated with RINs audited prior to the effective date of the final rule. Auditors would not be required to submit their QAPs to EPA for such guidance, and EPA's guidance or feedback to the auditors would confer no legal rights or privileges to the auditors, or to the production facilities and RINs they review.

RINs audited through a QAP on which EPA had offered guidance prior to the effective date of the final rule would not necessarily be deemed ''verified'' under the terms of the final rule. RINs could only be deemed ''verified'' after the final rule goes into effect, and after EPA approved the QAP that was used in the audit process. It is important to note that the final rule's provisions for interim RINs may not be the same as those in the proposed regulations. Therefore, any EPA decisions made after the rule is in effect regarding the sufficiency of QAPs and auditors operating prior to that time will be based on the content of the final rule, not the proposed rule. EPA's intention, however, is that the provisions and requirements proposed in this NPRM would apply to RINs verified prior to the final rule, and any changes to the proposed provisions would apply only to RINs verified after the final rule is effective. EPA invites comment on this approach, and will resolve this issue in the final rule after reviewing the comments. Similarly, it is important to note that the current regulatory provisions, including those regarding RIN replacement and civil liability, will remain in full effect until the final rule goes into effect.

Regarding the second question of what QAP requirements would need to be met for a RIN audited prior to the final rule's effective date to be considered verified after the final rule's effective date, the substantive requirements for the QAPs used prior to the final rule may be slightly different from QAPs used after the final rule. As discussed above, after the final rule is effective, a RIN could be verified only after the auditor conducted a site inspection and document review of RINs already generated, and (for QAP A) initiated ongoing monitoring of feedstock qualifications and production processes. All RIN verification after the effective date of the final rule would thus be ''prospective,'' covering RINs that are not yet generated at the time the audit is conducted. For RIN verification prior to the final rule's effective date, however, the requisite audit activities, including the site visit and setup of ongoing monitoring, might not occur until some point well after January 1, 2013. Given the short time period of RIN generation at issue before the normal oversight actions could be implemented, in many cases a matter of a few months, and the desire to have QAP plans start up as quickly as possible, EPA is proposing that prior to the final rule's effective date, auditors could verify RINs generated before the date the audit is completed. This ''retrospective'' RIN verification would only be available prior to the effective date of the final rule. Auditors would only be able to perform a retrospective audit if all the elements of the QAP were already in place and could only perform one retrospective audit of a given producer. This would ensure that auditors are not inappropriately taking advantage of this flexibility by doing retrospective audits only (which require less monitoring and work, especially for Option A QAPs) until the final rule is effective. Instead, they would be encouraged to get QAP-based audits up and running in their intended prospective form as soon as possible, while allowing reasonable flexibility to account for a start-up lag.

We recognize that the retrospective audit process for RINs generated prior to the actual audit being conducted may offer less certainty than the process that applies to RINs generated after the audit is conducted. This is because the verification is based on document review and a post-hoc site visit, leaving open the possibility that RINs generated prior to the site visit may not be representative of actual fuel production and the documents on which the audit is based were fraudulent. However, as there is a relatively low number of RINs at issue, we believe the risk of invalidity in this short term transition period is reasonable in light of the benefits of giving a reasonable expectation of validity to RINs generated as of January 1, 2013.

While these measures may give regulated parties and RIN purchasers flexibility and security in developing and using QAPs prior to issuance of the final rule, the EMTS system will not be available to display information such as whether a given RIN has been reviewed by an auditor and who conducted the audit, until after the effective date of the final rule. It will therefore be the responsibility of the market participants to keep records of verification of RINs until EMTS begins tracking and displaying RIN verification status. However, as noted above, EPA intends to post the names of those auditors whose QAPs and registration materials appear consistent with the proposed regulations on EPA's Web site. This public posting will confer no legal rights, privileges, or license, but will indicate that, at the time of EPA's review, the QAP of the auditor in question appears to meet the proposed requirements for a QAP.

Once the final rule is in effect, EPA will proceed to register auditors and approve QAPs that meet the requirements of the final rule. Upon receiving such registration and approval, auditors will be able to issue verifications for RINs generated prior to issuance of the final rule that were reviewed according to the QAP approved under the terms of the final rule. Once these RINs generated prior to the effective date of the final rule have been verified, they will be treated like all other verified RINs for purposes of the affirmative defenses and replacement obligation provisions for verified RINs that are determined to be invalidly generated.

### *F. Request for Comment on Prohibiting Producers From Separating RINs*

We request comment on a regulatory change in which renewable fuel producers would be prohibited from separating RINs. Under the current regulations, RINs generally cannot be separated from the wet gallons they represent until the point of blending or purchase by an obligated party. However, a renewable fuel producer can separate RINs from their associated volumes of renewable fuel under the conditions specified in § 80.1429(b)(4), including the situation where the fuel in question has been designated for a conforming use (i.e., for transportation fuel, heating oil or jet fuel) and is in fact used for such a conforming use, without further blending. In this circumstance, any owner of the RIN and associated gallon (including the producer) may separate the RIN from the fuel, including the producer of the fuel. The intent of this provision was to avoid situations in which RINs were never separated from renewable fuel due to its use in neat form or some atypical blend.

In the fraud cases that disturbed the RIN market in 2011–2012, some registered biodiesel producers exploited this provision and generated and sold invalid RINs without volume. Some have argued that removing this option and prohibiting producers in all cases from separating RINs from the volumes they produce would greatly reduce the ability of producers to generate fraudulent RINs without the knowledge of other parties in the RIN market.

While this mechanism might reduce the problem of producer fraud (of the type already seen), it would not eliminate the number of other ways invalid RINs could be generated at the point of production. Moreover, it could potentially create new concerns, as legitimate cases of producers separating RINs from volume would be prohibited. This would only be a partial solution to the problem of fraud and invalid RIN production. However, we solicit comment on the benefits of producers' ability to separate RINs from wet gallons in the limited circumstances that are currently permitted, and whether these benefits outweigh the potential added risk of fraudulent RINs in the market.

*G. Summary of the Two QAP Options*

A summary table of the two QAP options is provided below as a broad background for the outcomes associated with each option. The QAP options and associated consequences are discussed in each of the subsequent sections of this preamble.

TABLE III.G–1—SUMMARY OF PROPOSED QAP OPTIONS

| Key element | QAP Option A | QAP Option B |
|---|---|---|
| *Parties responsible for replacement of invalidly generated RINs*[7]. | Third-party auditor | Obligated party. |
| *Requirement for a RIN replacement mechanism as condition of registration.* | Yes | No. |
| *Affirmative Defense to civil liability for transfer or use of invalidly generated RINs.* | Yes | Yes. |
| *Treatment of a knowing transfer or use of invalidly generated RINs.* | Affirmative defense requires the party did not know or have reason to know the RIN had been invalidly generated before the RIN was verified. | Affirmative defense requires the party did not know or have reason to know the RIN had been invalidly generated at the time it was transferred or used for compliance. |
| *Limited exemption for invalidly generated RIN replacement.* | None | For 2013–14, up to 2% of the obligated party's RVOs. |
| *Cap on RIN replacement* | For 2013–15, 2% of the most recent five year's worth of verified RINs. | None. |
| *Requirements for QAPs* | Detailed requirements including ongoing monitoring. | Less detailed requirements. |

## IV. Provisions for RIN Verification Under Option A

The quality assurance program that we are proposing today would include two different options that would be available to regulated parties. Both options are intended to provide an efficient mechanism for ensuring that RINs are validly generated, and both options would provide the basis for an affirmative defense to liability for transferring or using invalid RINs. However, the two options would differ in whether invalidly generated RINs could be used for compliance, and in which party would be responsible for replacing invalidly generated RINs.

In this section we describe our proposed requirements for Option A. Under this option, obligated parties would not be responsible for replacing RINs that were invalidly generated if they successfully established an affirmative defense, and could use invalidly generated RINs for compliance under certain conditions. The third-party auditors responsible for verifying RINs under this Option would also be responsible for replacing those RINs if they are invalidly generated. In order to implement this approach, we are proposing detailed requirements for QAPs used to verify RINs that would include ongoing monitoring of operations at a renewable fuel production facility. We are also proposing that third-party auditors who verify RINs under Option A would be required to demonstrate the existence of a mechanism capable of replacing RINs that are invalidly generated and verified by the auditor. For clarity, we refer to RINs that have been verified through Option A as A–RINs.

In this section we first cover the proposed elements of QAPs for Option A and the proposed requirements for the replacement mechanism. We then describe how regulated parties could assert an affirmative defense for transferring invalidly generated A–RINs or using them for compliance. Finally, we discuss the treatment of invalidly generated A–RINs, from the responsibilities of owners of such RINs to the parties that would be required to replace them.

Since we are proposing two options for verifying RINs under a quality assurance program, both of which would be available to renewable fuel producers, we are also proposing two different sets of QAP requirements. Under Option A, the QAP requirements would be more comprehensive since obligated parties would be expected to exercise little or no oversight over the auditor process under this Option. Thus, for instance, we are proposing that any QAP used under Option A would have requirements for ongoing monitoring, i.e., for those production aspects that have sufficient variability such that less frequent monitoring could more easily result in the generation of invalid RINs. We would consider these aspects to require ''batch'' level monitoring, or as frequent as information becomes available or can be collected. We propose that all other components of QAPs under Option A would be evaluated on a more limited basis but on a specified schedule. We consider these aspects to require ''facility'' level monitoring, and are proposing that components subject to this periodic or limited schedule be monitored on a quarterly basis. Note that the components proposed for monitoring, whether on an ongoing or periodic basis, are components that are already regulated under the RFS program.

We request comment on the components we propose for ongoing or

[7] The generator of the invalid RIN is always responsible for replacement.

periodic monitoring, as well as any components not mentioned here. We also request comment on whether we have or whether we could better strike the necessary balance between the costs of implementing the quality assurance program versus the benefits for the RFS program. We also request comment on whether quarterly monitoring is appropriate for those components proposed to be subject to the less frequent schedule, or whether different components could or should be subject to different schedules (e.g., annual, once), and what those schedules should be, and why.

*A. Requirements for Option A Quality Assurance Plans*

As described in Section III above, QAPs would be used to verify that renewable fuel produced at a given facility qualifies under the RFS program and that corresponding RINs are validly generated. A QAP would form the basis for a facility audit, and would be created by an independent third-party based on criteria specified by EPA. This proposed rule would not impose any requirement on producers to engage a third-party auditor for the purpose of RIN verification, but instead would provide a voluntary means by which a production facility that engages an approved auditor, and upon a satisfactory facility audit using an EPA-approved QAP, would be verified by the auditor as validly generating RINs. RINs that had been verified through this process would provide the basis for an affirmative defense against civil violations for transferring or using invalid RINs for compliance, as discussed more fully in Section IV.C. As a result, verified RINs would be more valuable than RINs from a facility that had not been verified through a third-party auditor. We also expect that RIN replacement costs should significantly decrease as a result of this program.

This section discusses the minimum requirements of Option A QAPs under the RFS program, the elements of review that an Option A QAP must contain, and timing considerations affecting the use of a QAP.

1. Elements of an Option A QAP

QAPs would be used by registered third-party auditors to audit renewable fuel production at and RIN generation by a particular facility. The QAP must include a list of elements that the auditor will check in order to verify that the RINs generated by a renewable fuel producer or importer are appropriate given the feedstock, production process, and fuel for which RINs were generated. Therefore, each QAP must identify the specific RIN-generating pathway from Table 1 to § 80.1426 or a petition granted pursuant to § 80.1416 that it is designed to audit. Effectively, the auditor will be presenting a plan to EPA that the auditor believes is sufficient in scope and depth to ensure that RINs generated under such a plan are valid. The proposed required elements of an Option A QAP are discussed below. In the QAP, the auditor would specify how the inclusion of the required elements would be accomplished. We request comment on these proposed elements, including detailed descriptions of any elements not mentioned below.

a. Feedstock-Related Components

We propose 12 required elements in Option A QAPs designed to ensure that the feedstocks used in the production of renewable fuel qualify to generate RINs.[8] As shown in Table IV.A.1.a–1, some elements would be required to be monitored on an ongoing basis, and some on a quarterly basis. To begin with, for each batch of renewable fuel, we propose that the QAP should verify that feedstocks meet the definition of ''renewable biomass,'' and identify which renewable biomass from the listing in § 80.1401. As with all components proposed for monitoring and verification under a QAP, except for provisions related to the quality assurance program, there are no additional requirements added to the RFS program, e.g., that feedstocks are required to meet the definition of renewable biomass in § 80.1401 is a current RFS requirement.

We are also proposing specific elements depending on the type of feedstock. For instance, if the feedstock is separated yard waste, separated food waste, or separated Municipal Solid Waste (MSW), the QAP would be required to verify that a separation plan has been submitted and accepted or approved, as applicable, as part of the registration requirements under § 80.1450, and meets the requirements of § 80.1426(f)(5) and that all feedstocks being processed meet the requirements of the separation plan. If the feedstocks are planted crops or crop residue, the QAP would be required to include review of records maintained pursuant to § 80.1454 to verify that the land use restrictions of § 80.1401 are met and properly reported pursuant to § 80.1451(d). If the renewable fuel producer claims that the feedstocks qualify under the aggregate compliance approach, the QAP would be required to verify that the feedstocks are planted crops or crop residue that meet the requirements of § 80.1454(g). The auditor would also be required to ensure that other feedstocks with additional recordkeeping requirements in § 80.1454 are adequately covered (i.e. planted trees and tree residue and slash from non federal forest land).

The QAP would be required to verify that contracts exist for ongoing delivery of the type and amount of feedstocks used to produce renewable fuel, and that information in the contracts is consistent with production numbers. The QAP would also be required to verify that feedstock processing and storage equipment is appropriate, sufficient, and in working order to handle and process the feedstocks being used.

The QAP would be required to verify the accuracy of all feedstock-related factors used in calculation of the feedstock energy (FE) used under § 80.1426(f)(3)(vi) or (f)(4), as applicable, including the average moisture content of the feedstock, in mass percent, and the energy content of the components of the feedstock that are converted to renewable fuel, in Btu/lb. Note that requirements for these factors and calculations are specified in the RFS regulations. Under the QAP, the auditor reviews and verifies that the requirements of the regulations were followed.

The QAP would be required to verify that feedstocks that can be processed at a facility match information in the RFS registration and engineering review. (Note that we are proposing that a separate engineering review would no longer be required if a facility is covered by an Option A QAP). In addition, the feedstocks used to produce renewable fuel must be valid for the D code being claimed under § 80.1426 (or have an approved petition under § 80.1416) and must be consistent with the information reported in EMTS. Finally, the QAP would be required to verify that the feedstock used to produce renewable fuel is not a renewable fuel from which RINs were already generated in accordance with the requirements at § 80.1426(c)(6).

The feedstock-related elements that we are proposing to require for QAPs under Option A are shown in the table below, along with whether each item

[8] The treatment of biomass that is or is derived from invasive species will be addressed in a separate rule-making.

would be required to be monitored on an ongoing basis.

TABLE IV.A.1.a–1—OPTION A: QAP MONITORING FREQUENCY—FEEDSTOCK-RELATED

| | Component | Ongoing monitoring | Quarterly monitoring |
|---|---|---|---|
| 1–1 | Feedstocks are renewable biomass | X | |
| 1–2 | Separation plan for food or yard waste submitted and accepted. | | X |
| 1–3 | Separation plan for municipal solid waste submitted and approved. | | X |
| 1–4 | Feedstocks meet separation plan | X | |
| 1–5 | Crop, crop residue feedstocks meet land use restrictions. | X | |
| 1–6 | Feedstocks with additional recordkeeping | X | |
| 1–7 | Contracts for feedstocks compare to production | | X |
| 1–8 | Feedstock processing, storage equipment match engineering review. | | X |
| 1–9 | Accuracy of feedstock energy calculation | | X |
| 1–10 | Feedstock valid for D code, consistent with EMTS. | X | |
| 1–11 | Feedstock consistent with production process | X | |
| 1–12 | Feedstock is not renewable fuel where RINs generated. | X | |

b. Production Process-Related Components

We propose t 10 required elements in Option A QAPs designed to ensure that the renewable fuel production process is appropriate for the RINs being generated. Auditors submitting QAPs for EPA approval would be required to provide a list of specific steps they will take to audit each of the elements.

For each batch of renewable fuel, the QAP would require mass and energy balances of the production process, and verify that the results match expectations for the type of facility being audited (e.g., biodiesel from soybean oil may have different expectations than biodiesel from non-food grade corn oil) based on typical values from prior input/output values, or similar facilities if prior values are not available. Energy inputs from on-site energy creation (e.g., propane, natural gas, coal, heating oil, diesel, gasoline, etc) and/or energy bills, and mass inputs/outputs such as feedstocks, additional chemicals, water, etc. would be required as part of the mass and energy balances. In addition, the QAP would be required to verify that yields, production of co-products, and production of wastes match expectations for the type of facility being audited.

In addition to mass and energy balances, QAPs under Option A would be required to verify that the production process is capable of producing, and is producing, renewable fuel of the type being claimed. The QAP would be required to verify the accuracy of all process-related factors used in calculation of the feedstock energy under § 80.1426(f)(3)(vi) or (f)(4), as applicable.

The QAP would be required to verify workforce size and conduct random employee interviews to confirm the production process. We believe this element is useful as verification that the plant is running as stated. Staffing levels, or a reasonable metric such as whether the workforce is appropriate per shift for throughput, would confirm that the plant is operating as expected. We understand that automation, plant complexity and staff skill levels and experience, among other factors, can result in some variation here, but believe this is easily accessible and useful data.

The QAP would be required to also verify that production process technology and capacity used matches information reported in EMTS and in the facility's RFS registration. The QAP also would be required to verify that the production process is consistent with D code being used as permitted under Table 1 to § 80.1426 or a petition approved through § 80.1416.

The QAP would be required to verify a number of things related to the fuel type. For instance, the QAP would include verification of the existence of certificates of analysis demonstrating that the renewable fuel being produced meets the applicable specifications and/or definitions in § 80.1401, and would be required to verify contracts with lab(s) for certificates of analysis, unless a facility has an on-site laboratory. If on-site, the QAP would be required to verify lab procedures and test methods. The QAP would be required to verify that renewable fuel being produced at the facility and that can be produced, matches information in RFS registration in terms of chemical composition. The QAP would also be required to verify the existence of quality process controls regarding test equipment (e.g., accuracy of flow meters, temperature gauges), and would be required to monitor equipment integrity to ensure proper procedures for equipment replacement, maintenance, and cleaning are in place.

Finally, the QAP would be required to verify that production volume being claimed is consistent with storage and/or distribution capacity and other applicable reports generated by the producer.

The production process-related elements that we are proposing to require for QAPs under Option A are shown in the table below, along with whether each item would be required to be monitored on an ongoing basis.

TABLE IV.A.1.b–1—OPTION A: QAP MONITORING FREQUENCY—PRODUCTION PROCESS-RELATED

| | Component | Ongoing monitoring | Quarterly monitoring |
|---|---|---|---|
| 2–1 | Mass and energy balances | | X |
| 2–2 | Workforce size | | X |
| 2–3 | Process-related factors used in feedstock energy calculation. | | X |
| 2–4 | Production process consistent with EMTS | X | |
| 2–5 | Production process consistent with D code | X | |
| 2–6 | Certificates of analysis verify fuel | X | |
| 2–7 | Verify existence of quality process controls | | X |
| 2–8 | Volume production consistent with other reports required by EPA or other government entities. | | X |
| 2–9 | Volume production consistent with storage and distribution capacity. | | X |
| 2–10 | Volume production capacity is consistent with RFS registration. | | X |

c. RIN Generation-Related Components

We propose nine required elements in Option A QAPs designed to ensure that the renewable fuel being produced qualifies to generate RINs, and that the number of RINs generated is accurate.

For each batch of renewable fuel, the QAP would be required to verify that volumes of renewable fuel for which RINs are being generated meet, are designated for, and are sold for as transportation fuel, heating oil, and/or jet fuel as defined in § 80.1401.

The QAP would be required to verify that renewable fuel being produced matches the D code being claimed under § 80.1426, or approved petition under § 80.1416.

The QAP would be required to verify a number of things related to the volume of renewable fuel produced, including a check to ensure that volume temperature correction procedures are followed correctly. The QAP would be required to verify that volume of renewable fuel produced is consistent with expectations for the amount of feedstock being processed. The QAP also would be required to verify the accuracy of all fuel-related factors used in calculation of the feedstock energy, as applicable, including equivalence value for the batch of renewable fuel and the renewable fraction of the fuel as measured by a carbon-14 dating test method (see § 80.1426(f)(9)).

The QAP would be required to verify that fuel shipments are consistent with production, and would be required to review, if applicable, purchases and storage of petroleum-based fuel, and contracts with any company that removes wastes, co-products, off-spec products or any other material other than renewable fuel from the facility. The QAP would be required to review bills of lading (BOL), invoices, product transfer documents (PTDs), EMTS inputs, EPA quarterly reports and Energy Information Administration data.

Finally, the QAP must verify that appropriate RIN generation calculations are being followed under § 80.1426(f)(3), (4), or (5) as applicable, and that RIN generation was consistent with wet gallons produced.

The RIN generation-related elements that we are proposing to require for QAPs under Option A are shown in the table below, along with whether each item would be required to be monitored on an ongoing basis.

TABLE IV.A.1.c–1—OPTION A: QAP MONITORING FREQUENCY—RIN GENERATION-RELATED

| | Component | Ongoing monitoring | Periodic monitoring |
|---|---|---|---|
| 3–1 | Renewable fuel sold for qualifying uses | X | |
| 3–2 | Standardization of volumes | X | |
| 3–3 | Renewable fuel matches D code or petition | X | |
| 3–4 | RIN generation consistent with wet gallons | X | |
| 3–5 | Fuel shipments consistent with production | X | |
| 3–6 | Renewable content R is accurate | X | |
| 3–7 | Registration, reporting, recordkeeping | | X |
| 3–8 | Equivalence value EV is accurate, appropriate | X | |
| 3–9 | RIN generation calculations | X | |

d. RIN Separation-Related Components

We propose three required elements in Option A QAPs designed to verify RIN separation. First, under the limited circumstances where a renewable fuel producer or importer separates RINs, the QAP would be required to verify that any RIN separation being done by the producer is done according to the requirements of § 80.1429, was reported to EMTS accurately and in a timely manner, and is supported by records. The QAP would be required to ensure that fuel that is exported was not used to generate RINs, or alternatively that RINs were generated but retired. Finally, the QAP must verify the accuracy of the annual attestation.

The RIN separation-related elements that we are proposing to require for QAPs under Option A are shown in the table below, along with whether each item would be required to be monitored on an ongoing basis.

TABLE IV.A.1.D–1—OPTION A: QAP MONITORING FREQUENCY—RIN SEPARATION-RELATED

| | Component | Ongoing monitoring | Quarterly monitoring |
|---|---|---|---|
| 4–1 | Verify RIN separation | X | |
| 4–2 | Exported fuel not used to generate RINs | X | |
| 4–3 | Verify accuracy of annual attestation | | X |

2. Approval and Use of Option A QAPs

a. Approval of Quality Assurance Plan

We are proposing that a third-party auditor choosing to verify RINs under the quality assurance program must submit a QAP to EPA for approval. A separate QAP is required for each different feedstock/production process/fuel type combination (i.e., pathway). A QAP for a given pathway may be used for multiple facilities for which that pathway applies. We are also proposing that a QAP must be submitted for approval every year. A QAP would be deemed valid on the date EPA notifies the party that submitted the QAP that it has been approved. Only an EPA-approved QAP could be used by a third-party auditor to provide audit services to renewable fuel producers.

b. Frequency of Updates or Revisions to QAPs

We are proposing that a QAP approval by EPA only applies to the plan that was submitted to EPA, and there are specific cases in which we believe a QAP should be modified and resubmitted for approval. We are proposing that a QAP would need to be revised if the renewable fuel producer makes a change in feedstock, production process, or fuel that is not covered by the QAP. Under even one of these conditions, the plan submitted to EPA would no longer be applicable, and thus a new QAP would be required to be submitted and approved. We request comment on what changes would require a new QAP to be submitted for approval. Specifically, we request comment on whether a new QAP should be required to be submitted to EPA if the audited facility changes operations, feedstock, fuel type, etc.

*B. RIN Replacement Mechanisms Under Option A*

Auditors operating under Option A would be responsible for replacing invalid verified RINs if the RIN generator does not first replace them. Upon registration with EPA, auditors would be required to demonstrate that they have access to a RIN replacement mechanism that can replace a minimum percentage of any invalidly generated RINs they verify as A–RINs. See Section VI.B of this preamble for full registration requirements. If the party who generated the invalid A–RINs did not replace them, the RIN replacement mechanism would ensure the auditor's ability to fulfill its replacement requirement. We are proposing that there would be no requirement for a RIN replacement mechanism under Option B, where only producers and obligated parties, not auditors, would be responsible for replacing invalid verified RINs.

The reason we are proposing to require a RIN replacement mechanism under Option A (for auditors), but not under Option B (for obligated parties), is that the business models, size, and assets of the parties expressing interest in operating as auditors suggests that they would not be capable of self-financing a RIN replacement obligation. The obligated parties, on the other hand, are generally owners of major capital assets and are capable of self-financing a potential RIN replacement responsibility. While this may change in the future, it is appropriate at this point to ensure that there would be a reliable mechanism available to fulfill the auditor's replacement obligation. We intend that the requirement of a RIN replacement mechanism would provide stability in the marketplace and ensure that the RIN replacement obligation would in fact be fulfilled.

Whatever mechanism is used must be capable of fulfilling the auditor's potential replacement requirement for invalid RINs audited under an Option A QAP in a given calendar year and the previous four years. The calculation of this potential replacement requirement is further discussed in Section IV.B.1, below, in the context of the proposed cap on RIN replacement under Option A.

There are a number of RIN replacement mechanisms that may exist or become available to auditors. We are proposing to leave the choice of the type of mechanism to the auditors, who are in the best position to know what arrangement will work best for their businesses. The proposed rules do not therefore limit or specify the types of mechanisms we would accept. Rather, we propose only general minimum requirements for an acceptable replacement mechanism, and we solicit comments on these and potential additional requirements for these mechanisms. We have considered three possible types of mechanisms that could provide this function: traditional financial assurance instruments, RIN banks, and RIN escrow accounts. However, these mechanisms, outlined below, are not intended to be inclusive of all possible ways a RIN replacement mechanism could work, and are merely suggestions of potential pathways Option A auditors might follow.

We request comment on the various factors that will impact the effectiveness and cost of establishing and maintaining the minimum required balance in a RIN replacement mechanism, such as how many year's worth of RINs the mechanism should be required to be capable of replacing, whether a minimum percentage of the potential replacement obligation should be used as a baseline for the mechanism, and alternative methods to determining the appropriate minimum funding of the mechanism. We also seek comment on the perceived feasibility and necessity of the replacement mechanism requirement for auditors under Option A. Finally, we seek comment on whether any of the replacement mechanisms described below or any other form of replacement mechanism might provide the required type and amount of coverage, whether any should be prohibited, and any other relevant comments on this issue.

1. Required Replacement Capability for RIN Replacement Mechanisms

We do not believe it would be reasonable to require replacement mechanisms under Option A to provide coverage for all of the RINs an auditor verifies because we believe that properly functioning QAP audits will significantly reduce the chance of invalid A–RINs entering the market. We also recognize that the market will need time to evaluate the risk associated with bonds or other traditional financial assurance mechanisms and properly price these financial assurance instruments. Accordingly, we are proposing to phase in the RIN replacement mechanism over time to balance the benefits of encouraging early implementation of the more robust QAP A program with the cost of early

implementation. Under this approach, the minimum ''replacement cap'' will be set relatively low through 2015, and may change on January 1, 2016.

We propose that an auditor using an Option A QAP must be capable of replacing 2% of the total A–RINs that it verifies during the first phase of the program, i.e. through 2015, and we will finalize a replacement cap for subsequent years in the final rulemaking. We believe incidences of invalid RINs will be significantly below historic levels. Invalid RINs in 2010 and 2011 were generated when there was little due diligence being performed by downstream parties to ensure that RINs were valid, and we believe that incidences of invalidity would be significantly fewer in number once the QAP verification processes are in use. The auditor's replacement responsibility is therefore equal to the ''replacement cap'' for this first phase of the program. For further information on the replacement cap, see Section IV.D.4, below.

Nevertheless, historically, invalid RINs have not been generated with equal probability by all biodiesel producers. Instead, it has been a few producers that were responsible, with essentially all RINs generated by those producers being invalid. If such circumstances were repeated in the future, the potential impacts on auditors would be twofold. First, some auditors would not have to replace any of the RINs they verify, since many producers would have generated no invalid RINs. Second, in the event that an auditor was required to replace invalidly generated RINs, those invalid RINs would likely represent more than 2% of the RINs that the auditor verified. As a result, it is possible that the number of invalid RINs could be higher than 2% of a single auditor's throughput even if the total number of invalid RINs represented only 2% of all RINs generated for the nation as a whole. We therefore seek comment on the level of coverage required for RIN replacement mechanisms. We believe that the appropriate level of coverage for RIN replacement mechanisms should strike a balance between the benefits of ensuring that invalid RINs are replaced and reducing the risk of invalid RINs entering the market, and the costs associated with implementing RIN replacement mechanisms. We also seek comment on whether it would be appropriate to require a minimum dollar value as a floor for coverage. The minimum dollar value might help ensure that the auditors who participate in this program have the capital to function appropriately, but might also cause some qualified auditors to refrain from participating in the program because of the additional costs. We seek comment on whether to require an additional floor for the RIN replacement mechanism and the correct amount of the floor.

Beginning January 1, 2016, the Option A RIN replacement mechanism cap may change from the initial 2%. Our goals for the cap in 2016 and later years, as they are for the cap in 2013, 2014, and 2015, would be for it to ensure that most if not all of invalidly generated A–RINs would be replaced and at the same time provide assurance that the costs of a RIN replacement mechanism would not be excessive. We invite comment on what level would meet these goals, i.e., whether a lower cap, the same 2% cap, or a higher cap, for example 25%, would be appropriate. As noted above, we will finalize the replacement cap for 2016 and later years in the final rulemaking. As described in greater detail in Section IV.D.4, below, we also propose that the auditor's replacement responsibility extend back to cover no more than five years.[9] Therefore, the auditor must maintain the ability to replace the cap percentage of A–RINs verified in the current year to date plus the cap percentage of A–RINs verified in the previous four calendar years. If the replacement cap changes in 2016, we expect that the auditor's replacement responsibility for the years in the initial phase would not change.

Maintenance of a RIN replacement mechanism is a condition of an auditor's registration, which would be renewed annually. A failure to maintain the ability to replace up to the given cap percentage would therefore be a sufficient condition for denying a registration renewal or revoking an Option A auditor's registration. However, we recognize that if an auditor's replacement capacity has been significantly depleted by a replacement action, it might be difficult or even impossible for it to re-fund the replacement mechanism and maintain its registration in the short term. We therefore propose that the replacement mechanism be re-funded on an ongoing basis, i.e. by the given cap percentage of A–RINs verified, until the maximum required amount is again achieved. The formula for this calculation is in § 80.1470(c) of the proposed regulations, and this re-funding mechanism is mirrored in the calculation of the replacement cap, *see* Section IV.D.4 below. We request comment on all aspects of the calculation of the replacement mechanism and re-funding of a depleted replacement mechanism.

[9] While there is no statute of limitations on EPA taking enforcement actions with respect to invalid RINs, there is a five year limit on records retention.

2. Financial Assurance Instruments

As noted above, we would not prescribe that auditors under Option A must use any particular RIN replacement mechanism, but would only require that the mechanism used be capable of covering an auditor's potential replacement responsibility described above. Since obligated parties would not be responsible for replacing invalid RINs under Option A, any replacement mechanism held by the auditor would need to make disbursements directly to the auditor or to a third-party contractually obligated to perform the auditor's replacement responsibility and retire the correct number and type of A–RINs, up to the replacement cap discussed above.

We have considered a number of traditional financial instruments that we believe are not suitable to provide the coverage required under Option A. For instance, a liability policy obtained by an auditor would typically only cover losses incurred by another party contracting with the auditor, in this case, most likely the RIN purchaser. This would not be an acceptable replacement mechanism under Option A because the RIN purchaser is not responsible for replacement of A–RINs and therefore would have no compensable harm. If an insurance policy could be written to cover the replacement obligation of the auditor instead of a third-party, regardless of the fault of the auditor or the source of the invalidity (i.e., covering potentially fraudulent acts by the producer), then such an instrument may be acceptable as a replacement mechanism under Option A. Similarly, a replacement mechanism that would pay out directly to EPA instead of the auditor would not be acceptable because EPA cannot purchase or retire RINs. Surety bonds and letters of credit payable to EPA would therefore not be suitable replacement mechanisms for Option A.

On the other hand, a surety bond or other financial instrument, such as a letter of credit, could be used as a RIN replacement mechanism if capable of providing direct replacement of invalid RINs, either by itself or by contracting with a third party. A performance bond, for example, might directly guarantee the performance of the auditor's RIN replacement responsibility. The bond agreement could allow the surety the option of purchasing and retiring replacement RINs itself, hiring a third-party agent to complete the purchase and retirement, or paying into a standby

trust that could, in turn, fulfill the replacement responsibility on its own or by hiring a third-party agent to do so. A payment bond, similarly, could be established to pay out to a standby trust authorized to purchase and retire RINs on demand by the EPA administrator, or to contract with a third-party to perform the replacement.

In an effort to provide regulated parties with an option where the auditor could use a traditional liability policy as a RIN replacement mechanism while relieving the obligated party of RIN replacement responsibility, we considered a modified Option A approach. In this modified approach, the obligated party would be responsible for replacing invalid A–RINs that it had retired for compliance purposes, but the auditor would carry a third-party liability policy to cover the cost of that RIN replacement. In the event that the insurance policy failed for whatever reason to pay out the replacement costs, or paid out only part of the replacement costs, the obligated party would not be liable for fulfilling the remaining portion of its RIN replacement responsibility. Essentially, the obligated party would be responsible for RIN replacement, but would be assured that their replacement costs would be covered entirely by a third party. However, we found significant problems with this approach. The primary problem is that if an obligated party incurred a replacement obligation and sought compensation through the insurance policy, it would have little reason to press its claim with any vigor, knowing that any lack of payment from the insurer would effectively be forgiven by EPA. The obligated party, in short, would be rendered whole regardless of how little the policy paid, or even if the policy paid at all. As a result, we consider it very likely that under this modified Option A system, the invalid RINs would not be replaced. This approach would also affect the behavior of the insurer, who would define the limits of its liability on the basis of the potential harm that the obligated party might suffer. Since the obligated party would not be responsible for replacing any RINs not covered by the insurance policy, its ''harm'' would be limited to whatever amount the insurer chose or intended to pay out. The insurer would not be penalized or pursued for failing to pay out to the limits of the policy because such a decision would cause no harm or loss to the obligated party or the policy holder. It is arguable that this situation would effectively create a fictitious insurance contract, because the insurer would control most if not all of the total amount of the loss it was insuring against. We seek comment, however, on whether this or some other modification to Option A would be considered acceptable and feasible.

The inapplicability of a third-party liability policy as a replacement mechanism under Option A would not, of course, diminish its availability and use under Option B. While liability insurance is not a required feature of the Option B program, auditors and obligated parties could nonetheless choose to contract for it voluntarily. Third-party liability insurance, therefore, would still provide a way for obligated parties to cover their potential replacement responsibility under Option B. Obligated parties and auditors would remain free to set up whatever kinds of contracts and/or third-party agreements to cover potential losses due to invalid RINs.

We also considered a ''hybrid'' approach, combining certain features of Option A with certain features of Option B. Under this approach, the obligated party would retain the replacement responsibility, but the auditor would be required to carry a third-party liability policy to cover the obligated party's potential losses due to the use of invalid A–RINs. In this scenario, the obligated party would remain liable for replacement of invalidly generated RINs even if the insurance instrument provided only partial coverage, or if it failed to provide coverage at all. This option would give obligated parties the extra assurances of an Option A QAP and a dedicated liability insurance policy held by the third-party auditor to cover their potential losses. However, as noted above, this approach is essentially already available under Option B. An independent third-party auditor could offer a QAP that met the requirements of Option A and could also provide the assurance of a third-party liability policy to cover the RIN purchaser's potential replacement responsibility. Moreover, by leaving this as an independent and voluntarily chosen option, auditors and obligated parties have more flexibility to decide what level of coverage and risk they are willing to bear, instead of being required to maintain a set minimum amount of coverage. We therefore decided not to propose this as an independent option, but we request comment on whether this hybrid approach or some variation of it would be a valuable addition to the proposed program.

3. RIN Banks

Another potential replacement mechanism is a RIN bank. A RIN bank would be a repository for valid RINs to which multiple Option A auditors (the ''members'' of the bank) contribute, and which could be used as a source of replacement RINs in the event that any one of the members was required to replace invalid RINs. As with any other replacement mechanism, the bank would have to be capable of fulfilling any member's replacement requirement, meaning that it would have to contain RINs sufficient to meet the replacement responsibility of the member with the largest potential replacement requirement at any given point in time.

The primary advantage of a RIN bank is that it would give each member access to a large quantity of A–RINs in exchange for contributing a relatively small quantity of A–RINs. However, if RINs from the RIN bank were used to replace RINs for which one of the bank's members was responsible, the withdrawn RINs would have to be replaced in the bank. While the bank managers might require the responsible party to reimburse the bank for any RINs withdrawn as a result of its actions, if the responsible party declared bankruptcy or was otherwise unable to reimburse the bank, the remaining members would be responsible for re-populating the bank to the required level.

A RIN bank could be established, funded and managed by members of the bank. Members would each purchase and contribute verified A–RINs to the bank. While such contributions could be proportional to each party's RIN replacement liability, it would be up to the bank managers to stipulate how the bank would be populated, how withdrawals from the bank are administered and managed, how to re-populate the bank in the event that RINs are withdrawn to replace invalid RINs, and how to grant or revoke membership in the bank.

A RIN bank would establish an EMTS account to identify the RINs contributed by the bank's members. RINs would be held by the bank and be available to replace invalid RINs that were verified under Option A by a member of the bank. Each member of the bank would be required to have access to all of the RINs in the bank to replace A–RINs they had audited that were found to be invalid. If at any point the number of RINs held by the bank no longer met the EPA's requirements, either due to the addition of a new member(s) to the bank, an increase in the liability of one of the members of the bank, or a withdrawal to replace invalid RINs, the members of the bank would again be required to contribute RINs to the bank

until the minimum required level of RINs was reached.

RINs deposited in RIN banks would expire just like other RINs. We contemplated creating a special category of RINs that do not expire if deposited in a RIN bank which would allow the bank to provide perpetual backing for its members' replacement responsibilities, as long as the RINs were not withdrawn to replace invalid RINs. However, RINs that do not expire could acquire a higher market value compared to RINs from the same facility without this new status. If EPA adopted this system, we would also have to stipulate that RINs placed in a RIN bank could not be withdrawn for any reason other than to replace invalid RINs to prevent auditors from depositing RINs into the bank, achieving this new status, and then withdrawing them to be sold with a new higher market value. This stipulation would place restrictions on the use of RINs owned by the auditors participating in this system and could be problematic in cases where an auditor wanted to disassociate from a bank.

The alternative to this system, and the one we are proposing today, would not change the status of RINs deposited in a RIN bank and would allow them to expire just like any other RINs. Auditors would be free to regularly withdraw older RINs from the bank and replace them with newer RINs (in addition to their new contributions) to prevent RINs in the bank from expiring and losing their value. While we recognize that this would add some administrative burden to auditors and potentially impact the value of RINs that are deposited in the bank (since RINs from a previous year are limited to being used to cover 20% of an obligated party's RVO) we nevertheless believe this is a better option than creating a new class of RINs. This approach would allow auditors to have the most control over their own RINs, depositing and withdrawing them at any time, provided they maintain their required minimum balance in the bank. Further, since the rollover cap limitation on the previous year's RINs that may be used to meet the current year's RVO (see § 80.1427(a)(5)) is significantly higher than the percentage of RINs that would be required to be held by a bank, we believe the depreciation in the value of RINs deposited in a bank is likely to be minimal.

4. A–RIN Escrow Accounts

An A–RIN escrow account would work very much like a RIN bank, but would be funded by a single auditor instead of a group of auditors, and would be supervised and managed by a third-party escrow agent. The advantage of this option is that an auditor would have total control over the funding of the escrow account and, in contrast to the RIN bank, an auditor using an escrow account would never be adversely affected by the actions of another contributor to the account, such as failure to contribute its required share or a large withdrawal from the RIN bank that might leave the bank underfunded. On the other hand, an auditor using an escrow account would be solely responsible for the funding of the account, and so would be required to maintain a balance equal to a much larger percentage of its potential replacement responsibility than it might be if using a RIN bank.

To qualify as an acceptably funded account, we propose that the escrow account would be required to maintain a balance of A–RINs equal to the auditor's replacement responsibility at any given point in time. As with the RIN bank, the RINs held in escrow would expire just like any other RIN and would have to be retired and replaced on a rolling basis to maintain the auditor's ability to replace invalid RINs at any given point in time. Thus, the RIN auditor would eventually be able to use the proceeds from the sale of RINs in the escrow account to fund the purchase of new RINs, reducing the total long-term costs of this RIN replacement instrument. Likewise, if the account's balance fell below the minimum required amount for any reason, the auditor would be precluded from verifying RINs unless and until the account's balance was brought back to the minimum level until the cumulative five year cap is reached (as further described in Section IV.D.4)

The escrow account would contain verified A–RINs and would be used as a source of RINs to retire upon a finding that RINs verified by the auditor were in fact invalid. An originally signed copy of the escrow account agreement would be submitted by the auditor to EPA as part of its registration. The agreement would stipulate, for example, that the escrow agent would release RINs from the account upon demand by or with the concurrence of the EPA Administrator. RINs would be released directly to the auditor (for roll-over purposes or for meeting a replacement requirement) or to a designated third party such as a standby trust (solely for meeting the auditor's replacement requirement). Maintenance of the account's minimum balance requirements would be part of the auditor's regular compliance reporting. The auditor would set up a separate account in EMTS to identify RINs placed in the escrow account.

*C. Affirmative Defenses*

After meeting with industry stakeholders over the course of several months, we recognize that providing an affirmative defense to civil liability arising from the transfer or use of invalid RINs would promote greater liquidity in the RIN market, especially the market for RINs generated by smaller producers. EPA believes that in the circumstances present in the RFS program, an affirmative defense combined with a reasonable QAP and adequate mechanisms to replace RINs that are invalidly generated, is an appropriate way to promote greater liquidity in the RIN market. It is our intent to design a system that would provide RIN owners with such an affirmative defense to civil liability provided appropriate measures are in place with respect to a QAP and a mechanism for replacement of invalidly generated RINs.

To this end, under the proposed regulations renewable fuel producers and obligated parties would have the option of participating in a quality assurance program that would provide significant assurance (Option A) or reasonable assurance (Option B) that RINs are validly generated at production facilities. EPA would approve Quality Assurance Plans (QAPs) that meet the basic criteria prescribed in the regulations, and these QAPs would be the template for production oversight by an independent third-party auditor. Performance of an EPA-approved QAP audit would be the foundation of an affirmative defense for parties that transfer or use QAP-verified RINs for compliance purposes. The affirmative defense would only be available to RIN owners for RINs that were verified by an independent third-party auditor using an EPA-approved QAP, whether Option A or Option B. Additionally, it is our intent that affirmative defenses would not be available to the generator of an invalid RIN. Since the quality assurance program would be voluntary, parties could still purchase RINs not verified by an EPA-approved QAP and transfer or use these unverified RINs, but they could not assert an affirmative defense if the RINs were found to be invalid, regardless of their level of good faith or any independent due diligence they perform prior to purchase.

Once a RIN has been verified by the auditor, any person, other than the generator of the RIN, who transfers or uses that verified RIN would be eligible for an affirmative defense if the RIN was in fact invalidly generated and the

person then transferred it to another party or used it for compliance purposes. Once a RIN was verified through an audit based on an Option A QAP, it would remain verified for the purpose of asserting an affirmative defense.[10] The QAPs would be designed to verify valid generation of RINs, and the assertion of an affirmative defense would be limited to the prohibited acts of transferring and using invalidly generated RINs. The proposed affirmative defense addresses violations of 40 CFR 80.1460(b)(2) and the use violation of 40 CFR 80.1460(c)(1). 40 CFR 80.1460(b)(2) prohibits any person from transferring to any other person a RIN that is invalid. 40CFR 80.1460(c)(1) provides that no person shall use invalid RINs to meet the person's RVO, or fail to acquire sufficient RINs to meet the person's RVO. The proposed affirmative defense would apply to violations arising from a person's use of invalid RINs whether or not his/her use of the invalid RINs caused them to fail to acquire sufficient RINs to meet their RVOs.

We are proposing new regulations in Section VIII to address RINs that become invalid downstream of the RIN generator, but an affirmative defense would not apply in this situation. It should again be noted that an affirmative defense is not available for a RIN that was not verified under an EPA-approved QAP. In other words, the system as it exists under the current regulations would continue to be an option for obligated parties who do not wish to purchase RINs verified by a QAP.

As noted above in Section III of this preamble, there are two types of verified RINs: those verified by a third-party auditor who is required to have a replacement mechanism to guarantee replacement of invalidly generated RINs (''Option A'' or ''A–RINs'') and those verified by a third-party auditor who is not required to replace invalidly generated RINs (''Option B'' or ''B–RINs''). The requirements for establishing an affirmative defense under Option A are described below, while Option B is described in Section V.C. In order to establish an affirmative defense under Option A or Option B, we are proposing that the elements would be required to be proven by a preponderance of the evidence. This means that each element was more likely than not to have been met. Additionally, we are proposing that when a person seeks to establish an affirmative defense, he/she would submit a written report to EPA, along with any necessary supporting documentation, that would demonstrate how the elements were met. The written report would need to be submitted within 30 days of the person discovering the invalidity of the RIN. We welcome comment on the elements of the affirmative defense and the effects of establishing an affirmative defense.

In the event that invalidly generated A–RINs are transferred or used, the person could establish an affirmative defense to liability arising from transferring or using the invalid A–RINs for compliance with an RVO if the following elements were proven by a preponderance of evidence:

(1) The RINs in question were verified in accordance with an EPA-approved Option A QAP as defined in EPA regulations;

(2) The RIN owner did not know or have reason to know that the RINs were invalidly generated prior to being verified by the third-party auditor;

(3) The QAP auditor or RIN owner informs the Agency within the next business day of discovering that the RINs in question were invalidly generated;

(4) The RIN owner did not cause the invalidity; and

(5) The RIN owner did not have a financial interest in the company that generated the invalid RIN.

Allowing invalid RINs to circulate in the market without EPA's knowledge would subvert the intent of the quality assurance program and the RFS program. In that context, the knowledge and notification requirements, (2) and (3) of the above list, ensure that the RIN owner did not knowingly allow invalid RINs to enter the market, and did not benefit from the use or retirement of the invalid RINs without informing EPA that the RIN was invalid.

An affirmative defense is a defense that precludes liability even if all of the elements of a claim are proven, and generally is asserted in an administrative or judicial enforcement proceeding. In this proposed rule, we are including an explicit notification requirement to allow EPA to evaluate affirmative defense claims before deciding whether or not to commence an enforcement action.

We request comment on all the elements we are proposing as prerequisites to asserting an affirmative defense, and in particular the requirement to report invalid RINs to the EPA within the next business day of discovery.

*D. Treatment of Invalid A–RINs*

Under both the current and proposed regulations, RIN purchasers must assess the level of risk associated with purchasing a particular RIN to comply with their RVOs. For instance, a purchaser unfamiliar with the renewable fuel producer generating the RIN risks the possibility that the RIN is invalid, while a well-known producer might seem less risky. The use of the QAPs as described in this NPRM would reduce the risk of purchasing invalid RINs, especially in situations where the producer of the RIN is unknown or new to the market. Where a producer is considered less risky in a given situation by a given purchaser, the RIN buyer may not need as extensive a QAP to reduce its risk to an acceptable level, and would be willing to risk the obligation to replace the RIN if it were found invalid. On the other hand, a RIN deemed more risky might require a more stringent QAP and additional assurances against the responsibility to replace it if the RIN turns out to be invalid. The obligation to replace invalid RINs that have been retired for compliance purposes will differ depending on whether the RIN was unverified, or verified through an Option A or Option B QAP.

Additionally, as discussed in Section III.C, we are proposing an administrative process for replacement of invalid RINs that places initial responsibility to replace invalidly generated RINs on the RIN generator responsible for causing the invalidity. In the event the RIN generator does not replace the invalidly generated RINs according to the administrative process, the third-party auditor under Option A would also be required to replace the invalid RINs. Thus, for invalidly generated RINs verified by an Option A QAP, the auditor would have the responsibility to replace the invalidly generated RINs, and the obligated party would have no responsibility for RIN replacement, if they met the requirements of the affirmative defense. However, in the event that regulated parties fail to implement the administrative process for replacement of any invalid RINs, the EPA could bring an enforcement action against any or all of the parties that were required to replace the invalid RINs, which under QAP Option A includes the RIN generator or auditor, but not the obligated party. See § 80.1474 of the proposed regulations for details of the administrative process for replacement of invalid RINs.

[10] If a RIN was improperly verified, the QAP auditor could be liable for committing the prohibited act of verifying a RIN without following the requirements of the EPA-approved QAP plan. However, the RIN would remain verified for purposes of asserting an affirmative defense by parties who transferred or used that RIN after it was verified.

This section describes the responsibilities of regulated parties that generate RINs or take ownership of RINs verified under Option A but which are ultimately found to have been invalidly generated. We also describe the conditions under which invalid RINs must be replaced, by whom, and the mechanisms for doing so.

1. Responsibilities for Replacement of Invalid Verified A–RINs

For Option A we are proposing a system wherein RINs would be verified by a third-party auditor using an EPA-approved QAP, and the third-party auditor would be liable for replacing invalidly generated RINs. Obligated parties would not be liable for replacing invalid RINs under Option A, and could use invalid A–RINs for compliance.

Obligated parties that purchase A–RINs would not be subject to civil liability if an A–RIN transferred or used for compliance purposes was later found to have been invalidly generated, if all the elements of an affirmative defense were successfully asserted, as described in Section IV.C. Moreover, obligated parties would be under no obligation to replace A–RINs used for compliance that were subsequently found to be invalid and could transfer and use invalidly generated A–RINs (if they did not know or have reason to know the A–RINs were invalidly generated prior to being verified) without violating the Prohibited Acts section, § 80.1460.

Under Option A, the third-party auditor would be required to have a replacement mechanism capable of replacing invalidly generated A–RINs that were verified by that auditor.[11] We chose to have the third-party auditor replace invalidly generated A–RINs to provide obligated parties the greatest amount of incentive to buy RINs from smaller producers, who might be perceived to be higher risk producers, which would increase the liquidity of the market. The third-party auditors would have the greatest oversight of A–RIN generation because of the robustness of the verification product they are providing to the market under Option A. Thus, charging them with the corresponding replacement obligation is a reasonable approach to achieving the goals of the proposal. Additionally, as discussed above, after meeting with several third-party auditors, we discovered that they, in most cases, do not have the same level of financial resources that many obligated parties possess. Therefore, requiring a replacement mechanism provides a level of security for the Agency in making sure the statutory volume mandate is met. As described more fully in Section IV.B, the form of this replacement mechanism would determine how this replacement occurs.

QAP Option A would provide the greatest risk mitigation for obligated parties in the event that their RINs were invalidly generated and later used for compliance purposes. Not only could they assert a defense to civil liability for using an invalid A–RIN for compliance purposes, but they would not be responsible for later replacing that RIN. QAP Option A would provide a means for all producers to participate in the market because obligated parties would bear no risk of a replacement obligation for any A–RINs, regardless of who produced them. Smaller producers would thus have access to a larger number of obligated parties as potential customers than they might have under the existing regulations, where obligated parties are always subject to a replacement obligation if the RINs they have retired are deemed invalid. We seek comment on this approach. In particular, we seek comment on what types of entities would seek to serve as auditors, what the potential risk burden might be, and how this burden could be quantified. We further seek comment on the impact of the RIN replacement cap on the cost of the program.

2. Invalid A–RIN Replacement

The current regulations do not specify that an obligated party must replace invalid RINs. Rather, obligated parties choose to replace invalid RINs in order to meet their RVOs. If the party holding an invalid RIN is an obligated party, and he does not have a sufficient number of valid RINs to meet his RVO, he must acquire additional valid RINs.

Under the quality assurance program the requirement to replace an invalid RIN may be placed on a party other than the owner of the invalid RIN. As a result, the regulations governing the replacement of invalid verified RINs must specify which party is responsible. Under Option A only the renewable fuel producer or importer who generated the invalid RINs and the auditor who verified those RINs would be responsible for replacing them.

In general, as discussed above, the administrative process for replacement of invalid RINs places initial responsibility of replacement of invalid RINs on the RIN generator, regardless of who actually owns the invalid RINs at the time that the invalidity is discovered. Even though we are proposing that invalid verified A–RINs could continue to be transferred and used for compliance, the generator of an invalid A–RIN would never be permitted to transfer verified A–RINs that are invalid.

If the RIN generator failed to replace invalidly generated A–RINs in the time frame established in the administrative process specified in the proposed regulations, the third-party auditor would be required to replace the invalid A–RINs. A QAP A auditor would be responsible for replacing invalidly generated A–RINs up to the levels discussed in Sections IV.B and IV.D.5. All regulated parties that are potentially liable for replacing invalid RINs would be free to obtain more coverage for RIN replacement than the regulations require. In the event that regulated parties fail to implement the administrative process for replacement of any RINs, the EPA could bring an enforcement action against any or all of the parties that were required to replace the invalid RINs, i.e., the RIN generator or auditor, but not the obligated party.

The methods for replacing invalidly generated RINs under QAP Option A are outlined below. See § 80.1474 of the proposed regulations for details of the administrative process for replacement of invalid RINs. In general, RINs verified under Option A could always be transferred or used even if they are discovered to have been invalidly generated, since RIN replacement would be carried out by the RIN generator or the auditor.

In the event that EPA or the independent third-party auditor alleged that an A–RIN was invalidly generated, that RIN would be a ''potentially invalid RIN'' or ''PIR''. The RIN generator would be required to take one of three possible corrective actions within 30 days of being notified of the PIR:

- Retire a valid A–RIN of the same D-type as the PIR, either by purchasing it or generating a new valid RIN and separating it from the physical volume that it represents;
- Retire the invalidly generated RIN (if still in the RIN generator's possession); or
- If the RIN generator believed the PIR was in fact valid, it would submit a written demonstration providing a basis for its claim of validity to either the third-party auditor or EPA, whoever identified the PIR. If the third-party auditor determined that the demonstration was sufficient, the RIN would not need to be replaced; however, EPA would reserve the right to make a determination regarding the validity of the RIN. If EPA determined

[11] It should be noted that the replacement mechanism could not be funded by RINs that were both generated and verified by the same auditor. Auditor requirements are discussed in further detail in Section VI.

that the demonstration was sufficient, the RIN would not need to be replaced. However, if the third-party auditor determined it was not sufficient and if the EPA confirmed that determination, or if EPA determined it was not sufficient, it would notify the RIN generator of that finding and again require the RIN generator to replace the PIR within 30 days.

In order to allow a producer to replace a PIR with a new valid RIN from renewable fuel that it has generated, we are proposing a new provision in § 80.1429 that would permit producers to separate RINs from volume they produced for the specific purpose of retiring RINs to replace a PIR. If the RIN generator retired a valid RIN to replace the PIR, the invalid RIN that it replaced could continue to be transferred or used for compliance by any party.

If the RIN generator did not replace an invalidly generated A–RIN for any reason, the regulations would require the third-party auditor to replace the invalid A–RIN. The auditor would have 60 days from the day it received notification of the PIR to retire a valid RIN to replace the PIR. Regardless of whether the RIN generator or auditor replaced the invalid A–RIN or not, any other party that owned the potentially invalid A–RIN could transfer or use that A–RIN for compliance purposes. Additionally, if an obligated party or other third-party owner of an A–RIN successfully established an affirmative defense, they would not be responsible for replacing the A–RIN if it was deemed invalidly generated.

3. Process for Replacing Invalid Verified RINs

When an auditor or EPA determines that a RIN is a PIR, the RIN generator would be notified directly. At this point, the process of retiring an appropriate valid RIN would begin.

There would be two forms of invalid RIN replacement under the proposed quality assurance program:

1. If a party that is required to replace an invalid verified RIN owns the RIN in question, it may be retired through EMTS in the same way that invalid RINs under the current regulations are retired.

2. If a party that is required to replace an invalid verified RIN does not own the RIN in question, or the RIN has already been used for compliance, the party would be required to acquire a valid RIN and retire it in place of the invalid RIN. In this case, since it would be a valid RIN that is being retired, a new retirement code reason would be created in EMTS for this purpose.

a. Types of RINs That Can Replace Invalid Verified RINs

Parties that retire valid RINs to replace invalid RINs would be required to match the renewable fuel category and the QAP category of both the valid and invalid RINs. For instance, an invalid verified RIN with a D code of 4, representing biomass-based diesel, could only be replaced with a valid verified RIN with a D code of 4. Moreover, we propose that invalid RINs verified through Option A could only be replaced with valid RINs verified through Option A, not Option B (and vice-versa). Since the balance of cost and risk could be different under Options A and B of the quality assurance program, RINs verified under the two options could have different prices even though they have the same D code. Thus there could be a financial incentive for valid RINs verified under one option to be used to replace invalid RINs verified under the other option, and this could lead to unforeseen market imbalances. Nevertheless, we request comment on whether valid RINs verified under one option should be permitted to replace invalid RINs verified under the other option.

We do not believe that valid RINs generated under the existing regulations (i.e. not under the proposed quality assurance program) should be permitted to replace an invalid verified RIN. The replacement of invalid RINs with valid RINs is an approach that we have designed in the context of the quality assurance program to allow verified RINs that are found to be invalid to continue to be transferred and used for compliance. We do not believe it would be appropriate to replace a RIN that had been verified through the quality assurance program with one that has not been verified. We request comment on this approach.

b. Impacts of RIN Replacement on Renewable Fuel Demand

The purpose of requiring invalid RINs to be replaced is to ensure that the annual renewable fuel volume mandates provided in CAA 211(o)(2) are fulfilled. However, the process of identifying invalid RINs and replacing them could potentially unfold over months or even years. This process could result in some portion of a given year's applicable volume requirement being fulfilled in a subsequent year, as replacement RINs may not be generated in the same year that the invalid RINs were generated. Thus there is a possibility that RIN replacement could cause greater demand for renewable fuel in a given year than the applicable standards are intended to require for that year. While we expect the number of invalidly generated RINs to be considerably less under our proposed quality assurance program than they were in 2010 and 2011, nevertheless we believe that this issue should be addressed.

While the RFS program is designed to result in the use of specified volumes of renewable fuel within each calendar year, the current regulations include provisions that allow the volumes used in a given year to be more or less than the specified volume. For instance, the RIN rollover cap at § 80.1427(a)(5) allows up to 20% of a given year's volume requirement to be met with previous-year RINs. Effectively, this means that the demand for renewable fuel in a given year can be up to 20% below the volumes required. In addition, the deficit carryover provision at § 80.1427(b) allows an obligated party to delay compliance with any portion of his RVOs by one year. Although an obligated party cannot carry over a deficit for two years in a row, the fact that there is no limit to the size of deficit carryovers means that in theory there could be substantial differences between the volumes required in a given year and the actual demand for renewable fuel in that year. In addition, the applicable percentage standard set by EPA is based on projections of gasoline and diesel production, and to the extent the actual production varies from these projections, the actual volume of renewable fuel may be more or less than the national volume called for in section 211(o)(2). Finally, under the current regulations, the future replacement of RINs may occur in the context of an enforcement action related to the transfer or use of invalid RINs. This replacement obligation under the proposed regulations has a similar effect as far as timing of RIN replacement, recognizing that under the proposal there should be many fewer invalid RINs generated, and therefore much less need for future RIN replacement.

Consistent with the effect of these various provisions, we believe it would also be appropriate to permit an invalid verified RIN to be replaced outside of the year in which it was generated. In the case of RIN replacement using valid RINs from a RIN escrow account or RIN bank, valid RINs are set aside before invalid RINs are generated and discovered. The small increase in demand for renewable fuel caused by setting aside these valid RINs would occur before RIN replacement, not after, and they would accrue at the same rate that RINs are being generated and verified. We believe that these features of RIN escrow accounts and RIN banks

would mitigate the impacts of RIN replacement on the renewable fuel market, and thus the use of future year RINs to replace invalid RINs generated in the past would be very unlikely to create a difficulty in meeting the volume mandates in a given year.

4. Cap on RIN Replacement

Another mechanism we are proposing to reduce the costs associated with the Option A quality assurance program is a cap on RIN replacement. Such a cap would help to ensure that QAP Option A could be implemented at a reasonable cost, and thus help to achieve the overall goals of this proposal. We are proposing that the cap would not apply to invalid RIN replacement for the nation as a whole, but rather to individual auditors that would be required to replace invalid RINs. However, since its primary benefit would be to reduce the costs of a RIN replacement mechanism that an auditor would be required to hold, we are proposing that the cap would apply only to auditors under QAP Option A, since auditors under QAP Option B would not be required to hold a RIN replacement mechanism. The cap would apply to all RINs that the auditor validates through an Option A QAP within a calendar year, and would apply separately to RINs of each D code.

The level of the cap reflects a balance between the need to ensure that the volume mandates of the RFS program are met and providing auditors with reasonable assurance that the costs of replacing invalid RINs will not be excessive. We believe that the incidences of invalidly generated RINs would be significantly lower for RINs verified under an Option A QAP than they were over the previous few years. Since we are proposing that the required RIN replacement mechanism should provide coverage for 2% of each D code of A–RINs verified by an auditor in the current year and (up to) the previous four years (*see* Section IV.B above), we likewise believe it would be appropriate to cap the number of A–RINs that each auditor must replace at 2% of the A–RINs it has verified in the same period. In other words, the RIN replacement cap should be equal to the minimum replacement coverage required for Option A auditors. As stated above, we believe that this cap would ensure that most if not all of invalidly generated A–RINs would be replaced and would provide assurance that the costs of a RIN replacement mechanism would not be excessive.

We are proposing that the cap apply to all A–RINs that have been verified by an auditor to date, up to a maximum of the most recent five year's worth of verified RINs. The table below provides an example for how the cap would be applied. (This table assumes the 2% cap continues into the second phase of the program, i.e. in 2016 and beyond, though as discussed above, we are proposing that the cap may change in 2016.)

TABLE IV.D.5–1—EXAMPLE OF APPLICATION OF RIN REPLACEMENT CAP UNDER OPTION A

| | A–RINs verified by the auditor | 2% cap | Maximum number of A–RINs that the auditor would be responsible for replacing |
|---|---|---|---|
| 2013 | 50,000,000 | 1,000,000 | 1,000,000 |
| 2014 | 30,000,000 | 600,000 | 1,600,000 |
| 2015 | 35,000,000 | 700,000 | 2,300,000 |
| 2016 | 40,000,000 | 800,000 | 3,100,000 |
| 2017 | 60,000,000 | 1,200,000 | 4,300,000 |

In 2018, the auditor's responsibility for replacing any 2013 RINs would expire and be replaced by its responsibility for 2018 RINs. Therefore, assuming a relatively static number of A–RINs verified each year and a static replacement cap, the auditor's replacement responsibility would plateau in year six of its auditing activities.

Finally, we are proposing that the 2% cap on A–RIN replacement would not apply to invalid RINs that were erroneously verified based on negligence, error, or omission of the auditor, including any failure by the auditor to properly implement its QAP. This issue is discussed further in Section VI.A.3.

## V. Provisions for RIN Verification Under Option B

As described in Section IV, the voluntary quality assurance program we are proposing today would include two compliance options that would be available to regulated parties. Both options would be intended to provide a more efficient mechanism for ensuring that RINs are validly generated, and both options would provide an affirmative defense against civil violations for certain actions involving invalid RINs. However, the two options would differ in whether invalidly generated RINs could be used for compliance, and in which party would be responsible for replacing invalidly generated RINs.

In this section we describe our proposed requirements for Option B. Under this option, obligated parties would be responsible for replacing RINs that were invalidly generated, as under the current regulations. Also, obligated parties would not be permitted to use an invalidly generated RIN for compliance unless the generator of the invalid RIN replaced it. However, since obligated parties are more likely to conduct their own oversight to verify that the RINs they acquire are valid, we are proposing that the requirements for QAPs used to verify RINs would be less rigorous than those under Option A. Moreover, we would not require third-party auditors who verify RINs as having been validly generated to replace RINs that are invalidly generated. For clarity, we refer to RINs that have been verified through Option B as B–RINs.

In this section we first cover the proposed elements of QAPs for Option B. We then describe how regulated parties could assert an affirmative defense for transferring invalidly generated RINs or using them for compliance. Finally, we discuss the treatment of invalidly generated RINs, from the responsibilities of owners of such RINs to the parties that would be required to replace them.

### *A. Requirements for Option B Quality Assurance Plans*

As described more fully in Section IV.A, QAPs would be used to verify that the production of renewable fuel at a given facility meets all EPA requirements and that corresponding RINs are validly generated. In general,

QAPs under Option B would operate in the same way that QAPs under Option A would operate. The primary difference would be the frequency of monitoring of the required QAP elements. Specifically, we propose that there would be no requirement for ongoing monitoring under Option B, rather, all elements of an Option B QAP would be evaluated on a quarterly basis. In addition, there are fewer required elements under an Option B QAP compared to an Option A QAP.

1. Elements of an Option B QAP

Option B QAPs would be used by EPA-approved independent third-party auditors to audit renewable fuel production. The QAP would have to include a list of elements that the auditor would check to verify that the RINs generated by a renewable fuel producer or importer are appropriate given the feedstock, production process and fuel for which RINs were generated. Therefore, each QAP must identify the specific RIN-generating pathway from Table 1 to § 80.1426 or a petition granted pursuant to § 80.1416 that it is designed to audit. The proposed required elements of an Option B QAP are discussed below. We request comment on these proposed elements, including detailed descriptions of any elements not mentioned below.

We also request comment on whether quarterly monitoring is appropriate under Option B, or whether different components could or should be subject to different schedules (e.g., monthly, biannually, etc), and what those schedules should be, and why.

a. Feedstock-Related Components

We propose eight required elements in Option B QAPs designed to ensure that the feedstocks used in the production of renewable fuel qualify to generate RINs. First, for each batch of renewable fuel, we propose that the QAP should verify that feedstocks meet the definition of ''renewable biomass,'' and identify which renewable biomass per § 80.1401.

We are also proposing specific elements depending on the type of feedstock. For instance, if the feedstock is separated yard waste, separated food waste, or separated MSW, the QAP would be required to verify that a separation plan has been submitted and accepted or approved, as applicable, as part of the registration requirements under § 80.1450, and meets the requirements of § 80.1426(f)(5), and that all feedstocks being processed meet the requirements of the separation plan. If the renewable fuel producer claims that the feedstocks qualify under the aggregate compliance approach, the QAP would be required to verify that the feedstocks are planted crops or crop residue that meet the requirements of § 80.1454(g).

The QAP would be required to verify that the feedstocks used to produce renewable fuel are valid for the D code being claimed under § 80.1426 (or have an approved petition under § 80.1416) and must be consistent with the information reported in EMTS. The QAP would be required to verify that the feedstock used to produce renewable fuel is not a renewable fuel from which RINs were already generated.

Finally, the QAP would be required to verify the accuracy of all feedstock-related factors used in calculation of the feedstock energy used under § 80.1426(f)(3)(vi) or (f)(4), as applicable, including the average moisture content of the feedstock, in mass percent, and the energy content of the components of the feedstock that are converted to renewable fuel, in Btu/lb. The feedstock-related elements that we are proposing to require for QAPs under Option B are shown in the table below. All items would be required to be monitored on a quarterly basis.

TABLE V.A.1.a–1—OPTION B: QAP MONITORING FREQUENCY—FEEDSTOCK-RELATED

| | Component |
|---|---|
| 1–1 ..... | Feedstocks are renewable biomass. |
| 1–2 ..... | Separation plan for food or yard waste submitted and accepted. |
| 1–3 ..... | Separation plan for municipal solid waste submitted and approved. |
| 1–4 ..... | Feedstocks meet separation plan. |
| 1–5 ..... | Crop, crop residue feedstocks meet land use restrictions. |
| 1–6 ..... | Feedstock valid for D code, consistent with EMTS. |
| 1–7 ..... | Feedstock is not renewable fuel where RINs generated. |
| 1–8 ..... | Accuracy of feedstock energy calculation. |

b. Production Process-Related Components

We are proposing four required elements in Option B QAPs designed to ensure that the renewable fuel production process is appropriate for the RINs being generated. Auditors submitting QAPs for EPA approval would be required to provide a list of specific steps they will take to audit all four elements.

First, the QAP would be required to verify that production process technology and capacity used matches information reported in EMTS and in the facility's RFS2 registration. The QAP also would be required to verify that the production process is capable of producing, and is producing, renewable fuel of the type being claimed, i.e., is consistent with the D code being used as permitted under Table 1 to § 80.1426 or a petition approved through § 80.1416.

For each batch of renewable fuel, the QAP would require mass and energy balances of the production process, and verify that the results match expectations for the type of facility being audited (e.g., biodiesel from soybean oil may have different expectations than biodiesel from non-food grade corn oil) based on typical values from prior input/output values, or similar facilities if prior values are not available. Energy inputs from on-site energy creation (e.g., propane, natural gas, coal, biodiesel, heating oil, diesel, gasoline, etc) and/or energy bills, and mass inputs/outputs such as feedstocks, additional chemicals, water, etc., would be required as part of the mass and energy balances.

Finally, the QAP would be required to verify the accuracy of all process-related factors used in calculation of the feedstock energy (FE) under § 80.1426(f)(3)(vi) or (f)(4), as applicable. The production process-related elements that we are proposing to require for QAPs under Option B are shown in the table below. All items would be required to be monitored on a quarterly basis.

TABLE V.A.1.b–1—OPTION B: QAP MONITORING FREQUENCY—PRODUCTION PROCESS-RELATED

| | Component |
|---|---|
| 2–1 ..... | Production process consistent with EMTS. |
| 2–2 ..... | Production process consistent with D code. |
| 2–3 ..... | Mass and energy balances appropriate. |
| 2–4 ..... | Accuracy of process-related factors used in feedstock energy (FE) calculation. |

c. RIN Generation-Related Components

We propose seven required elements in Option B QAPs designed to ensure that the renewable fuel being produced qualifies to generate RINs, and that the number of RINs generated is accurate.

For each batch of renewable fuel, the QAP would be required to verify that volumes of renewable fuel for which RINs are being generated meet, are designated for, and are sold as transportation fuel, heating oil, and/or jet fuel as defined in § 80.1401.

The QAP would be required to verify a number of things related to the fuel type. For instance, the QAP would include verification of the existence of certificates of analysis demonstrating that the renewable fuel being produced meets the applicable specifications and/or definitions in § 80.1401, and would be required to verify contracts with lab(s) for certificates of analysis, unless a facility has an on-site laboratory. If on-site, the QAP would be required to verify lab procedures and test methods. The QAP would be required to verify that renewable fuel being produced at the facility and that can be produced, matches information in RFS2 registration in terms of chemical composition, and would be required to sample and test the final fuel and compare to specifications. The QAP would be required to verify that renewable fuel being produced matches the D code being claimed under § 80.1426, or approved petition under § 80.1416.

The QAP would be required to verify a number of things related to the volume of renewable fuel produced, including a check to ensure that volume temperature correction procedures are followed correctly. The QAP would be required to verify that volume of renewable fuel produced matches expectations for the amount of feedstock being processed. The QAP also would be required to verify the accuracy of all fuel-related factors used in calculation of the feedstock energy, as applicable, including equivalence value for the batch of renewable fuel and the renewable fraction of the fuel as measured by a carbon-14 dating test method.

The QAP would be required to verify that production volume being claimed matches storage and/or distribution capacity and that actual volume production capacity matches the value specified in the facility's RFS2 registration. Finally, the QAP must verify that appropriate RIN generation calculations are being followed under § 80.1426(f)(3), (4), or (5) as applicable, and that RIN generation was consistent with wet gallons produced. The RIN generation-related elements that we are proposing to require for QAPs under Option B are shown in the table below. All items would be required to be monitored on a quarterly basis.

TABLE V.A.1.c–1—OPTION B: QAP MONITORING FREQUENCY—RIN GENERATION-RELATED

| | Component |
|---|---|
| 3–1 ..... | Renewable fuel sold for qualifying uses. |
| 3–2 ..... | Certificates of analysis. |
| 3–3 ..... | Renewable fuel matches D code or petition. |
| 3–4 ..... | Renewable content R is accurate. |
| 3–5 ..... | Equivalence value EV is accurate, appropriate. |
| 3–6 ..... | Volume production capacity is consistent with registration. |
| 3–7 ..... | RIN generation calculations. |

d. RIN Separation-Related Components

We propose three required elements in Option B QAPs to verify RIN separation. First, under the limited circumstances where a renewable fuel producer or importer separates RINs, the QAP would be required to verify that any RIN separation being done by the producer is done according to the requirements of § 80.1429, was reported to EMTS accurately and in a timely manner, and is supported by records. The QAP would be required to ensure that fuel that is exported was not used to generate RINs, or alternatively that RINs were generated but retired. Finally, the QAP must verify the accuracy of the annual attestation.

The RIN separation-related elements that we are proposing to require for QAPs under Option B are shown in the table below. All items would be required to be monitored on a quarterly basis.

TABLE V.A.1.d–1—OPTION B: QAP MONITORING FREQUENCY—RIN SEPARATION-RELATED

| | Component |
|---|---|
| 4–1 ..... | Verify RIN separation. |
| 4–2 ..... | Exported fuel not used to generate RINs. |
| 4–3 ..... | Verify accuracy of annual attestation. |

2. Approval and Use of QAPs

a. Approval of Quality Assurance Plan

We propose that approval of QAPs under Option B would operate in essentially the same way as under Option A, i.e., a third-party auditor choosing to verify RINs under the quality assurance program must submit a QAP to EPA for approval. A separate QAP is required for each different feedstock/production process/fuel type combination (i.e., pathway). A QAP for a given pathway may be used for multiple facilities for which that pathway applies. We are also proposing that a QAP must be submitted for approval every year. A QAP would be deemed valid on the date EPA notifies the party that submitted the QAP that it has been approved. Only an EPA-approved QAP could be used by a third-party auditor to provide audit services to renewable fuel producers.

b. Frequency of Updates/Revisions to QAPs

We are proposing that a QAP approval by EPA only applies to the plan that was submitted to EPA, and there are specific cases in which we believe a QAP should be modified and resubmitted for approval. We are proposing that a QAP would need to be revised if the renewable fuel producer makes a change in feedstock, production process, or fuel that is not covered by the QAP. Under even one of these conditions, the original plan submitted to EPA would no longer be applicable, and thus a new QAP would be required to be submitted and approved. We request comment on what changes would require a new QAP to be submitted for approval. Specifically, we request comment on whether a new QAP should be required to be submitted to EPA if the audited facility changes operations, feedstock, fuel type, etc.

*B. RIN Replacement Mechanisms*

As outlined in Section IV, auditors operating under Option A must have a replacement mechanism sufficient to cover a minimum percentage of invalid RINs they verify. We are proposing that there would be no requirement for a replacement mechanism under Option B, though this does not preclude any regulated party from setting up such a mechanism voluntarily or contracting amongst themselves to ensure that the obligated party's potential replacement responsibility is accounted for.

*C. Affirmative Defenses*

As discussed in Section IV.C, we believe that making an affirmative defense available against otherwise applicable civil liability arising from the transfer or use of invalid RINs would promote greater liquidity in the RIN market, especially the market for RINs generated by smaller producers.

Under the proposed quality assurance program, there would be two types of verified RINs: Those verified through an Option A QAP by a third-party auditor who is required to replace invalidly generated RINs, and those verified through an Option B QAP by a third-party auditor who is not required to replace such RINs. The requirements for establishing an affirmative defense

under Option B are described below. As discussed under Option A, we are proposing that when a person seeks to establish an affirmative defense, they would submit a written report to EPA, along with any necessary supporting documentation, that would demonstrate how the elements were met. The written report would need to be submitted within 30 days of the person discovering the invalidity of the RIN. We welcome comment on the elements of the affirmative defense and the effects of establishing an affirmative defense.

In the event that invalidly generated B–RINs are transferred or used, the person could establish an affirmative defense to the prohibited act of transferring or using the invalid B–RINs for compliance with an RVO if the following elements were proven by a preponderance of evidence:

(1) The RINs in question were verified in accordance with an EPA-approved Option B QAP as defined in EPA regulations;

(2) The RIN owner did not know or have reason to know that the RINs were invalidly generated at the time of transfer or use for compliance, unless a remedial action had been implemented by the RIN generator;

(3) The QAP provider or RIN owner informs the Agency within the next business day of discovering that the RINs in question were invalidly generated;

(4) The RIN owner did not cause the invalidity;

(5) The RIN owner did not have a financial interest in the company that generated the invalid RIN; and

(6) If the RIN owner used the invalid RINs for compliance, the RIN owner adjusted its records, reports, and compliance calculations in which the invalid RIN was used as required by regulations, unless a remedial action by the RIN generator had been implemented.

The affirmative defense requirements pertaining to B–RINs are the same as those for A–RINs, except for the element of knowledge, item (2), and for the element dealing with adjusting RVO calculations, item (6). Owners of verified B–RINs must not have known or had reason to know of the invalidity of the RIN at the time they either transferred a RIN or used a RIN for compliance purposes. This restrains the use of B–RINs more than A–RINs. This is because under Option B, obligated parties are responsible for replacing any invalid RINs used for compliance purposes, notwithstanding an affirmative defense to liability for the civil violation arising from the transfer or use of invalid RINs. We do not believe it would be appropriate to allow an obligated party to use an invalid RIN for compliance with its RVO if it already knew of the invalidity and therefore knew that, even if it successfully avoided liability for a civil violation, it would still be liable for retiring valid RINs in the future to replace the invalid RINs. Similarly, we do not believe it would be appropriate to allow a RIN owner to transfer an invalid RIN to a third party if it knew that the third party could not retire the RIN for compliance with an RVO (or even that it would be possible to sell an invalid B–RIN, given that it had lost its value for compliance purposes). For these reasons, we propose that the owner of an invalid but verified B–RIN cannot assert an affirmative defense if it knows or has reason to know of its invalidity at the time it transfers or uses the RIN for compliance purposes. Such knowledge would subvert the purpose of the quality assurance program. In regard to item (6), we have chosen to have the affirmative defense for B–RINs contingent upon obligated parties taking the invalid B–RINs out of the system or demonstrating that the producer implemented a remedial action by retiring a replacement B–RIN. This would help the Agency efficiently ensure that the environmental goals of the RFS program are achieved by incentivizing obligated parties to make the system whole.

*D. Treatment of Invalid B–RINs*

The treatment of invalid RINs would differ depending on the type of verified RIN that is chosen by the RIN owner. The treatment of invalid RINs verified under Option A is discussed in Section IV.D. This section describes the responsibilities of regulated parties that generate RINs or take ownership of RINs verified under Option B, but which are ultimately found to have been invalidly generated. We also describe the conditions under which invalid B–RINs must be replaced, by whom, and the mechanisms for doing so.

Additionally, we reiterate that we are proposing an administrative process for replacement of invalid B- RINs that places initial responsibility to replace invalidly generated RINs on the RIN generator responsible for causing the invalidity. In the event the RIN generator does not replace the invalidly generated B–RINs according to the administrative process, the obligated party would be required to replace the invalid RINs if the RINs were verified under Option B or were unverified. Thus, for invalidly generated RINs verified by an Option B QAP and for unverified RINs, the obligated party who owns the RINs would bear the replacement responsibility. However, in the event that regulated parties fail to implement the administrative process for replacement of any RINs, the EPA could bring an enforcement action against any or all of the parties that were required to replace the invalid RINs. See § 80.1474 of the proposed regulations for details of the administrative process for replacement of invalid RINs.

1. Responsibilities for Replacement of Invalid Verified B–RINs

Under Option B, RINs would be verified by a third-party auditor using an EPA-approved QAP just as under Option A. However, under Option B the obligated parties would be responsible for replacing invalidly generated RINs if the RIN generator failed to do so under the administrative process for replacement of invalid RINs.

Obligated parties that purchase B–RINs would not be subject to a civil violation if a B–RIN transferred or used for compliance purposes was later found to have been invalidly generated, if the elements of an affirmative defense were successfully asserted. See Section V.C. However, obligated parties would be responsible for replacing any invalidly generated B–RINs used for compliance purposes. Obligated parties would be free to contract with producers, independent third-party auditors, or other parties, such as brokers, to limit their exposure for replacement of invalidly generated B–RINs. Obligated parties would not be permitted to transfer or use B–RINs they know or have reason to know have been invalidly generated. Any such transfer or use would be deemed a prohibited act, pursuant to § 80.1460.

Option B would provide flexibility for obligated parties, producers, and third-party auditors to minimize the cost of verification services for RINs they deem to be less risky. Obligated parties that want the protection of an affirmative defense but would rather contract on their own terms regarding replacement of invalidly generated RINs could find this option appealing, as it would be easier for them to find coverage for less risky RINs and/or to demand replacement assurance as a term of their purchase contract or audit service contract. Additionally, smaller producers could be drawn to this option because the cost to participate in the quality assurance program could be less under Option B due to the absence of a requirement for a RIN replacement mechanism and the less stringent audit requirements for an Option B QAP.

However, as with Option A, Option B might not work for all parties in all

situations. Obligated parties could still view the potential risk of replacing invalidly generated B–RINs, even though they could be protected by contracts, as too high to purchase from smaller producers. Producers deemed more risky could therefore choose to use Option A QAP auditors. We seek and welcome comments on potential risk containment measures to alleviate obligated parties' potential concerns of purchasing from smaller producers

2. Invalid B–RIN Replacement

As mentioned above and in Section IV.D, the proposed administrative process for replacement of invalid RINs places initial responsibility of replacement of invalid RINs on the RIN generator, regardless of who actually owns the invalid RINs at the time that the invalidity is discovered.

If the RIN generator fails to replace invalidly generated B–RINs in the time frame established in the administrative process specified in the proposed regulation, the obligated party would be responsible for replacing the invalid B–RINs. In the event that regulated parties fail to implement the administrative process for replacement of any RINs, the EPA could bring an enforcement action against any or all of the parties that were required to replace the invalid RINs.

The methods (fully detailed in the proposed regulations in § 80.1474) for replacing invalidly generated RINs under QAP Option B are outlined below. In general, and in contrast to Option A, potentially invalid RINs verified under Option B could not be transferred or used for compliance purposes.

In the event that EPA or the independent third-party auditor alleges that a B–RIN was invalidly generated, the RIN would be a potentially invalid RIN or ''PIR''. The RIN generator would be required to take one of three possible corrective actions within 30 days of being notified of the PIR:

- Retire a valid B–RIN of the same D-type as the PIR, either by purchasing it or by generating a new valid RIN and separating it from the physical volume it represents;
- Retire the invalidly generated RIN (if still in the RIN generator's possession); or
- If the RIN generator believed the PIR was in fact valid, it would submit a written demonstration providing a basis for its claim of validity to either the third-party auditor or EPA, whoever identified the PIR. If the third-party auditor determined that the demonstration was sufficient, the RIN would not need to be replaced; however, EPA would reserve the right to make a determination regarding the validity of the RIN. If EPA determined that the demonstration was sufficient, the RIN would not need to be replaced. However, if the third-party auditor determined it was not sufficient and if the EPA confirmed that determination, or if EPA determined it was not sufficient, it would notify the RIN generator of that finding and again require the RIN generator to replace the PIR within 30 days.

As discussed in section IV.D.2, producers would be permitted to separate RINs from volume they produced for the specific purpose of retiring a RIN to replace a PIR. Similarly, if the RIN generator retired a valid RIN to replace the PIR, the invalid RIN that it replaced could continue to be transferred or used for compliance by any party. However, if the RIN generator for any reason failed to replace the PIR, the obligated party would be notified of the failure and would be required to retire the invalid RIN within 60 days. If the PIR had already been used for compliance with its RVO, the obligated party would be required instead to correct its RVO by subtracting the number of PIRs from it. Unless and until the PIR was replaced, either by the RIN generator or the obligated party, it would remain a PIR and could not be transferred or used for compliance purposes.

3. Process for Replacing Invalid Verified RINs

The process for replacing invalid RINs under Option B would in general be the same as under Option A. This includes the use of particular codes in EMTS for retiring replacement RINs, and a requirement that replacement RINs match the invalid RINs in terms of their D codes and type of verification under the quality assurance program (i.e. Option A or Option B). See the broader discussion under Section IV.D.3 regarding the general process for replacing invalid verified RINs.

In Section IV.D.3.b we discussed the possibility under Option A that replacement RINs may not be generated in the same year that the invalid RINs were generated, and that such circumstances could result in a portion of a given year's applicable volume requirement being fulfilled in a subsequent year. Thus there is a possibility that RIN replacement could cause greater demand for renewable fuel in a given year than the applicable standards are intended to require for that year. This same situation could occur under Option B. However, we do not believe that this circumstance would create a problem for the renewable fuels market under our proposed program for the reasons discussed in Section IV. In addition, we are proposing a limited exemption to B–RIN replacement that would absolve obligated parties from replacing a small percentage of invalidly generated B–RINs. See Section V.D.4 below. The level of this limited exemption may be above the number of invalid B–RINs generated, given that our proposed quality assurance program is expected to reduce incidences of invalidly generated RINs. As such, the occasions in which invalid B–RINs must be replaced would be correspondingly smaller, or even non-existent.

4. Temporary Limited Exemption for Invalid RIN Replacement

During the development of the proposed QAP process for today's NPRM, some regulated parties raised the possibility of a regulatory provision that would permit a small fraction of invalid RINs to not be replaced by parties downstream from the generator/producer. Given the perceived concerns about RINs generated by the smallest producers, such a limited exemption for invalid RIN replacement could help provide a means for those small producers to sell their RINs, particularly during the first two years while auditors are learning to implement QAPs. We believe that a provision for a temporary limited exemption for invalid RIN replacement may be appropriate, and we request comment on it. It is important to note that this would only apply to replacement by parties other than the producer. The issue is not whether some percentage of RINs should never have to be replaced, but instead what is the appropriate approach for replacement by parties other than the producer.

a. Determination of the Appropriate Exemption Level

The number of invalid RINs that could be exempt from replacement should be a small fraction of the overall volume obligation. We believe that this fraction should be consistent with some measure of real-world uncertainty in whether the renewable fuel volume requirements will be precisely met. Since there are several potential sources of uncertainty, there are several different ways that an appropriate exemption level for invalid RIN replacement could be calculated.

One source of uncertainty is the roundoff in the applicable percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel. In the RFS1 program that was finalized on May 1,

2007, we determined that the applicable percentage standards would be specified to two decimal places.[12] As a result, the total number of RINs that are actually used to comply with the applicable standards may differ by up to 0.005% from the precise number of RINs that would be needed to exactly match the volume mandates. For example, the applicable 2012 standard for biomass-based diesel was set at 0.91% on January 9, 2012, corresponding to a volume requirement of 1.0 bill gal. Since this percentage standard was the result of rounding to two decimal places, the actual calculated value could have been as high as 0.91499% and still round to 0.91%. Obligated party compliance with a standard of 0.91% instead of 0.91499% would mean that the actual volume of biodiesel consumed could be 0.9945 bill gal instead of 1.0 bill gal, a difference of 0.0055%. This same result can be obtained by dividing the maximum potential rounding error of 0.005% by the applicable percentage standard of 0.91%.

If we were to base the exemption for invalid RIN replacement on the roundoff error in the applicable percentage standards, the calculation would be carried out as follows:

$$Exemption\ for\ invalid\ RIN\ replacement = \frac{Maximum\ potential\ roundoff\ error\ (0.005\%)}{Applicable\ percentage\ standard}$$

Table V.D.4.a–1 provides the results if this formula were applied to the applicable 2012 standards.

TABLE V.D.4.a–1—EXEMPTION FOR INVALID RIN REPLACEMENT BASED ON ROUNDOFF ERROR IN APPLICABLE STANDARDS

| | Applicable standard (percent) | Exemption for RIN replacement (percent) |
|---|---|---|
| Cellulosic biofuel .... | 0.006 | [a] 8.3 |
| Biomass-based diesel ..... | 0.91 | 0.55 |
| Advanced biofuel .... | 1.21 | 0.41 |
| Total renewable fuel ..... | 9.23 | 0.05 |

[a] Based on a maximum potential roundoff error of 0.0005% instead of 0.005%

Another source of uncertainty in whether the required volumes of renewable fuel will actually be consumed is the difference between the projected volumes of gasoline and diesel that are used to calculate the applicable percentage standards, and the volumes of gasoline and diesel that are actually consumed. Using EIA's Short-Term Energy Outlook (STEO), we determined that projections of the sum of gasoline and diesel have typically exceeded the actual volumes by an average of 1.7%.

TABLE V.D.4.a–2—COMPARISON OF PROJECTED VERSUS ACTUAL OBLIGATED VOLUMES

| | Projected (bill gal) | Actual (bill gal) | Difference (percent) |
|---|---|---|---|
| 2011 | 196.9 | 193.1 | −1.9 |
| 2010 | 196.6 | 196.2 | −0.2 |
| 2009 | 200.1 | 193.7 | −3.2 |
| 2008 | 210.0 | 198.4 | −5.5 |
| 2007 | 208.4 | 206.8 | −0.7 |
| 2006 | 206.5 | 205.9 | −0.3 |
| 2005[a] | 204.0 | 203.7 | −0.2 |
| Average | ..... | ..... | −1.7 |

**Source:** EIA's Short Term Energy Outlook, Table 4a. Values represent the sum of motor gasoline and distillate fuel oil consumption. All projected volumes for a given year are from the October release in the previous year.

[a] STEO for years prior to 2005 do not include projections.

Based on the formula used to calculate the applicable percentage standards, a shortfall of 1.7% in actual gasoline + diesel consumption volumes will produce a 1.7% shortfall in the volume of renewable fuel consumed. Since Congress established the mechanism for calculating the applicable standards, including the use of projected volumes, this shortfall represents an acceptable source of uncertainty in the RFS program. As such, it may also represent an acceptable level of uncertainty in the context of establishing a limited exemption for invalid RIN replacement by parties other than the renewable fuel producer.

Based on our review of potential sources of uncertainty, it appears that differences between projected and actual gasoline and diesel volumes is the largest source of uncertainty. Using the historical differences shown in Table V.D.4.a–2, we propose that the limited exemption for invalid RIN replacement be set at 2%, approximating the 1.7% value to account for the variability shown in Table V.D.4.a–2. However, we request comment on a different value based on one of the alternative methods described above.

b. How would the limited exemption be applied?

A primary purpose of the overall proposal would be to address the market liquidity concerns discussed above,

[12] Since the required volumes of cellulosic biofuel have been significantly less than the volumes specified in the statute, we have used three decimal places for the percentage standard for cellulosic biofuel.

largely focused on the ability of small producers to sell RINs. As described in Section IV, QAP Option A addresses this by providing a significant degree of oversight on RIN generation, and placing the replacement obligation on the QAP auditor, not the obligated party. As a result, we do not believe that it would be necessary for the limited exemption to apply under Option A, and we propose that the limited exemption would only apply under Option B. In addition, we propose that the limited exemption would be available only to obligated parties that are required to replace invalid RINs, not renewable fuel producers that are required to replace invalid RINs.

Nevertheless, under Option A an auditor would be responsible for replacing invalidly generated RINs. If the limited exemption for RIN replacement was also available to the auditor, it might help reduce the costs associated with any RIN replacement mechanisms that auditors carry. We request comment on whether the limited exemption should also apply under Option A.

While a limited exemption for RIN replacement could also apply under the existing regulations, where RINs are not verified by an EPA-approved independent auditor, we do not believe that this would be appropriate. The voluntary QAP process that we are proposing in today's NPRM is an alternative to the existing regulatory provisions governing liability for the transfer or use of invalid RINs and their replacement. We are considering a limited exemption for RIN replacement only in this context, as a component of the voluntary QAP process and other measures aimed at achieving a regulatory structure that facilitates reasonable oversight of RIN generation, adequate assurance that invalid RINs will be replaced, and a market for RINs where the opportunity to produce and sell RINs is spread broadly across producers, including small producers.

We propose that the limited exemption would apply separately to each of the four standards under the RFS program: cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel. We do not believe it would be appropriate to apply the limited exemption only to the total renewable fuel standard, since doing so would permit much more than 2% of invalid advanced biofuel RINs to not be replaced. For instance, in 2012 the required volume of advanced biofuel is 2.0 bill gal, while the total renewable fuel requirement is 15.2 bill gal. If the 2% limited exemption was applied only to the total renewable fuel requirement, allowing up to 258 mill invalid RINs to not be replaced, this would represent 13% of the advanced biofuel requirement if all the invalid RINs were advanced biofuel RINs. It would represent an even larger fraction of biomass-based diesel.

We also propose that the limited exemption would apply separately to each obligated party that is responsible for replacing invalid RINs rather than to the industry as a whole. For instance, an obligated party would apply the 2% limited exemption to each of its four Renewable Volume Obligations (RVOs) to determine the number of RINs of each of the four types that would not need to be replaced should they be found to be invalidly generated. This approach would ensure that each obligated party can estimate at the beginning of each year how many RINs would not need to be replaced should they be determined to be invalid, and moreover would allow him to adjust his RIN acquisition activities in real-time to address risk based on the number of invalid RINs he had already acquired. If instead we applied the limited exemption to the nationwide volumes, we do not believe it would have the intended effect of reducing perceived risk for obligated parties considering acquiring RINs from smaller renewable fuel producers. So long as the total nationwide number of invalid RINs fell below 2%, no obligated party would be required to replace invalid RINs. However, each individual obligated party would never know if any RINs he acquires would be protected from replacement should they be determined to be invalid. Moreover, this approach would create an inherent imbalance among obligated parties holding invalid RINs since it could potentially allow one party to avoid replacing a large number of invalid RINs while effectively forcing another party to replace all of its invalid RINs.

We propose that the limited exemption would represent the threshold below which invalid RINs would not be required to be replaced rather than a trigger that determines when all invalid RINs must be replaced. Under our proposed threshold approach, an obligated party would know at the beginning of each year that 2% of the RINs needed to meet each of his RVOs would not need to be replaced if those RINs were B–RINs and were determined to be invalidly generated. The limited exemptions would be calculated as follows:

$LE_{CB,i} = 0.02 \times RVO_{CB,i}$

$LE_{BBD,i} = 0.02 \times RVO_{BBD,i}$

$LE_{AB,i} = 0.02 \times RVO_{AB,i}$

$LE_{RF,i} = 0.02 \times RVO_{RF,i}$

Where:

$LE_{CB,i}$ = Limited exemption for cellulosic biofuel for year i

$LE_{BBD,i}$ = Limited exemption for biomass-based diesel for year i

$LE_{AB,i}$ = Limited exemption for advanced biofuel for year i

$LE_{RF,i}$ = Limited exemption for renewable for year i

$RVO_{CB,i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

$RVO_{BBD,i}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year i after 2010, in gallons, pursuant to § 80.1407.

$RVO_{AB,i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

$RVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

Under this threshold approach, the number of B–RINs than an obligated party would be required to replace would be those in excess of the applicable limited exemption LE as calculated above. Under an alternative trigger approach, an obligated party would not be required to replace any invalid RINs so long as the number of invalid RINs it owns falls below 2% of his RVOs. However, if at any time within a calendar year the number of invalid RINs it owns exceeded 2% of his RVOs, it would be required to replace all of them. We do not believe that this alternative would have the intended effect of reducing perceived risk for obligated parties considering acquiring RINs from smaller renewable fuel producers.

Finally, we propose that the limited exemption would be applicable only during the first two years of the quality assurance program, for RINs verified under Option B in calendar years 2013 and 2014. During this timeframe, we expect regulated parties to be working to optimize implementation of the quality assurance program, and it may not be possible for all of the smallest renewable fuel producers to participate under QAP Option A. The limited exemption can help to ensure that the RIN market is more liquid as the program starts up, as obligated parties would be less concerned about potential invalidity for B–RINs. But as the program matures, we believe that there will be much less need for a limited exemption since small renewable fuel producers will have greater opportunities to have their RINs verified under Option A. Moreover, obligated parties will gain experience in the first

two years of the program with Option B, and we would expect their confidence in the validity of B–RINs to grow over this timeframe as well. We request comment on this approach and whether it should apply for a period longer than two years.

## VI. Proposed Requirements for Auditors

Today, we are proposing a number of requirements for the independent third-party auditors that would use approved quality assurance plans (QAPs) to audit renewable fuel production to verify that RINs were validly generated by the producer. Qualified, independent third-party auditors would be integral to the successful implementation of the combination of provisions EPA is proposing. Under both options, third-party auditors would need to meet minimum qualifications (e.g. independence and professional competency requirements). All third-party auditors would be required to register with EPA, similar to how other parties (e.g. gasoline refiners, renewable fuel producers, etc.) register for other EPA fuels programs. We are also proposing to require that third-party auditors under both options have professional liability errors and omissions insurance (E&O Insurance). However, under Option A, third-party auditors would also be required to have an approved RIN replacement mechanism since, as discussed in Section IV.B, they would be responsible to replace RINs that become invalid for any reason after being verified by the auditor. During registration, third-party auditors would submit QAPs to EPA for approval, demonstrate that they meet minimum qualifications, and provide the Agency with other information as discussed below. After EPA has approved a QAP and registered the third-party auditor, we propose that the auditor could flag RINs in EMTS as verified. This would provide parties throughout the renewable fuel distribution chain the confidence that a RIN has been validly generated and that an affirmative defense may be established. Finally, in order to ensure that QAPs are appropriately implemented, we are also proposing recordkeeping, reporting, and attest engagement requirements on third-party auditors consistent with similar requirements on other parties in RFS.

### *A. Who can be an auditor?*

One key element of the QAP process is the minimum qualifications that the auditors conducting facility visits must have. Today we are proposing minimum qualifications for an auditor in order to implement a QAP and verify RINs. First, as is required of independent third-parties that conduct engineering reviews for renewable fuel producers under RFS, auditors would be required to be independent of the renewable fuel producers that they are auditing. Second, auditors would be required to have the professional expertise to effectively implement QAPs. Third, under Option A, third-party auditors would be required to also have an approved RIN replacement mechanism, as discussed in Section IV above to assure replacement of invalid RINs generated from facilities that an auditor has audited, as well as E&O insurance. EPA believes that these key qualifications would provide assurances that auditors could successfully implement QAPs and would help avoid the generation of invalid RINs at the fuel producer level. We seek comment on whether any additional minimum qualifications would be necessary for auditors to successfully implement QAPs or aid in the generation of invalid RINs at facilities.

#### 1. Independence

The first, and perhaps the most important, requirement for auditors is that they remain independent of renewable fuel producers. Independence of the auditor from upstream parties is necessary to ensure that RINs are not inappropriately validated due to a conflict of interest between the third-party auditor and the renewable fuel producer. For example, if auditors were employed by the renewable fuel producers to validate RINs produced from a facility owned by the producer, the auditor would have an incentive to ensure that RINs produced from that facility appeared valid, while the RINs may in fact be invalid. In the RFS2 final rule, we defined an independent third-party as a party that was not operated by the renewable fuel producer (or any subsidiary or employee of the producer) and free from any interest in the renewable fuel producer's business. Similar provisions have also appeared in RFS1 and other fuels programs when a third-party is required to independently test fuel samples, audit reporting and recordkeeping requirements, and/or conduct in-use compliance surveys. Thus, we are proposing the same independent third-party definition for third-party auditors that we used in RFS2 for an independent third-party to conduct engineering reviews. Additionally, we are proposing that independent third-party auditors submit an affidavit attesting to their independence as part of registration (discussed below).

Although the proposed requirement for independence is limited to renewable fuel producers, it could be extended to include independence from other parties as well. However, we believe this is unnecessary. This proposed rulemaking is not intended to discourage any current efforts that an obligated party or other intermediary may take to ensure compliance with RFS requirements, and requiring that third-party auditors be independent of all parties may hamper existing efforts by industry to mitigate invalid RIN generation. However, some parties may have a conflict of interest with third-party auditors that might promote the improper validation of RINs. For example, a third-party auditor could also be acting on behalf of a RIN-owner, which may be an incentive to validate RINs fraudulently to sell to other parties. Therefore, we specifically seek comment over whether we should expand the proposed definition of independence to include other parties.

We also recognize that a conflict of interest may exist if the independent third-party implementing a QAP for a renewable fuel production facility was the same party that conducted the facility's engineering review required under § 80.1450(b)(2), since the auditor would essentially be verifying its own assessment of a facility. Similar reasoning could apply to the independent third-parties that do attest engagements. However, we recognize that, especially in the beginning, there may be a limited number of qualified independent-third party auditors capable of implementing QAPs for a facility if we do not allow independent third-parties that conducted engineering reviews or attest engagements to also implement QAPs for a given facility. Therefore, we specifically seek comment on whether we should exclude a third-party that has conducted an engineering review or attest engagement for a facility from implementing a QAP for that same facility. We also seek comment on whether any other situations present a conflict of interest for independent third-party auditors that may disqualify a third-party from being able to implement a QAP for a facility.

#### 2. Professionally Qualified To Implement a QAP

Another key element to ensure the effective implementation of QAPs at renewable fuel production facilities would be that auditors have the necessary professional expertise and credentials. In RFS2, we require that each renewable fuel production facility undergo an engineering review by a

licensed professional engineer as part of registration. In this NPRM, we are proposing a similar requirement for auditors since the verification of production capabilities of a quality assurance program should be similar to the type of review conducted in the engineering review process for RFS registration. Independent third-party auditors would demonstrate that they possess the required professional expertise during registration. We are not proposing that companies that register as a third-party auditor be solely constituted of professional engineers to implement an EPA-approved QAP and conduct facility audits; however, a licensed professional engineer would need to supervise and or work in a team with other employees of the third-party auditing company.

However, since the complexity of QAP implementation may vary substantially based on size and scope of the QAP and whether RINs are verified under Option A or Option B, independent third-parties that conduct audits may need to demonstrate additional professional qualifications to EPA before they can be registered to implement QAPs. For example, periodic (e.g. quarterly) audits may include careful review of several months' worth of invoices and other bookkeeping records for a facility, and this type of audit may be more suitable to a certified public accountant (CPA) than a professional engineer. Additionally, we require that all responsible parties in RFS undergo annual attest engagements conducted by a licensed certified public accountant (CPA) or certified internal auditor (CIA) to verify similar information. Although we are not proposing that independent third-parties that implement QAPs demonstrate that CPAs conduct audits, we are seeking comments over whether third-parties must have any additional qualifications (e.g. minimum years of experience, professional licensing in states where audited facilities are located, etc.) before we register them as auditors under the proposed quality assurance program.

Another potential qualification, suggested by a party that may conduct third-party facility audits, could be that an independent third-party auditor has sufficient knowledge of the RFS program in order to conduct audits and potentially validate RINs. Although we believe that third-party auditors should have thorough knowledge of RFS requirements to implement QAPs, it would be difficult to construct a standard to measure a third-party auditors ''competency.'' It was suggested by a party that may conduct third-party facility audits that we require elements of various ISO validation standards such as, for example, ISO standards used for validation of international greenhouse gas programs. We believe that these standards could serve as a useful template in the development of similar voluntary consensus standard board (e.g. ISO and ASTM International) specifications for third-party auditors. However, we also believe that standards such as these are best developed through the existing collaborative processes that draw upon the expertise of affected stakeholders. It is also important to note that several independent third-parties have developed sufficient expertise with RFS to provide useful validation services to obligated parties, and we believe that there exist adequate incentives for parties to ensure that third-party auditors understand the RFS program sufficiently to prepare and implement QAPs. Therefore, we are not proposing to create such a requirement for auditors, but we do seek comment on whether the Agency should be responsible for the development of a similarly detailed professional competency standard to validate RINs.

3. Errors and Omissions Insurance

An additional element to ensure the effective implementation of QAPs at renewable fuel production facilities would be to require independent third-party auditors to maintain professional liability insurance, commonly known as Errors and Omissions or E&O insurance. We are proposing this as a registration requirement for both QAP Option A and Option B. The amount of insurance should be, at a minimum, equal to 2% of the RINs the auditor verifies in a year to cover the replacement of any RINs verified by an auditor that turn out to be invalid as a result of auditor error, omission, or negligence. Additionally, we are proposing that independent third-party auditors would be required to use insurance providers that possess a financial strength rating in the top four categories from either Standard & Poor's or Moody's (i.e., AAA, AA, A or BBB for Standard & Poor's and Aaa, Aa, A, or Baa for Moody's). We feel that requiring E&O insurance would help to achieve the level of professionalism necessary for the quality assurance program to work as intended. Possession of E&O insurance would lend business and financial credibility to a potential QAP auditor in the eyes of their customers, as well as provide a level of comfort for the Agency that the statutory volume mandate would be met in the event of error, omission, or negligence on the part of a QAP auditor.

Since E&O insurance policies are intended to provide coverage for any failings on the part of the auditor, we do not believe that the 2% cap on RIN replacement proposed for Option A should apply to RIN replacement that is covered by an E&O insurance policy. Thus we are proposing that the 2% cap on RIN replacement would only apply to invalidly generated RINs that the auditor is responsible for replacing, but which are not the result of errors, omissions, or negligence on the part of the auditor as defined in the E&O policy.

We seek comment on (1) Whether the requirement of E&O insurance would fulfill the goals discussed above, (2) whether the requirement would prevent some third-party auditors from being able to participate in the quality assurance program, and (3) what, if any, minimum amount of coverage should be required and what that minimum amount should be based on.

*B. Registration Requirements*

In order to implement and enforce the new quality assurance program that we are proposing today, we believe that third-party auditors must become regulated parties under the RFS program. We believe that it would be necessary to impose registration, recordkeeping, and reporting requirements on third-party auditors to ensure that appropriate QAPs are executed according to the requirements specified in the proposed regulations. This would allow EPA and affected parties to monitor and have confidence that third-party auditors are implementing QAPs appropriately.

One necessary requirement for third-party auditors would be that they have to register with EPA as a regulated party through the Agency's Central Data Exchange (CDX). We already require that obligated parties, renewable fuel producers, and RIN owners register with EPA, and that those parties provide us with production information, basic company information, and in the case of renewable fuel producers, third-party engineering reviews. Requiring third-party auditors to register would allow EPA to determine that the basic minimum requirements discussed in Section VI.A. are met. Registering auditors would also facilitate the process of allowing third-party auditors to indentify RINs as having been verified in EMTS so other parties may recognize RINs as having been verified under an EPA-approved QAP.

During registration, we propose that third-party auditors would need to

provide basic contact information as well as their basic corporate structure. This information is useful both as contact information and to help the Agency determine whether a third-party auditor is a legitimate legal entity. Third-party auditors would be required to indicate which facilities they intend to audit. EPA recognizes that a third-party auditor may contract with additional renewable fuel producers and facilities to implement QAPs after initial registration, and therefore, we are also requiring that a third-party auditor be required to update their registration each time they wish to verify RINs for additional renewable fuel producers or new facilities. This information would help the Agency ensure that QAPs submitted to the EPA as part of the registration process are consistent with the type of renewable fuel facilities being audited.

Since we are proposing a requirement that third-party auditors implementing QAPs under both Options A and B have E&O insurance (see Section VI.A.3), third-party auditors would be required to provide copies of any applicable E&O insurance policies during the registration process. If a third-party auditor is implementing a QAP under Option A, they would need to also provide EPA with copies of pertinent documents and other evidence that demonstrate they have an adequate replacement mechanism in place. This information is necessary to ensure that third-party auditors have the ability to cover their RIN replacement responsibilities. Third-party auditors would also be expected to provide EPA with copies of professional certifications (see Section VI.A.2) and a signed affidavit that states that the third-party auditor is independent of and free from any conflicts of interest with any renewable fuel producer that for which they intend on verifying RINs.

Third-party auditors would also be required to provide QAPs for Agency approval during registration, and EPA would be required to approve a QAP before a third-party auditor could be registered and use a QAP for a facility audit. EPA believes that it would be inappropriate to register a third-party auditor without an appropriate QAP. QAP details are discussed in more detail in Sections IV.A and V.A for Options A and B, respectively.

Recognizing that foreign third-party auditors may have unique challenges compared with domestic third-party auditors, EPA is proposing additional registration requirements for foreign third-party auditors. In the final RFS2 rulemaking, we outlined a number of requirements that applied to foreign RIN owners (see 40 CFR 80.1467). These additional requirements are designed to ensure enforcement of RFS regulations at the foreign RIN owner's place of business and are similar to requirements for foreign parties under other fuels regulations. For example, under RFS, foreign RIN owners must submit reports in English and provide translated documents in English upon demand from EPA inspectors or auditors, must submit themselves to administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity, and post a bond covering a portion of the gallon-RINs that a foreign RIN owner owns. EPA is proposing the same requirements be extended to foreign third-party auditors and seeks comment over whether fewer or additional requirements would be necessary.

The effectiveness of this proposed rule is contingent on the integrity of the third-party auditors and their ability to competently implement approved QAPs. The registration process is designed to help ensure that QAPs are implemented by competent, qualified and independent third-party auditors. A third-party auditor may only verify RINs under a voluntary quality assurance program if the auditor is registered with EPA. In order to ensure that auditors fulfill their regulatory obligations, we propose that each auditor would renew its registration on an annual basis. The renewed registration submissions would include updates to information required for initial registration and an affidavit by the auditor that it is in full compliance with applicable QAP regulations. The affidavit would include a specific certified statement that the third-party auditor (1) Has only verified RINs that it reviewed under an EPA-approved QAP, (2) has informed EPA and RIN generators about all potentially invalid RINs that it discovered, and (3) has fulfilled its RIN replacement obligation if applicable. Third-party auditors that fail to accurately and completely renew their registrations will no longer be registered and therefore can no longer implement QAPs and verify RINs. We also propose that we may revoke a third-party auditor's registration at any time if it determines that the third-party auditor has failed to meet its regulatory requirements. Furthermore, we are proposing that we can deny a registration application from any third-party auditor that employs any person that was involved in the verification of RINs for a third-party auditor whose registration was revoked. We seek comment on whether this approach is appropriate.

We also seek comment on whether we should require that third-party auditors' registration information, including QAPs, be made publicly available. We believe that there is a positive correlation between the effectiveness of a quality assurance program and the amount of transparency in the third-party auditor's registration and QAP implementation processes. By making registration information publicly available, it would allow other parties to evaluate whether they have confidence in a QAP conducted by a third-party auditor. This would also allow affected stakeholders to notify EPA of concerns or deficiencies in a third-party auditor's registration or QAP. Some third-party auditors may argue that such information is confidential business information. To address this concern, EPA could allow third-party auditors to submit both confidential and public versions of registration documents to ensure that sensitive information is protected.

*C. Other Responsibilities of Auditors*

1. Notifying the Agency When There Are Problems

We believe that an important element of today's proposed quality assurance program is the timely notification and correction of problems that are identified during the facility audit process, and a requirement to communicate potential problems that are uncovered through this process. Historically, in other EPA fuels programs, such as the RFG, ULSD, and E15 Survey Programs, we require that the independent party that implements the program report potential violations of standards within 24 hours of identifying the potentially non-compliant fuel sample. This has allowed the Agency to work with responsible parties to correct potential issues in a timely manner, thereby reducing the potential environmental impact of the non-compliant fuel. We believe that the utility of this third-party notification would enhance the effectiveness of today's proposed quality assurance program. Therefore, we are proposing requirements that third-party auditors would be required to notify EPA and the renewable fuel producer of potential problems, including but not necessarily limited to fraud, errors, and/or omissions, within 24 hours after a problem has been identified. We seek comment on whether EPA should allow third-party auditors more or less time to report potential issues that arise during

audits of renewable fuel production facilities.

2. Indentifying Verified RINs in EMTS

The primary goal of today's proposed quality assurance program is to allow downstream parties to feel confident that RINs are being appropriately generated at renewable fuel production facilities. Third-party auditors have an integral role in providing this assurance by verifying that facilities are in fact producing the type and quantity of renewable fuels from the appropriate feedstocks using specified pathways, and that the associated RINs have been validly generated. The next step would be for third-party auditors to identify RINs as having been verified so that downstream parties would know which RINs had been subjected to review by an auditor and thus can be the basis for an affirmative defense. To attain this goal, we are proposing requirements that third-party auditors would be responsible for tagging RINs as having been ''verified'' in a way that would be clearly visible in EMTS after they have been generated.

We propose that verifying a RIN in EMTS be prospective, meaning that a RIN could only be verified after an auditor has audited a facility in accordance with an approved QAP and met other conditions discussed below. Apart from the verification of RINs during the interim period between release of the NPRM and the final rule, we do not believe that there are any benefits from allowing verification of RINs retroactively in EMTS that warrant the complication, confusion, and risks associated with it.

We also believe that before a QAP can be implemented by a third-party auditor, a relationship must be established in CDX between the third-party auditor and the renewable fuel producer or importer. This process would occur during the initial registration of a third-party auditor and after any updates to a third-party auditor's registration. This procedure would be necessary to ensure that both the third-party auditor and the renewable fuel producer or importer have agreed to establish a quality assurance program under a proposed affirmative defense option. Also as discussed in Section IV.B, EPA may not recognize this relationship unless the third-party auditor satisfies applicable replacement mechanism requirements. Hence, we propose that renewable fuel producers would have to acknowledge through an update of their registration that a third-party auditor will implement a QAP and verify RINs at the renewable fuel producer's facility.

Third-party auditors should also have the ability to stop verification of newly generated RINs should a problem arise during the QAP implementation process. Since third-party auditors would be in the best position to identify potentially invalid RINs before EPA and other parties, allowing third-party auditors this flexibility is necessary to ensure that problems with invalid RINs are quickly identified and corrected. Additionally, since under Option A and potentially as a contractual matter Option B, a third-party auditor may have some liability to replace RINs, they should have the ability to limit their liability should they notice through the implementation of a QAP that RINs may be invalid. However, if a third-party auditor removes the ''flag'' for a facility that is generating RINs, this will not affect a previously verified RIN's ability to be used for compliance if it has been generated prior to the third-party auditor choosing to no longer validate a facility's RINs. Since one of the goals of today's proposed quality assurance program would be to mitigate the transaction and use of invalid RINs for compliance purposes, we are proposing that third-party auditors under both options be required to remove the validation flag for RINs generated at a facility until problems are rectified and confidence is restored to both the third-party and EPA that newly generated RINs are valid.

As mentioned above, one key requirement for the effective implementation of a QAP by a third-party party auditor would be that the third-party auditor must be free from conflicts of interest with renewable fuel producers that are being audited. However, some existing third-party auditors currently act as agents for renewable fuel producers by not only verifying that RINs are appropriately generated at renewable fuel producer's facilities, but by also handling a renewable fuel producer's reporting activities in EMTS (e.g. they submit reports to generate RINs in EMTS for renewable fuel volumes produced at a facility owned/operated by the renewable fuel producer). This may present a conflict of interest since those third-party auditors have a contractual relationship to act on behalf of the renewable fuel producer. On the other hand, since third-party auditors are going to be responsible for verifying all RINs generated at a facility in EMTS, they may be able to serve as an agent for a renewable fuel producer in this capacity without an apparent conflict of interest. We seek comment on whether we should allow third-party auditors to act as agents in the generation of RINs for renewable fuel producers. We also seek comment on any element of today's proposal to require third-party auditors to validate RINs in EMTS.

Finally, as pointed out elsewhere, Option A RINs may have more value in the marketplace than Option B RINs. We seek comment on mechanisms that the market will employ to differentiate such RINs across the supply chain and how EPA may facilitate such transfers in the context of EMTS.

3. Recordkeeping, Reporting, and Attest Engagements

a. Recordkeeping Requirements

Under both options, we propose third-party auditors would be required to implement EPA-approved QAPs and maintain records of all verification and validation activities related to the implementation of a quality assurance program. These records would serve to demonstrate that a QAP was appropriately implemented if invalid RINs are reported at a later date.

b. Reporting Requirements

Under the existing RFS program, obligated parties, exporters of renewable fuel, producers and importers of renewable fuels, and any party who owns RINs must report appropriate information to EPA on a regular (e.g. quarterly and/or annual) basis. Similarly, we are proposing that the third-party auditors would be required to submit quarterly reports, in line with existing RFS quarterly reporting deadlines, identifying how many RINs the auditor has verified the previous quarter. We are also proposing that independent third-party auditors would have to include the facilities audited and the dates of those audits. This information would allow EPA to compare a third-party auditor's reported activity to information gleaned from EMTS to ensure that third-party auditors are appropriately implementing QAPs.

If a third-party auditor were to implement a QAP under Option A, then he would be required to also report the size of the replacement mechanism he has obtained to cover their potential RIN replacement liability. We believe that these reports would help the Agency ensure that third-party auditors are maintaining an appropriate replacement mechanism to replace invalid RINs relative to the number of RINs verified by the third-party auditor. For example, renewable production facilities sometimes increase production levels, which may increase the size of the RIN

replacement mechanism a third-party auditor would need to have.

We recognize that some may see this as providing the same information twice since we are proposing to require that independent third-party auditors identify facilities they intend to audit and provide proof of an appropriate replacement mechanism during registration. However, we believe that quarterly reports indicating where and when audits occurred and the size of the appropriate RIN replacement mechanism relative to the number of RINs validated by third-party auditors would provide a useful compliance tool to better ensure that third-party auditors are effectively implementing QAPs since failure to fulfill reporting requirements may constitute a violation to the Clean Air Act and may subject the responsible party to the penalties discussed below. We seek comment on whether we should require quarterly reports from third-party auditors, or more/less frequent reporting, and whether we should require third-party auditors to report additional information on a regular basis.

c. Attest Engagements

We seek comment on whether to require that third-party auditors have an annual attest engagement similar to those required of other parties currently required under § 80.1464. Attest engagements are used in many of the Agency's fuels programs and are similar to financial audits. Attest engagements consist of an independent, professional review of compliance records and reports. During discussions with stakeholders, some suggested that we establish an ''audit the auditor'' program. We believe that attest engagements may be an appropriate means of verifying the accuracy of the information reported to us by the third-party auditors. Similar to current RFS requirements, the attest engagement could consist of an outside certified CPA or certified independent auditor following agreed upon procedures to determine whether underlying records, reported items, and transactions agree, and issuing a report as to their findings and that attest engagements occur annually. These requirements would be similar to those we require of other parties in RFS.

d. Prohibited Activities for Third-Party Auditors

We are proposing new prohibition and liability provisions applicable to third-party auditors. Since we are creating a new regulated party that will be integral to the successful implementation of voluntary quality assurance programs, we believe it is appropriate to hold these parties liable if they fail to comply with the proposed requirements. The prohibition and liability provisions would be similar to those of other fuels programs. We propose to identify certain prohibited acts, such as failing to properly implement an EPA-approved QAP; failing to timely notify RIN generators and EPA of potentially invalid RINs; failing to replace invalid RINs, if applicable; and verifying RINs that are invalid.

In addition, a third party auditor who is subject to an affirmative requirement under this proposal will be liable for a failure to comply with the requirement. For example, third-party auditors will be liable for separate violations for failing to comply with the registration, reporting and recordkeeping requirements. Like other fuels programs, we propose that if the third party auditor causes another person to violate a prohibition or fail to comply with a requirement, the third party auditor may be found liable for the violation.

The penalty and injunction provisions in section 211(d) of the Clean Air Act apply to violations of the renewable fuels regulations implemented pursuant to section 211(o). Accordingly, under the proposed rule, any person who violates any proposed prohibition or requirement may be subject to civil penalties of $37,500 for every day of each such violation and for the amount of economic benefit or savings resulting from the violation.

We request comment on the need for any additional prohibition and liability provisions specific for third-party auditors.

## VII. Proposed Requirements for Audits

Under the proposed quality assurance program, an auditor would use an approved QAP as the basis for the verification of renewable fuel produced and RINs generated at a facility. In order to verify production, the auditor must review documents, monitor facility activity, contact entities that do business with the facility, and conduct onsite visits. All of these components constitute an audit of the facility. The elements of a QAP are discussed in some detail in sections IV and V. The following provides some additional detail on the proposed elements of an audit. As with other provisions of the RFS program, the proposed use of a QAP and the associated audit would also be available to foreign producers of renewable fuel. We request comment on specific aspects of the proposed program with respect to foreign producers, and specifically request comment on possible additional program elements that may only be applicable to foreign producers.

*A. Document Review and Monitoring*

The auditor should ensure that the producer has and is fulfilling the EPA record-keeping requirements at § 80.1454(c)(1)(i)(A)–(B) and (ii). We expect the auditor to evaluate reports submitted to EPA, and propose that these be reports year-to-date, as applicable, and from the previous year, for comparison. These include Activity Reports, RIN transaction reports, RIN generation reports, and Renewable Fuel producer Co-product reports. The third-party engineering review and annual attestation report should also be reviewed.

Reports submitted to EPA should be cross-checked with other records. For instance, the auditor should have access to certificates of analysis. The auditor must check recent feedstock receipts (if the producer uses a variety of feedstocks, then the auditor should be provided with receipts for each feedstock). Integrated facilities may not have internal sales receipts for feedstock usage, so an alternative paper trail will likely be required. Similar to the feedstock document review and crosscheck, renewable fuel and co-product delivery documentation should be part of any audit.

For all documentation reviews, we would expect the auditor to analyze reports to determine whether a producer is reporting volumes consistently, and to require (from the producer) explanation for missing or inaccurate reports. The auditor should investigate discrepancies between volumes reported and processed. Other reports the auditor should consider as part of its review include the EIA M22 Survey, any state reports, federal and state tax returns, and association dues reports. The auditor should also determine if there is any import or foreign biofuel producer documentation.

Of prime concern to the proposed quality assurance program is the verification of RINs, and there are many aspects to this part of the audit. The auditor should evaluate monthly RIN generation reports submitted through the EMTS, verify that RINs generated match wet gallons sold, determine if the facility purchases or separates RINs, and review product transfer documents for all RIN activity. We propose that this review encompass random samples of documentation; however, based on the documentation provided by the producer, the auditor could decide to review all documentation. Furthermore, and in order to ensure that renewable

fuel producers will maintain their records in a manner that will allow third party auditors and the EPA to efficiently evaluate whether RINs were properly generated, we are also proposing to change § 80.1426 to state that RINs may only be generated for fuel that is demonstrated pursuant to the reporting requirements of § 80.1451, the recordkeeping requirements of § 80.1454, or in other records maintained by the producer, to be produced in accordance with the applicable pathway listed in Table 1 to § 80.1426(f) or a petition approved by EPA pursuant to § 80.1416.

Finally, for those components of the audit that we propose to require ongoing, or batch-level monitoring, the QAP would be required to provide details of the means for collection and evaluation of the data collected on an ongoing basis.

We request comment on whether and how the document review and monitoring discussed here should be more detailed (and/or include different details) for facilities subject to an Option A QAP than for those subject to an Option B QAP.

*B. Buyer/Seller Contacts*

At the end of an audit, the auditor should know all customers of and suppliers to the facility, and all parties that distribute feedstock to and fuel from the facility. We expect the auditor to contact the customers and suppliers in order to verify sales and purchases, in accordance with the requirements under the applicable QAP (i.e., Option A or Option B). We envision this proposed requirement as a ''spot check''; the auditor should be able to provide a reason for such calls regarding the entity called, questions asked, etc. We request comment on whether and how the audit requirements for Buyer and Seller contacts should differ between facilities subject to an Option A QAP than for those subject to an Option B QAP.

*C. Onsite Visits*

The goal of the onsite visit is to verify that plant has the technology to produce, store, and blend biofuels at registered levels, is operating in accordance with the facility's registration, and that the RINs generated since the last visit are valid. The auditor will likely use plant maps and photos as part of this analysis, and should compare and contrast the plant's infrastructure with the third-party engineering review reports on file with EPA. The auditor should note the size and number of storage and blending tanks, and observe the measurement of volume in the tanks. The auditor should determine whether the process rate is consistent with annual and quarterly production of the facility, and whether the facility has quality process controls in place (e.g., are ASTM International specifications being followed where appropriate).

We believe that mass and energy balances on the facility are critical components of any audit. Because integrated facilities will likely have energy usage that is not directly related to biofuel production, the auditor should have alternate means of assessing and correlating energy usage to production.

The proposed requirements for onsite visits are the same for Option A QAP and Option B QAPs. We are proposing that an auditor conduct at least four (4) onsite visits per year, or every three (3) months. We request comment on this proposed onsite visit frequency. In addition, we request comment on whether, over time, less frequent audits would be reasonable under an Option B QAP. We are proposing that new production facilities should be audited before verification of RINs.

We expect that each visit could take from one to several days, depending on the size and complexity of the facility, the availability of records, changes since the last audit, etc. The proposed required visits are the minimum. There may be value in visiting more often. It is possible that there may be some value to requiring unannounced visits as well, and we request comment on the value and impact that such unannounced site visits would have on the effectiveness of the program and its associated costs.

*D. RIN Verification*

We are proposing that RINs would be verified only for a specified period *following* an audit. Although an audit of any entity usually certifies what *was* done, the audits we are proposing are prospective in that the audits are verifying that past practices and procedures have been followed, and are currently in place for future RINs that will be generated. RINs generated after the completion of the audit could then be verified until the next audit is completed, but for no longer than 100 days after completion of the audit. We believe this prospective approach is appropriate for the proposed quality assurance program because the audit would be verifying the starting point from which future RINs would be generated. In that sense, the upcoming period of RIN generation is starting with a verified set of conditions. In addition, it could place a serious impediment in the market for RINs if their verification followed RIN generation by any significant period of time.

To allow for some flexibility around the proposed standard audit schedule (i.e., quarterly, or roughly every 90 days), we are proposing that RINs generated for up to 100 days after the last audit could be verified, unless the real time monitoring data or other information obtained by the QAP auditor prior to the onsite audit indicates that RINs are invalid. If another audit was not conducted within 100 days, RINs could no longer be verified for that facility until a new audit was conducted. We request comment on this coverage period.

If a verified RIN was invalidly generated, it would indicate that the QAP that had been used to verify that RIN was deficient in some aspect. We request comment on whether, in the event of discovery of invalid RINs, a more frequent onsite visit schedule should be required. We are not inclined to require such an outcome at this point because one of the purposes of the quality assurance programs is to proactively identify invalidly-generated RINs. In addition, it is highly anticipated that there will also be situations where no invalid RINs have been generated for an extended period of time for a given facility. Under this scenario, less frequent onsite visits may be warranted. We request comment on whether lower audit frequency levels should be allowed after a significant period of time with no invalidly generated RINS, and suggestions as to appropriate reduced onsite visit frequencies.

## VIII. Additional Changes Related to the Definition and Treatment of Invalid RINs

*A. Export and Exporter Provisions*

In this action, we propose to address the following issues regarding the export of renewable fuels: Exporter RVO requirements, identification of renewable fuel content for all fuel transfers, and retirement of RINs at the time of export. The Agency is proposing to address these issues primarily because the export of renewable fuel, particularly ethanol and biodiesel, has become more prevalent in the transportation fuel market. These proposed changes address how RINs should be handled when renewable fuel is exported. In addition, it will provide EPA with the data needed to track renewable fuel exports. The intent is to ensure that exported renewable fuel is not included in meeting the mandated domestic annual renewable fuel volume requirement.

1. Exporter RVO

Any volume of renewable fuel which is exported, either neat or blended, requires calculation of an export RVO. In this rule, we are making minor changes to the regulations to address concerns that some regulated parties may be misinterpreting the regulations and only establishing an RVO for exported renewable fuel that is ''in its neat form or blended with gasoline or diesel.'' The opening clause of 40 CFR 80.1430(a) clearly provides that an RVO must be satisfied by any party that ''owns any amount of renewable fuel'' that is exported, and 40 CFR 80.1430(f) also states that ''each exporter of renewable fuel'' must satisfy an RVO. The portion of 80.1430(a) that provides that the regulation applies ''whether [the exported renewable fuel] is in its neat form or blended with gasoline or diesel'' was intended to make the point, through specific examples, that the regulation applies to both neat renewable fuels and renewable fuel blends that are exported. Thus, the reference to ''gasoline or diesel'' blends is illustrative, and does not exclude other exported renewable fuel blends, such as biodiesel blended into fuel oils, from the scope of the regulation. We are proposing changes to 40 CFR 80.1430(a) to remove the references to examples of fuel blended with ''gasoline and diesel,'' and state in this section of the regulations that the requirement to establish an RVO applies whether the exported renewable fuel is in its neat form or blended.

We seek comment on what additional amendments, if any, should be made to the export provisions at 80.1430, the recordkeeping requirements at 80.1454, and the reporting requirements at 80.1451, to ensure that exporter RVOs adequately make the RIN market whole for any exported biofuel for which RINs may have been generated. In particular EPA seeks comment on whether EPA should limit exporter RVO requirements in situations where exporters can document that either no RINs were ever generated for the exported fuel, or that any such RINs were previously retired.

2. Require Identification of Renewable Fuel Content

As background, the Federal Trade Commission, as directed by EISA established labeling requirements for biofuel blends.[13] EISA specifically addressed three categories of biodiesel fuel blends, requiring labels with precise wording for two. First, fuel blends containing no more than five percent biodiesel and no more than five percent biomass-based diesel, and that meet ASTM D975 (''Standard Specification for Diesel Fuel Oils''), need not be labeled. Second, fuel blends containing more than five but no more than twenty percent biomass-based diesel or biodiesel ''shall be labeled 'contains biomass-based diesel or biodiesel in quantities between five percent and 20 percent.' '' EISA Sec. 205(b)(2) (emphasis added). Finally, blends containing more than 20 percent biodiesel or biomass-based diesel ''shall be labeled 'contains more than 20 percent biomass-based diesel or biodiesel.' '' EISA Sec. 205(b)(3) (emphasis added). As fuel blends containing no more than five percent biomass-based diesel are not required to be labeled, it is possible that some exporters may believe that the fuel they are exporting has a lower biofuel content than it actually does or they may be claiming that it's straight diesel fuel.

To better document and communicate the biodiesel content of any biofuel blend throughout the fuel supply chain (not just biofuel blends containing more than five percent biomass-based diesel), we propose to extend the existing product transfer document requirements at 40 CFR 80.1453 to fuel blends such that any person that sells or otherwise transfers title to any biomass-based diesel blend or biodiesel blend to any other person for resale of the product shall prepare a product transfer document evidencing such transfer. Such product transfer documents may be in the form of an invoice, bill of lading, bill of sale or other written instrument meeting the requirements of this subsection. All such transfer documents shall include the name of the transferor, the name of the transferee, the date of transfer, the volume in gallons of the product transferred, and either the volume in gallons or percentage of biomass-based diesel or biodiesel that is contained in the blended product. Each person making such transfer shall maintain each transfer document required by this subsection for a period of four years from the transfer date.

3. RIN Retirement Requirements

The current RFS regulations require exporters to demonstrate compliance with their exporter RVOs on an annual basis, by February 28 of the year following the compliance year in question. 40 CFR 80.1451(a). EPA is seeking comment on the period of time that should be allowed for retirement of RINs as a result of renewable fuel export, and whether the current deficit carry-over provision in 80.1451(a)(1)(xii) should be eliminated for exporters. Given the volatility in the renewable fuel export market, a shorter time period may ease concerns for related uncertainty in the RIN market. This problem was anticipated, as stated in the final RFS2 Rule: ''However, we are aware of some exporters who sell RINs that they separate as a source of revenue, with the intention to purchase replacement RINs on the open RIN market later in the year to comply with their RVOs.'' This provision was included to allow flexibility for exporters. However, EPA is considering whether a change is required at this time to prevent instability and abuse.

One approach under consideration would require exporters to clearly demonstrate on a quarterly basis that they have acquired RINs sufficient to cover volumes exported in the quarter. This shorter time frame would significantly reduce the window of opportunity for large exports of renewable fuel without exporters having obtained the RINs that must ultimately be retired. Alternatively, EPA could require the immediate retirement of RINs, at the time of export or within a limited window such as 30 days after export. This would prevent rolling deficits carried by exporters, and guard against unanticipated market changes, or even ''shell companies'' closing up shop in order to avoid the cost of meeting their export RVO. Eliminating the deficit carry-forward provision as it applies to exporters would also further the same objectives. EPA solicits comment on these options.

*B. ''Downstream'' Invalidation and Product Transfer Documents*

The definition of ''renewable fuel'' requires that the fuel be used to replace or reduce the quantity of fossil fuel present in transportation fuel, heating oil, or jet fuel. Several stakeholders have requested that the EPA amend the regulations to address concerns that properly generated RINs may become invalid as a result of the fuel not being used in or as transportation fuel, heating oil, or jet fuel ''downstream'' of the renewable fuel producer or importer, that is after it has left the custody of the producer or importer. In response to these concerns, EPA is proposing amendments to clarify and expand on existing requirements regarding the designation of qualifying renewable fuel, and is also proposing new limitations on RIN generation for those types of renewable fuel that can be expected to be used in or as non-qualifying fuel.

[13] Automotive Fuel Ratings, Certification and Posting Final Rule, 73 FR 40154, July 11, 2008.

1. Designation of Intended Renewable Fuel Use

The existing regulations at § 80.1426(a) and (c) require renewable fuel producers and importers to generate RINs for fuel that: (1) Qualifies for a D code pursuant to § 80.1426(f) or has been approved by a petition pursuant to § 80.1416, and (2) is demonstrated to be produced from renewable biomass pursuant to the recordkeeping and reporting requirements in the regulations. However, § 80.1426(c) also specifies that RINs may not be generated for fuel that is not designated or intended for use as transportation fuel, heating oil or jet fuel, i.e., for a ''non-qualifying fuel use''.

We are proposing amendments to § 80.1426(a) and (c), and conforming amendments to the product transfer document (PTD) regulations in § 80.1453, to require all renewable fuel producers and importers to designate all RIN-generating renewable fuel as transportation fuel, heating oil or jet fuel on the PTDs that a renewable fuel producer or importer prepares to accompany a fuel shipment. These changes would standardize the existing ''designation'' requirement for RIN generators by specifying the location and content of the designations. The requirement to designate intended fuel uses in PTDs would operate as a constant reminder to renewable fuel producers and importers that RINs may only be generated for fuel intended for use as transportation fuel, heating oil or jet fuel, i.e., qualifying fuel uses, and would facilitate EPA enforcement of the designation requirement. The regulations would require that designations be made in good faith. Parties designating fuel for a qualifying fuel use who in fact knew that the fuel would likely be used in a fuel other than transportation or jet fuel or heating oil (a ''non-qualifying fuel use'') would be in violation of this proposed regulation, and subject to civil penalties.

We are also proposing to include special conditions, in addition to the PTD requirements, related to the distribution and sale of any renewable fuel that is not typically sold for use in or as transportation fuel, jet fuel, or heating oil. We propose that these conditions would apply to all RIN-generating renewable fuels other than ethanol, biodiesel, and ''drop in'' renewable diesel. Biogas and renewable electricity would also be excluded from these conditions since sections 80.1426(f)(10) and (11) include specific conditions designed to ensure that these fuels are used in transportation fuel. These special conditions must be satisfied in order for RINs to be generated for those fuels. We are proposing to include these new requirements together with other conditions for RIN generation in §§ 80.1426(a) and (c), and conforming amendments to the registration, reporting and recordkeeping sections.

EPA believes that denatured ethanol, biodiesel that meets the ASTM 6751 specifications and renewable diesel that meets the ASTM D 975 Grade No. 1–D or No. 2–D specifications are highly likely to be used as transportation fuel, heating oil or jet fuel. Accordingly, to relieve burdens associated with identifying what we expect to be de minimis volumes of these fuels used for non-qualifying purposes, and to avoid the potential for downstream invalidation of RINs for such fuels and associated detrimental impacts that such potential may have on RIN markets, we are proposing that validly generated RINs for these fuels will remain valid regardless of the downstream use of the fuel. However, parties upstream from the ultimate consumer who re-designate any renewable fuel for which RINs were generated for a non-qualifying use would be subject to the proposed RIN retirement provisions in 80.1433 that are discussed below. We seek comment on whether these fuels are highly likely to be used only as transportation fuel, heating oil or jet fuel, and on whether other biofuel types should be similarly recognized. We also seek comment on whether biodiesel and renewable fuel diesel producers who generate RINs should be required to sample and test their fuels to ensure that the fuel is appropriate for use as transportation fuel, and what specific sampling and testing requirements would be appropriate. For all other fuels, we think that it is appropriate to limit the opportunity for RIN generation to circumstances where the producer or importer has taken actions to ensure that the fuel is used for transportation fuel, heating oil or jet fuel. Where such actions are taken, we are proposing that RINs generated for qualifying renewable fuel will remain valid regardless of the final downstream use.

While we are proposing that the special conditions related to renewable fuel that is not typically sold for use in or as transportation fuel, jet fuel, or heating oil would not apply to ''drop in'' renewable diesel, we also recognize that there is at least one circumstance in which renewable diesel may benefit from being subject to the same special conditions. Renewable diesel is a product that was originally introduced by companies attempting to create a ''drop-in'' transportation fuel made from renewable sources that met the same specifications as petroleum based transportation diesel. Some renewable fuel producers are currently generating RINs for fuel that they claim meets the exiting definition of renewable diesel, but which is not chemically equivalent to a petroleum diesel fuel under the renewable diesel definition. This product is primarily composed of triglycerides that have not been chemically converted to a hydrocarbon, and can be produced through simple filtration of vegetable oils with little processing equipment or effort. Further, this product cannot be used as a ''drop-in'' transportation fuel but instead can only be used at blend levels with diesel fuel that are approved under 40 CFR part 79, and moreover it is commonly used for non-qualifying fuel uses. To address these issues, we are proposing to clarify in the definition of ''non-ester renewable diesel'' that qualifying products must be approved under 40 CFR part 79 at specific blend levels with diesel fuel. However, it may also be necessary to differentiate between the two types of renewable diesel (''drop in'' and triglycerides) so industry may easily determine which product and which RINs they are purchasing, and to allow EPA enforcement to differentiate between the two products upon inspection of a renewable fuel facility. We request comment on limiting the definition of non-ester renewable diesel, or renewable diesel, to fuel that meets the ASTM D 975 Grade No. 1–D or No. 2–D, and that are homogenous hydrocarbons. We could then refer to all other fuels that meet the current definition of renewable diesel as viscous non-ester renewable diesel, and they would be subject to the special conditions related to the distribution and sale of renewable fuel that is not typically sold for use in or as transportation fuel, heating oil or jet fuel. This approach would not remove anyone from the program and could give greater certainty to the industry.

The new regulatory requirements are designed to ensure that these fuels are in fact used in or as transportation fuel, heating oil or jet fuel, and therefore that RINs are appropriately generated for these fuels. These requirements are necessary because these other renewable fuels are commonly used in non-qualifying fuels. For instance, butanol is a common chemical feedstock but can also be used in transportation fuel. The EPA believes that the only current allowable use for these other fuels (insofar as RINs are associated with them) would be as a blending

component or additive for gasoline or diesel fuels. We are proposing two options for generating valid RINs for these fuels. First, the renewable fuel producer or importer of these fuels may generate RINs if they maintain contemporaneous records demonstrating that they used the fuel as a blendstock or additive and that the final product is a transportation fuel, heating oil or jet fuel that met all applicable standards. Second, if the renewable fuel producer or importer does not use the fuel itself as a blendstock or additive for gasoline or diesel fuel, they may still generate RINs if they enter into a contract that requires the party who purchases the fuel to use it as a blendstock or additive for gasoline or diesel fuel, and that meets certain requirements designed to assure that the buyer does, in fact, use the fuel as a blendstock or additive in a transportation fuel, heating oil or jet fuel that meets all applicable standards.

In order to verify that these fuels are produced for use as a transportation fuel, heating or jet fuel, EPA is proposing conforming registration, recordkeeping and reporting requirements. We are proposing that parties who generate RINs for the production of these renewable fuels will have to include information in their registration stating if they will be using the fuel as a blendstock or additive at their facility or if they will be selling the fuel to another party who will be using the fuel as a blendstock or additive. If the renewable fuel producer or importer will be using the fuel as a blendstock or additive, they will be required to describe their blending activities in their registration application. If the renewable fuel producer or importer will be selling the fuel to another party who will be using the fuel as a blendstock or the fuel was blended into a qualifying fuel downstream of the renewable fuel producer or importer, these parties will need to provide additional information to verify that the fuel was, in fact, blended for a qualifying fuel use. We solicit comment on how these new registration requirements should apply to currently-registered entities. Options include requiring an immediate (within 30–60 days) registration update, or allowing the new submissions to occur at the facilities' next 3-year registration update. We propose that renewable fuel producers or importers who contract with a downstream party to blend their product to make a qualifying renewable fuel be required to include affidavits in their reports from the downstream parties to verify that the fuel was used in or as a qualifying fuel. This concept is modeled after the existing regulations relating to RIN generation for biogas and renewable electricity, which require the use of downstream affidavits to verify proper use of the fuel. We also propose that any party who produces or blends these fuels will need to keep records relating to the blending activities to allow the QAP providers and the EPA to verify that RINs were properly generated. We seek comment on whether these requirements are appropriate for renewable fuels that are not highly likely to be used for qualifying RFS fuels or whether there are other mechanisms that could provide adequate assurance that these fuels are used for transportation fuel, heating oil or jet fuel.

2. Required Actions Regarding Fuel for Which RINs Have Been Generated That Is Used for a Non-Qualifying Fuel Use

Section 80.1429(f) of the existing regulations provides that any person who uses or designates a renewable fuel for an application other than transportation fuel, heating oil or jet fuel (i.e., a non-qualifying fuel use) must retire any RINs *received* with that renewable fuel. Section 80.1429(f) was intended to require the person using or designating RIN-generating fuel in or for a non-qualifying fuel use to retire the RINs received with the fuel so that they cannot be used for RFS compliance. This approach, however, places the burden of using fuel for a qualifying fuel use on the end user when the fuel has already been designated upstream as either a qualifying or non-qualifying fuel. In other words, once the fuel reaches the end user, it has already been designated as transportation fuel, heating oil or jet fuel, or has been redesignated for a non-qualifying fuel use. The end user has no part in the designation or redesignation of the fuel.

In order to ensure that RINs generated with renewable fuels are retired if the fuel is redesignated for a non-qualifying fuel use, we propose to tighten the requirements for RIN retirement for any party that redesignates a renewable RIN-generating fuel for a non-qualifying fuel use, and to relieve end users of such an obligation. To accomplish this, we propose to remove and reserve paragraph 80.1429(f) of the regulations and to add a new section 80.1433 to require parties that designate fuel for which RINs were generated for a non-qualifying fuel use, i.e. for something other than transportation fuel, heating oil, or jet fuel, to retire an appropriate number and type of RINs. We believe that any person designating fuel for which RINs have been generated for a non-qualifying use should make the RIN system whole by retiring an equivalent number and type of RINs. This approach places the burden of ensuring an appropriate number of RINs are retired on a party in the fuel distribution business, rather than an end user. Such parties tend to have greater expertise in complying with regulatory requirements, and the potential number of parties potentially subject to these requirements is far reduced by placing the burden for RIN retirement upstream of end users. We further propose new subsection 80.1460(g) which would prohibit a person from designating a qualifying renewable fuel for which RINs were generated for a non-qualifying fuel use, unless the requirements of section 80.1433 have been met. The proposed amendments would require retirement of applicable RINs within a 10 day period.

3. RIN Generation for Fuel Made With Renewable Fuel Feedstock

The existing regulations do not provide a pathway for any party to generate RINs for a fuel produced using another renewable fuel as a feedstock. Parties seeking to do so, however, may submit a petition requesting approval pursuant to § 80.1416. 40 CFR 80.1426(c)(6)(ii) sets forth certain prohibitions that would apply if, in the future, EPA approved a pathway that allowed a party to generate RINs for a fuel that was produced using another renewable fuel as a feedstock. These prohibitions are designed to prevent parties from generating more than one RIN for the same volume of renewable fuel. For example, the production of ETBE uses ethanol as a feedstock, and RINs may have been previously generated if the ethanol used to make the ETBE was denatured. The ETBE producer in this example should not be allowed to generate RINs representing the full energy equivalence of the finished ETBE, if RINs were previously generated for the ethanol feedstock. In order to address this type of scenario, we are proposing to modify § 80.1426(c)(6) to prohibit a party from generating new RINs for a fuel that is made from a feedstock that is a renewable fuel, where the feedstock that is a renewable fuel was produced by another party, unless EPA approves a petition under § 80.1416 to allow for the generation of RINs for a fuel that was produced using another renewable fuel as a feedstock and the petition and approval include an enforceable mechanism to prevent double counting of RINs.

We also propose to amend § 80.1426(f)(4) to address the potential

for ''double discounting'' for non-renewable feedstocks when renewable fuel is produced by co-processing renewable biomass and non-renewable feedstocks to produce a fuel that is partially renewable. Specifically, we have discovered that the existing regulations may inadvertently cause the number of RINs generated to be discounted twice for the presence of non-renewable feedstocks. The first would be in the calculation of the equivalence value under § 80.1415(c)(1), and the second would be in the calculation of the number of RINs generated under § 80.1426(f)(4)(i). To correct this problem, we are proposing to add a new paragraph (f)(4)(iii) so that for purposes of § 80.1426(f)(4) only, the equivalence value does not include a discount for non-renewable feedstocks.

4. Use of Renewable Fuel in Ocean-Going Vessels

Another issue the Agency is aware of concerns the use of renewable fuel-containing MVNRLM in ocean-going vessels. The definition of ''transportation fuel'' specifically excludes ''fuel for use in ocean-going vessels.'' 40 CFR 80.1401. In the preamble to the March 26, 2010 RFS rule, the Agency stated that '' 'for use in ocean-going vessels' means residual or distillate fuels other than Motor Vehicle Nonroad Locomotive and Marine (MVNRLM) intended to be used to power large ocean-going vessels.'' 75 FR 14670, 14721 (March 26, 2010). The rule also defines ''fuel for use in ocean going vessels'' as including ECA marine fuel. 40 CFR 80.1401. Some parties have questioned whether MVNRLM that is blended into ECA marine fuel is ''fuel for ocean going vessels'' such that RINs generated for the renewable fuel component of MVNRLM become invalid upon that use. It is the Agency's interpretation that the definition of ''fuel for use in an ocean-going vessel'' in § 80.1401 does not include MVNRLM that is blended into ECA marine fuel. This is based on the definitions of fuel for use in an ocean-going vessel and of ECA marine fuel, as explained in the March 2010 rulemaking.[14] Therefore, RINs that have been or are properly generated for any renewable fuel component of MVNRLM that is blended to produce ECA fuel remain valid. EPA notes that the vast majority of MVNRLM is used for qualifying RFS purposes, and that only a trivial quantity of such fuels is used to produce ECA fuel for ocean-going vessels. Given the complexity and regulatory burden that would be involved in tracking trivial quantities of MVNRLM that may be used in ECA fuel, the RFS regulations appropriately treat all properly generated RINS for renewable fuel blended into MVNRLM as valid, regardless of the possible downstream blending of MVNRLM with ECA fuel. In addition, under today's proposal, additional regulatory requirements designed to ensure that renewable fuel is put to a qualifying use would be imposed on certain types of renewable fuel, as discussed above. These new requirements would further limit the quantity of renewable fuel that could ultimately be blended with ECA fuel used in ocean going vessels.

We seek comment on whether our interpretation of ''fuel for use in an ocean-going vessel'' creates any potential problems.

5. Treatment of Improperly Separated RINs

Section 80.1431(a)(1)(viii) currently provides that a RIN that was improperly separated pursuant to 80.1429 is invalid. Under section 80.1460(c)(1), obligated parties may not use invalid RINs for compliance purposes. EPA proposes to remove 80.1431(a)(1)(viii) of the regulations, and to add section 80.1460(h), identifying the improper separation of RINs as a prohibited act. The net effect of these changes would be to allow obligated parties to use RINs that were improperly separated for compliance purposes, since the RINs would no longer be considered invalid. However, improper RIN separation would continue to be a prohibited act under the regulations.

EPA seeks comment on whether the RFS regulations should instead maintain section 80.1431(a)(1)(viii), but also require a more comprehensive and robust mechanism to allow parties that acquire separated RINs and EPA to evaluate whether the RINs were properly separated and used in or for a qualifying fuel. The goal would be to make it easier for EPA and obligated parties to determine whether RINs are valid. These mechanisms could require a designate and track approach, with corresponding recordkeeping and reporting requirements, similar to the program set forth in the diesel sulfur regulations at 40 CFR part 80, subpart I. In general, under Subpart I, each time custody of fuel is transferred from one facility to another, the transferor must designate the fuel and record its volume. The party who receives custody of the fuel must record the same information, to ensure that each party relies on the same designation and volume for its own compliance purposes. Maintaining proper PTDs, with proper designations, is also part of the diesel sulfur program's recordkeeping requirements. EPA seeks comment on whether the RFS regulations should establish similar designation and track requirements addressed at tracking and recording RIN separation events and end use of renewable fuels.

Additionally, EPA requests comment on whether we should require RIN separators to include with their quarterly reports additional records related to qualifying separation events that are already required as part of the recordkeeping regulations. See § 80.1454 for a description of the records that must be retained by parties. EPA believes requiring this information to be reported quarterly will allow EPA to review the information in a more timely way than in the existing structure, where EPA must request it from RIN separators on an ad hoc basis. Additionally, all parties who separate RINs must sign and certify that the information reported to EPA under the RFS program is true and accurate.

Inaccurate, misleading, and/or false reports submitted to EPA may be used in a criminal prosecution against the submitter and other culpable persons. Enhanced reporting requirements for RIN separators would facilitate EPA's ability to investigate and prosecute persons who engage in RIN separation violations. EPA seeks comment on the type and scope of reporting that would most likely assist EPA in identifying RIN separation violators.

*C. Treatment of Confidential Business Information*

1. Overview

In the March 26, 2010 RFS2 final rule, the EPA addressed a number of confidentiality concerns raised by comments to the rule proposed on May 26, 2009 (74 FR 24904). At the time, the Agency explained that renewable fuel producers would need to submit information to support their registration and report information to the Agency for implementation of the RFS program. The EPA also confirmed that we would treat any information submitted with a claim that it was confidential business information (''CBI'') as CBI in accordance with existing Agency regulations at 40 CFR part 2, subpart B. Information submitted to the Agency in compliance with the RFS2 regulations has been handled in that fashion. The EPA typically makes confidentiality determinations on a case-by-case basis. However, subsequent to the

[14] This does not change the fact that the blend of fuel that results from blending MVNRLM or NRLM with ECA marine fuel would still be ECA marine fuel and subject to the sulfur limits that apply to such fuel.

implementation of the RFS program, we have received hundreds of requests for information; the need for case-by-case determinations has prevented timely release of non-CBI information.

Due to the high level of interest in RFS compliance information, the EPA is considering approaches to increasing public access to information collected by the RFS program. At the same time, we want to ensure that we continue to properly process CBI claims and protect company's confidential information. The EPA is now proposing to make certain RFS registration and reporting information publicly available because we believe that greater transparency will work hand-in-hand with our QAP process to improve the integrity of information submitted for RFS compliance and deters fraudulent behavior. As discussed in more detail below, today's action provides affected businesses subject to Part 80, other stakeholders, and the general public an opportunity to comment on the proposal to publish RFS registration and reporting information that would be aggregated into monthly, quarterly, and annual reports. This action is part of a broader effort to increase transparency and provide information to the public that would promote greater liquidity in the RIN market in a way that assures reasonable oversight of RIN generation.

Notably also, many interested parties—including renewable fuel producers—have asked the EPA to publish this information. Since implementation of the RFS program, the Agency has received numerous requests for this information. Not only are members of the public and interested stakeholders interested in reviewing this information, many parties to the RFS program are requesting that the Agency release this information in order to make the RFS program more transparent. The EPA is soliciting comments on whether, for any information in the format proposed for release, there are unique circumstances where disclosing this information would cause substantial harm to a company's competitive position.

2. Proposal To Disclose Aggregated RFS Registration Information

a. Approach

The EPA is proposing to summarize and publish aggregated registration and QAP information required under 40 CFR 80.1450(b), (c), and (g) from independent third-party auditors and renewable fuel producers and importers that are registered with the RFS program. We propose to publish this information by facility and on a monthly basis. Each monthly report of registration information will disclose certain registration information for each producer, importer, and QAP. The monthly reports would be cumulative reports of all registrations accepted by the EPA; they would include existing registrations, new registrations, and registration updates. For each facility, we would publish the company name, facility name, facility type/fuel product, total permitted capacity, production volume, production process type, feedstocks, D-Code, and any co-products. This information would not reveal proprietary production processes. For example, the production process would be identified by the production process description used in Table 1 to 40 CFR part 1426, or for a production process approved through the Agency's pathway petition process, it would be identified by the name associated with that process in OTAQReg. An example of what information we intend to publish appears below:

TABLE VIII.C.2.a–1—EXAMPLE REGISTRATION REPORT

| Company name | Facility name | Facility type | Total permitted capacity | Production volume | Feedstock | Process type | D code | Co-products |
|---|---|---|---|---|---|---|---|---|
| Example Ethanol Company. | Example Ethanol Facility. | Ethanol ..... | 125,000 | 20 | Corn Starch ... | Wet mill process using biomass or biogas for process energy. | 6 | Distillers grains, corn oil. |
| Example Biodiesel Company. | Example Biodiesel Facility. | Biodiesel ..... | 125,000 | 500 | Canola Oil ..... | Transesterification using natural gas or biomass for process energy. | 4 | None. |

After publishing these monthly registration reports, we intend to summarize and update the information so that we can publish quarterly and annual registration reports of the same type of information. At this time, the EPA is not proposing to publish registration information at the broader company-level or more specific batch-level. We also are not proposing, at this time, to publish registration submissions or information from supplemental registration documents (e.g., heat plans, separated food waste plans). The EPA is interested in stakeholder views on this approach.

b. Rationale for Proposal

The EPA believes that the information elements as described above are not entitled to confidential treatment for a number of reasons. First, this type of registration information is already available through other public outlets. For example, for publicly-traded companies, this information is filed with the U.S. Security Exchange Commission in their annual 10–K and quarterly 10–Q reports in the company's overview. In those reports, companies identify their fuel products, production facilities, co-products, production processes, production capacities, actual production volumes, and feedstocks. Additionally, many producers currently post this type of information on their public Web sites and issue press releases broadcasting this information. Regardless of whether a company is publicly traded or posts this information on its Web site, all renewable fuel producers report this information to the U.S. Department of Energy's National Renewable Energy Laboratory, which publishes the information on their Web site. Since this information is already publicly available, it would not be eligible for confidential treatment under the Agency's existing CBI regulations

under 40 CFR part 2, subpart B, and therefore, it could be released.

Second, the EPA believes that release of this information would not cause substantial harm to the competitive position of a Part 80 business submitter. The information elements, submitted under Part 80, and proposed to be made publicly available consist of information on renewable fuel producers' facility fuel product, total permitted capacity, production volume, production process type, feedstocks, D-Code, and co-products. These information elements do not reveal any proprietary information, or any other information that would likely provide insight for competitors to gain an advantage. For example, consider the Example Ethanol Facility:

- Example Ethanol Facility is a renewable fuel producer that produces ethanol from corn starch using a wet mill process and generates D-Code 6 RINs for its ethanol. The production of ethanol from cornstarch using a wet mill process is typical of an ethanol production facility, widely-known, and demonstrates that the facility meets RFS regulatory requirements for RIN generation. The feedstock, process, and fuel product must comply with an approved RFS pathway, which are specific to these three information elements and identified in Table 1 to section 1426 or a publicly-available EPA petition approval. These information elements are necessary for a producer to determine if it meets RFS requirements. These information elements describe commonly used renewable fuel production information and do not describe any particular specifications about an individual facility's unique processing. Because these information elements are widely known and do not reveal details about the precise production processes used, they are not the type of information that a competitor could use to develop marketing strategies to undermine the producer's competitive position. Thus, disclosing information elements containing feedstock, process type, D-Code, and fuel type would not reveal—and could not be used to determine—an individual facility's production efficiency, production costs, or pricing structure.
- That the Example Ethanol Facility is permitted to produce 125,000 gallons of ethanol but only produces 20 gallons of ethanol does not disclose proprietary information. Releasing total permitted capacity and production volumes do not disclose actual production rates; nor could it be used to determine facility-level production rates or the quantity of feedstock used to produce that volume. This information would not provide a competitor with business insights and/or any competitive advantage over the Example Ethanol Facility. Accordingly, the EPA believes that disclosing permitted capacity and production volumes would not cause substantial harm to a business submitter's competitive position.
- That the Example Ethanol Facility produced distillers grains and corn oil as co-products from wet mill process does not disclose proprietary information. Wet mill processing is widely known to result in the co-production of distillers grains and corn oil, and these co-products must be disclosed to the EPA with the producer's registration for compliance with 40 CFR 80.1426. This is not the type of information that could be used by a competitor to gain business insights or advantage over the Example Ethanol Producer. Co-product information is widely known among the renewable fuel industry and would not contain details regarding co-product characteristics, production volume, quality, quantity, production efficiency, costs, or pricing structure. Therefore, the EPA believes that disclosing a facility's co-product would not cause substantial harm to business submitter's competitive position.

3. Proposal To Disclose Aggregated RFS Report Information

a. Approach

In addition to publishing monthly, quarterly, and annual registration reports, we are also proposing to publish monthly, quarterly and/or annual report of information that is required to be reported to the EPA under 40 CFR 80.1452(b) for renewable fuel producers and importers. We are proposing to publish this information in the same manner as registration information—on a corporate and/or facility-by-facility basis, as described in the chart below. The EPA intends to publish:

- The name of the renewable fuel producer or importer and associated registration information (i.e., name, address, feedstock, process, fuel type, D-Code). The EPA also intends to depict this information in a variety of formats, including geographically (i.e., maps) or tables to identify where renewable fuel production facilities are located (40 CFR 80.1450(b) and 80.1452(b)(1)).
- The EPA company and facility registration numbers and the associated registration information of the renewable fuel producers, foreign ethanol producers and importers that generated RINs in EMTS during the applicable time period(s) (40 CFR 80.1450(b), 80.1452(b)(2), 80.1452(b)(3), 80.1452(b)(4), and 80.1452(b)(5)). This information will be provided for each facility where renewable fuel was produced.
- The D-code of RINs generated by the facility during the time period (40 CFR 80.1452(b)(6)). For each D-code generated at a facility, the EPA will publish the number of RINs generated (40 CFR 80.1452(b)(12)), volume of fuel produced (40 CFR 80.1452(b)(10)), fuel type (40 CFR 80.1452(b)(9)), production process (40 CFR 80.1452(b)(7)), feedstocks (40 CFR 80.1452(b)(13)), and co-products (40 CFR 80.1452(b)(15)).
- The EPA also intends to release the volume of denaturant (for ethanol), applicable equivalence value, and whether all the feedstocks used during the time period were claimed to have met the definition of renewable biomass (40 CFR 80.1452(b)(11), and 80.1452(b)(14)).

An example of the ''reporting'' information the EPA proposes to publish appears in the chart below:

TABLE VIII.C.3.a–1—EXAMPLE "REPORTING" REPORT

| RIN generating company | Company name | Renewable fuel original producer | Facility name and address | Location in latitude/ longitude | Renewable fuel production year/month | D code/fuel type | Feedstocks used | Production process | Co-products | Volume of denaturant | Amount of fuel produced (in gallons?) | RINs generated |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Example Ethanol Company. | Example Ethanol Company. | Example Ethanol Company. | 111 Ethanol Street, City, State, ZIP. | Lat/Long .. | 2010/July | 5—Renewable Fuel/ 10—Non-cellulosic ethanol (EV 1.0). | 888—Feedstock not listed (used at a grandfathered facility 100%). | 888—Grandfathered (Other). | Distillers grains, corn oil. | 549.52 | 27,476 | 27,476 |
| Example Biodiesel Company. | Example Biodiesel Company. | Example Biodiesel Company. | 222 Biodiesel Way, City, State, ZIP. | Lat/Long .. | 2010/July | 4—Biomass-Based Diesel/ 20—Biodiesel (EV 1.5). | 160—Biogenic Waste Oils/ Fats/ Greases 100%. | 180—Transesterification, Dedicated Renewable Biomass Facility. | | | 21,934 | 32,902 |

As with registration information, the EPA proposes to publish ''reporting'' information in only an aggregated form (at the facility level, not the batch level), and only on a monthly, quarterly, and/or annual basis. The EPA will continue to consider the confidential nature of the batch-level information and may take further action to provide additional programmatic transparency. The EPA is interested in stakeholders' views on this approach, including whether facility-level information is the appropriate level of aggregation or whether it might be more appropriate to publish batch-level information.

b. Rationale for Proposal

The EPA believes that the disclosure of certain aggregated RFS report information is not entitled to confidential treatment for a number of reasons. First, the information elements in this category consist of publicly available and widely known information on renewable fuel producer's company name, facility name, RIN-generating name, location, production year, fuel product type, RIN D-Code, production volume, production process type, feedstocks, equivalence value, and number of RINs generated. Furthermore, disclosing this information is not likely to cause substantial harm to the competitive position of the business required to report these information elements under Part 80 because these elements of information do not reveal any proprietary information, or any other information that would likely provide insight for competitors to gain an advantage. Furthermore, because these information elements would be aggregated to the facility level and further aggregated for the time period of the EPA-published report, the information would not be presented in a form that any company's competitors could use to gain a competitive advantage. Aggregating this information at the facility level and for the monthly, quarterly, and/or annual time period would prevent competitors from reverse engineering the information to determine information that could be considered confidential (e.g., exact amounts of feedstocks used, which could potentially be used to reveal production efficiencies). Accordingly, disclosing aggregate information would not cause substantial harm to the submitter's competitive position. For example:

- The name of the renewable fuel producer or importer and associated registration information, including facility name, registration identification numbers, RIN-generating name, location, production year, fuel type, RIN D-Code, production process type, and feedstock is non-specific information that is submitted for RFS program registration. These information elements are necessary for a producer to determine if it meets RFS requirements. These information elements describe commonly used renewable fuel production information and do not describe any particular specifications about an individual facility's unique processing. Because this information does not reveal details about the precise production processes used, they are not the type of information that a competitor could use to develop marketing strategies to undermine the producer's competitive position. These information elements do not reveal—and could not be used to determine—an individual facility's production efficiency, production costs, or pricing structure. Accordingly, the EPA believes that disclosing the name of the renewable fuel producer or importer, the facility name, registration identification numbers, RIN-generating name, location, production year, fuel type, RIN D-Code, production process type, and feedstock would not cause substantial harm to business submitter's competitive position.

- The volume of denaturant, applicable equivalence value, and whether all the feedstocks used during the time period were claimed to have met the definition of renewable biomass (40 CFR 80.1452(b)(11), and 80.1452(b)(14)) is widely-known information that is submitted to demonstrate RFS program compliance. The volume of denaturant used must be less than 2% to meet RFS requirements for RIN generation. The equivalence value is a number that is used to determine how many gallon-RINs can be generated for a gallon of renewable fuel according to 40 CFR 80.1426. An affirmation that that the feedstocks a producer used meets the definition of renewable biomass is required to demonstrate that the feedstocks a facility registered to use, pursuant to 40 CFR 80.1450, were actually used. Revealing the volume of denaturant, equivalence value, and confirming that a producer affirmed use of renewable biomass would not reveal anything proprietary or otherwise about the precise production process a given producer is using, and would not provide any insight that competitors might use to gain competitive advantage. Rather, this information is commonly-known information about the renewable fuel produced that demonstrates RFS regulatory compliance for RIN generation.

4. QAP Plans and Independent Engineering Reviews

At this time, the EPA is not proposing to publish QAP plans or independent engineering reviews that are submitted for RFS registration. For QAP plans and independent engineering reviews that are claimed as CBI, the EPA proposes to require submission of two versions of those documents: One clearly marked ''CBI version,'' with appropriate areas denoted as CBI, and a second ''public version,'' with CBI information redacted. We would require the submission of both versions of QAP plans and engineering reviews begin with the effective date of this rule. For engineering reviews filed pursuant to 40 CFR 80.1450(b)(2), we would require submission for new registrations, and as necessary for updates pursuant to 40 CFR 80.1450(d)(3). Based on the Agency's experience with the RFS program, the EPA notes that certain information should not fall under a claim of CBI because this information is generally available to the public or widely-known within the industry, and disclosure of this information would not likely cause harm to the competitive position of any submitting renewable producer, importer, or any other party to a RIN transaction.

If the EPA receives a Freedom of Information Act (FOIA) request for the CBI version of an engineering review or QAP plan, the EPA would process the FOIA request pursuant to its CBI regulations under 40 CFR part 2, subpart B. Submission of the two versions of QAP plans and engineering reviews (CBI and public versions) would allow the Agency to clearly understand what information is claimed as CBI, and would also allow the Agency to make public versions available to the public without unnecessary delay. The EPA is interested in stakeholder views on this approach.

5. Request for Comments

The added transparency of making certain registration and reporting information available to the public in the form of EPA-published reports, along with the implementation of the QAP process, will strengthen the RFS program and act as a deterrent to fraudulently generated RINs. The EPA solicits comment on all aspects of these proposals.

*D. Proposed Changes to Section 80.1452—EPA Moderated Transaction System (EMTS) Requirements—Alternative Reporting Method for Sell and Buy Transactions for Assigned RINs*

Reporting and product transfer document (PTD) requirements, found in sections 80.1452 and 80.1453, respectively, currently state that the reportable event for a RIN purchase or sale occurs on the date of transfer. Sellers must report the sale of RINs within five (5) business days of the reportable event via the EPA Moderated Transaction System (EMTS). Buyers must report the purchase of RINs within ten (10) business days of the reportable event via EMTS. The date of transfer is the date on which title of RINs is transferred from the seller to the buyer. Some buyers and sellers of assigned RINs have expressed concerns with these requirements stating they have difficulty determining the date of transfer since title of the renewable fuel is not transferred until the fuel physically reaches the buyer. Some transactions, for example those by rail or barge, may take several weeks, and their current accounting systems do not include a means for capturing the buyer's receipt date.

EPA understands this concern, but also recognizes that some regulated parties have modified their accounting systems to address the current reporting and PTD requirements in RFS2. We also believe that for parties separating, retiring, and selling or buying separated RINs, the current reporting and PTD requirements are effective and should remain unchanged. Therefore, at this time EPA is not proposing to replace existing requirements, but is instead proposing an additional, alternative method for reporting sell and buy transactions involving assigned RINs only.

The proposed alternative method for sell and buy transactions of assigned RINs would redefine the reportable event for both the seller and the buyer, introduce a unique identifier that the seller must provide to the buyer, and require the buyer to report the date of transfer. Buyers and sellers would need to agree on which method they would be using to report transfers of assigned RINs; either the current method or the alternative method. EPA believes that this alternative would provide the regulated community with the flexibility to address their reporting concerns and also provide EPA with the data necessary to effectively administer and enforce transactions of assigned RINs. EPA welcomes comment on this proposed alternative method for reporting assigned RIN buy and sell transactions.

We propose that sellers of assigned RINs under the alternative method be required to do the following:

- Within five (5) business days of shipping renewable fuel with assigned RINs, report a sell transaction, using the alternative method, via EMTS;
- Include in the EMTS sell transaction report other required information per section 80.1452; and
- Provide a PTD to the assigned RIN buyer with a unique identifier, also reported via EMTS, in addition to the information in section 80.1453. The date of transfer is not required for the alternative method.

We propose that buyers of assigned RINs under the alternative method be required to do the following:

- Within five (5) business days of receiving a shipment of renewable fuel with assigned RINs, report a buy transaction, indicating use of the alternative method, via EMTS;
- Include in the EMTS buy transaction report other required information per section 80.1452;
- Include in the EMTS buy transaction report the unique identifier provided by the seller; and
- Include in the EMTS buy transaction report the date the renewable fuel was received, i.e. the date of transfer.

If this proposed alternative method is finalized, the EMTS would be modified to accept such transactions. EPA would provide additional instruction and guidance at the time of the new EMTS version release. EPA invites comment on all aspects of this proposal.

## IX. Impacts

The quality assurance program that we are proposing in today's NPRM would provide a voluntary mechanism for regulated parties to verify that RINs are validly generated, provide an affirmative defense against violations if a regulated party transfers an invalidly generated RIN or uses it for compliance, and provide clarity regarding the responsibility of regulated parties to replace invalidly generated RINs. The proposed program would not change the volume requirements of the RFS program, but instead would help to ensure that those volume requirements are met. Likewise, the proposed changes to the regulations governing export of renewable fuel, separation of RINs from wet gallons, and qualifying uses of renewable fuel would also be intended to ensure that the RFS volume requirements are met with qualifying renewable fuel. As a result, there would be no change to the expected impacts of the RFS program in terms of volumes of renewable fuel consumed or the associated GHG or energy security benefits. Instead, the primary impacts of the quality assurance program would be improved liquidity in the RIN market and improved opportunities for smaller renewable fuel producers to sell their RINs.

The quality assurance program that we are proposing in today's action would be voluntary. As a result, there would be no obligatory costs. There would likely be costs associated with an individual party's participation in the quality assurance program. However, the fact that the quality assurance program would be voluntary means that a decision to participate will be made independently by each regulated party, and thus we cannot estimate the costs that might be incurred for the nation as a whole. Furthermore, any costs incurred would only be borne if the industry believed that those costs were less than current costs in the marketplace resulting from efforts to verify, acquire, and trade RINs.

In the discussion below, Section IX.A addresses direct costs associated with implementing Quality Assurance Plans (QAPs), such as the time required to develop a QAP and the associated recordkeeping and reporting, site visits to renewable fuel production facilities, costs for accounting services, etc. Section IX.B addresses potential costs associated with RIN replacement mechanisms that would be required under Option A.

*A. Direct Costs for Implementing QAPs*

Currently, there are approximately 485 biofuel producers operating more than 600 biofuel production facilities. These numbers are expected to increase as the biofuel market expands. While it is unlikely that all biofuel producers would opt to participate in the quality assurance program, that was the assumption for these cost estimates in order to reflect the maximum potential cost of the program.

EPA staff met with seven parties who are already developing RIN validation programs for the biofuels industry. We also met with several industry groups and obligated parties which have been affected by RIN fraud. These parties all provided informal estimates of the costs associated with this type of quality assurance program which was used to inform our cost calculations.

For those biofuel producers who opt into the quality assurance program, each biofuel production facility must be visited and assessed as part of any audit conducted under the proposed quality assurance program. An auditor would

use an approved QAP as the basis for the verification of biofuel produced and RINs generated at a facility. In order to verify production, the auditor must conduct site visits, review documents, and contact entities that do business with the facility. The proposed components of audits are described in Section VII.

We are proposing that production facilities should be visited on a quarterly basis. New production facilities would be visited prior to verification of any RINs and, subsequently, according to the standard quarterly schedule. We expect that each visit could take from one to several days, depending on the size and complexity of the facility, the availability of records, changes since the last audit, etc. For some components of the audit, we propose to require ongoing, or batch-level, monitoring. The QAP would be required to provide details of the means for collection and evaluation of the data collected on an ongoing basis.

Tables IX.A–1, IX.A–2, and IX.A–3 below itemize the activities anticipated for each biofuel production facility audit. The estimates include costs incurred by the biofuel producer (Table IX.A–1), the auditor (Table IX.A–2), and the EPA (Table IX.A–3). This table does not include costs associated with the RIN replacement mechanism that some QAP providers may acquire to cover loss in the event of RIN fraud. These costs are discussed separately below.

TABLE IX.A–1—COSTS TO THE BIOFUEL PRODUCER FOR IMPLEMENTING A QAP

| Category | Manager time | Prof./tech. time | Clerical time | Number per yr | Capital $ | Total hours | Total $ |
|---|---|---|---|---|---|---|---|
| Site Visit | 1 | 16 | 4 | 2 | | 42 | 3,588 |
| Reporting | 2 | 12 | 4 | 3 | | 54 | 4,560 |
| Recordkeeping | 0 | 0 | 2 | 3 | | *6* | *222* |
| Total | | | | | | 102 | 8,370 |

TABLE IX.A–2—COSTS TO THE QAP AUDITOR FOR IMPLEMENTING A QAP

| Category | Manager time | Prof./tech. time | Clerical time | Number per yr. | Capital $ | Total hours | Total $ |
|---|---|---|---|---|---|---|---|
| Auditor: | | | | | | | |
| Contract Init | 4 | 4 | 2 | 1 | 530 | 10 | 1,428 |
| Site Visit | 4 | 16 | 0 | 1 | 1,060 | 20 | 3,036 |
| Follow-up | 2 | 28 | 5 | 3 | 1,060 | 105 | 12,459 |
| Monitoring | 2 | 50 | 0 | | | 52 | 5,020 |
| Consultants | | | | 4 | 1,000 | | 4,000 |
| Reporting | 0 | 4 | 12 | | | 16 | 1,656 |
| QAP Prep | 2 | 16 | 4 | | | 22 | 3,808 |
| EMTS | 0 | 25 | 0 | | | 25 | 2,400 |
| Recordkeeping | 0 | 12 | 25 | | | *37* | *2,077* |
| Total | | | | | | 250 | 38,839 |

TABLE IX.A–3—COSTS TO THE EPA FOR IMPLEMENTING A QAP

| Category | Manager time | Prof./tech. time | Clerical time | Capital $ | Total hours | Total $ |
|---|---|---|---|---|---|---|
| Implementation | | 3 | | | 3 | 267 |
| EMTS Data Management | | 1 | | | *1* | *89* |
| Total | | | | | 4 | 356 |

1. Time and Cost Assumptions

The specific times estimated for each task are shown in Tables IX.A–1, IX.A–2, and IX.A–3. These estimates are based on a number of basic assumptions. An initial site visit of the facility to be audited is assumed to require two days, and include estimated travel and per diem costs. For simplicity, we have estimated an average $600 for airfare, $150 for lodging, and $80 for the per diem expenses. It is assumed that a plant manager would meet briefly with the auditor, and that a plant chemist or other professional would escort the auditor throughout the visit. Some clerical support would be required to locate files for the related document reviews.

It was assumed that an auditor would travel and spend half a day on contract initiation. Any follow up site visits were assumed to be shorter in duration, as the auditor would now be familiar with the facility and its normal operation. A substantial amount of the auditor's time would be spent in follow up documentation of the facility, such as checking feedstock suppliers, process fuel suppliers, doing volume and mass balances, and monitoring the ongoing operation of the facility. It was assumed that an auditor would employ specialized consultants and/or local agents to perform some portion of the audit support.

In addition to tracking facility operation, an auditor would also be responsible for preparing the QAP, maintaining recordkeeping, monitoring and/or brokering activities on EMTS, and assisting with RFS reporting requirements.

2. Labor Cost Assumptions

The labor costs used in this cost estimation are average mean wages for each labor category, as provided in the Bureau of Labor and Statistics Report dated May 2011. Based on this data, we used the following hourly wages for each employee type:

Managerial—$55.04 per hour
Technical/Professional—$47.81 per hour
Clerical—$18.35 per hour

Doubling to account for company overhead and benefits, and for convenience, rounding up to the dollar, gives the following hourly rates:

Managerial—$110 per hour.

Technical/Professional—$96 per hour.

Clerical—$37 per hour.

For the Agency costs, the work was assumed to be performed by a GS–13 technical employee, doubled and rounded up, for an hourly rate of $89.

3. Cost Estimate Results

We made our total cost estimate based on the number of registered biofuel producers in the CDX as of July 2011, assuming that all parties choose to participate in the voluntary quality assurance program. This assumes 485 RIN generators with 600 biofuel production facilities. This results in a total cost for the program of $27,576,450. If all parties are participating in the program and all RINs are verified, this results in a per RIN cost of less that $0.01. However, these costs are assumed to be linear and we do not expect that there would be any economies of scale in terms of the number of RINs verified by an auditor. However, we do expect that the per-RIN cost would vary depending on the number of RINs generated by each fuel producer since the effort involved in validating many aspects of renewable fuel production are the same regardless of the size of the facility.

We do not expect that the costs of participation in the proposed quality assurance program would vary significantly by the D code of RINs. While RINs with different D codes may command different prices in the market, the verification process for each RIN is expected to be similar regardless of D code, with the biggest cost differences in feedstock verification.

*B. Costs for RIN Replacement Mechanisms*

For reasons described previously, some QAP providers may choose a replacement mechanism to insure against invalid RINs. Such mechanisms would be required under Option A, but would not be required under Option B. There is large uncertainty in estimating the costs of these mechanisms because it is an entirely new market. Informal discussions with potential QAP auditors, as well as other parties involved in similar markets or financial surety mechanisms in general, have suggested a broad range of potential costs. For these reasons the costs for such a mechanism were not included in the analysis above, and EPA welcomes comments on the cost impacts of any potential financial surety mechanisms.

In order to fully inform cost impacts of the various QAP options, we discuss the relevant cost factors of the three possible types of mechanisms discussed in Section IV above. The discussion includes RIN banks, RIN escrow accounts, and other traditional financial instruments. As noted previously, these mechanisms are not intended to be inclusive of all possible ways a RIN replacement mechanism could work, and are merely suggestions of potential pathways Option A auditors might follow.

A RIN bank is a managed repository of valid audited RINs which are available to all members of the bank for replacement purposes. The costs associated with a RIN bank are directly proportional to the value of the RINs banked, and the number of banked RINs required to meet the obligations of the bank members. There would also be bank management costs, which would be impacted by the number of bank members, and how the bank is managed in terms of RIN deposit, withdrawal, update, and replacement. In addition, bank managers would need to come up with a system to maintain current year RINs in the bank, which may involve additional costs for the sale of expiring RINs and any differential in the value of the RIN at the time of deposit and the time of sale or release. These costs would be born by the members of the bank, but would likely be passed on to RIN purchasers to the maximum extent possible. These parameters will vary so much from bank to bank that it is impossible to estimate an average per RIN cost across the entire program. However, it is reasonable to assume that the cost would be effectively the per-RIN value of banked RINs plus some fractional percentage to cover management costs.

A RIN escrow account would work very much like a RIN bank, but would be funded by a single auditor instead of a group of auditors, and would be supervised and managed by a third-party escrow agent. The advantage of this option is that an auditor would have total control over the funding of the escrow. However, an auditor using an escrow account would be solely responsible for the funding of the account, and so would be required to maintain a balance equal to a much larger percentage of its potential replacement responsibility than it might be if using a RIN bank. The cost of a RIN escrow account is entirely dependent upon the number and value of the RINs covered by the escrow.

Traditional financial instruments, such as surety bonds, letters of credit, or expanded insurance coverage, are also options under Option A. The cost for this type of coverage is dependent on the level of risk determined by the surety provider, as well as the value of the RINs to be covered. This type of financial instrument would most likely provide a maximum dollar amount of coverage, which would translate into a per RIN cost depending on the number of RINs covered, relative to the number of RINs audited by the QAP provider purchasing the financial protection. EPA has learned that the cost of these policies vary greatly among the parties looking into these options. For this reason, this type of financial protection was not included in the cost analysis outlined above.

**X. Public Participation**

We request comment by April 18, 2013 on all aspects of this proposal, including but not limited to the following:

- The RIN replacement cap of 2% and the limited exemption of 2%.
- A potential regulatory change in which renewable fuel producers would be prohibited from separating RINs.
- The proposed components of QAPs.
- The proposed elements of RIN replacement mechanisms, including the inclusion of E&O insurance.
- The costs associated with indemnifying auditor verification of RINs.
- Mechanisms to ensure that auditors are not complicit in fraud.

This section describes how you can participate in this process.

*A. How do I submit comments?*

We are opening a formal comment period by publishing this document. We will accept comments through April 18, 2013. If you have an interest in the program described in this document, we encourage you to comment on any aspect of this rulemaking. We request comment on various topics throughout this proposal.

Your comments will be most useful if you include appropriate and detailed supporting rationale, data, and analysis. If you disagree with parts of the

proposed program, we encourage you to suggest and analyze alternate approaches to meeting the goals described in this proposal. You should send all comments, except those containing proprietary information, to our Air Docket (see **ADDRESSES**) before the end of the comment period. If you submit proprietary information for our consideration, you should clearly separate it from other comments by labeling it ''Confidential Business Information (CBI).'' You should send CBI directly to the contact person listed under **FOR FURTHER INFORMATION CONTACT** instead of the public docket. This will help ensure that no one inadvertently places proprietary information in the docket. If you want us to use your confidential information as part of the basis for the final rule, you should send a non-confidential version of the document summarizing the key data or information. We will disclose information covered by a claim of confidentiality only through the application of procedures described in 40 CFR part 2. If you do not identify information as confidential when we receive it, we may make it available to the public without notifying you.

*B. Will there be a public hearing?*

We will hold a hearing on March 19, 2013, Room 1153 EPA East, Washington, DC 20004, beginning at 10:00 a.m. local time. If you would like to present testimony at the public hearing, we ask that you notify the contact person listed above under **FOR FURTHER INFORMATION CONTACT** at least ten days before the hearing. You should estimate the time you will need for your presentation and identify any needed audio/visual equipment. We suggest that you bring copies of your statement or other material for the EPA panel and the audience. It would also be helpful if you send us a copy of your statement or other materials before the hearing. We will make a tentative schedule for the order of testimony based on the notifications we receive. This schedule will be available on the morning of the hearing. In addition, we will reserve a block of time for anyone else in the audience who wants to give testimony. We will conduct the hearing informally, and technical rules of evidence won't apply. We will arrange for a written transcript of the hearing and keep the official record of the hearing open for 30 days to allow you to submit supplementary information. You may make arrangements for copies of the transcript directly with the court reporter.

## XI. Statutory and Executive Order Review

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal and policy issues. Accordingly EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 and any changes made in response to OMB recommendations have been documented in the docket for this action.

This action is being proposed today as a result of several cases of fraudulently generated RINs. As discussed above, several biodiesel production companies have been identified as having generated RINs that did not represent qualifying renewable fuel. While these invalid RINs represented a very small amount (about 5%) of the nationwide biodiesel volume in the 2009—2011 timeframe, the net result is that this fraud has impacted the liquidity of the biodiesel RIN market as some biodiesel RINs are perceived as having less value than others. In addition, as a result of fraudulent activities, obligated parties have been subject to monetary penalties and the additional cost of purchasing new RINs to cover the invalid RINs, even though they purchased the original RINs in good faith believing that they were valid. These issues have raised novel legal and policy issues for the RFS program and EPA believes it is necessary put in place an additional regulatory mechanism that could provide an alternative way to assure that RINs used for compliance are valid to restore confidence in the RIN market and level the playing field for large and small producers.

*B. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2473.01.

The RFS program requires that specified volumes of renewable fuel be used as transportation fuel, heating oil, and/or jet fuel each year. Obligated parties demonstrate compliance with the RFS standards through the acquisition of unique Renewable Identification Numbers (RINs) assigned by the producer or importer to every batch of renewable fuel produced or imported. Validly generated RINs show that a certain volume of qualifying renewable fuel was produced or imported. The RFS program also includes provisions stipulating the conditions under which RINs are invalid, the liability carried by a party that transfers or uses an invalid RIN, and how invalid RINs must be treated.

In this action we are proposing a voluntary quality assurance program intended to provide a more structured way to assure that the RINs entering commerce are valid. The voluntary quality assurance program for RINs would provide a means for regulated parties to ensure that RINs are properly generated, through audits of production facilities conducted by independent third parties using quality assurance plans (QAPs).

The annual public reporting and recordkeeping burden for this collection is estimated to be 320 hours per response. A document entitled ''Supporting Statement for Renewable Fuels Standard (RFS2) Voluntary RIN Quality Assurance Program (Proposed Rule)'' has been placed in the public docket. The supporting statement provides a detailed explanation of the Agency's estimates by collection activity. The estimates contained the supported statement are briefly summarized here:

*Total No. of Respondents:* 485.

*Total Burden Hours:* 192,270.

*Total Cost to Respondents:* $ 4,062,000.

Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2012–0621. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60

days after February 21, 2013, a comment to OMB is best assured of having its full effect if OMB receives it by March 25, 2013. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201 (see table below); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The following table provides an overview of the primary SBA small business categories potentially affected by this regulation:

| Industry | Defined as small entity by SBA if: | NAICS [a] codes |
|---|---|---|
| Petroleum refineries | ≤1,500 employees | 324110 |

[a] North American Industrial Classification System.

The program proposed in today's action is a voluntary quality assurance program intended to provide a more structured way to assure that RINs entering commerce are valid. As a result of the recent fraud issue, obligated parties are reluctant to purchase RINs from smaller refiners because of the uncertainty of their validity. While this voluntary program could be beneficial for both larger and smaller refineries it could be particularly beneficial for smaller petroleum refineries if they choose to participate. In the current climate, these smaller producers have been forced to offer their RINs at a significant discount relative to RINs from larger producers, assuming they can find obligated parties or distributors willing to purchase them at all. While there will be some cost to opt into the program, we believe these costs will be offset by leveling the playing field between larger producers and small producers, allowing small producers to effectively compete in the market.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action will not impose any requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act*

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The agency has determined that this action does not contain a Federal mandate that may result in expenditures of $100 million or more for the private sector in any one year. Because the program outlined in this proposal is optional, entities subject to this rule will have the flexibility to participate or not. Thus, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132 (Federalism)*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. These rules will apply to manufacturers of on-highway engines and not to state or local governments. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comments on this proposed rule from State and local officials.

*F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule will be implemented at the Federal level and impose compliance costs only on engine manufacturers who elect to participate in the program. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed action from tribal officials.

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211 (Energy Effects)*

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that any energy impacts of this rule will be negligible because the voluntary QAP audit process would ensure that the volume consumption goals of the statute are met while addressing the unique features of the RFS program that have resulted in

inefficiencies and poor liquidity in the RIN market.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the agencies to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials, specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

Today's action proposes a voluntary set of regulatory provisions that could provide regulated parties with a specific mechanism for demonstrating that they have conducted due diligence to verify the validity of RINs. Therefore, EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.

**RFS Renewable Identification Number (RIN) Quality Assurance Program**

**XII. Statutory Authority**

Statutory authority for the rule finalized today can be found in section 211 of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's rule, including the recordkeeping requirements, come from Sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. 7414, 7542, and 7601(a).

**List of Subjects in 40 CFR Part 80**

Administrative practice and procedure, Air pollution control, Diesel fuel, Environmental protection, Fuel additives, Gasoline, Imports, Oil imports, Petroleum.

Dated: January 31, 2013.

**Lisa P. Jackson,**

*Administrator.*

For the reasons set forth in the preamble, 40 CFR part 80 is proposed as follows:

## PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7521(1), 7545 and 7601(a).

### Subpart M—[ Renewable Fuel Standard]

■ 2. Section 80.1401 is amended by adding in alphabetical order the definitions of ''A–RIN'', ''B–RIN'', ''Independent Third-Party Auditor'', ''Non-qualifying fuel'', ''Quality assurance audit'', ''Quality assurance plan'', and ''Verified RIN'' and revising the definition of ''Non-ester renewable diesel''.

The added and revised text read as follows:

**§ 80.1401 Definitions.**

* * * * *

*A–RIN* means a RIN verified by a registered independent third-party auditor using a QAP that has been approved under § 80.1469(a) following the audit process described in § 80.1472.

* * * * *

*B–RIN* means a RIN verified by a registered independent third-party auditor using a QAP that has been approved under § 80.1469(b) following the audit process described in § 80.1472.

* * * * *

*Independent Third-Party Auditor* means a party meeting the requirements of § 80.1471(b) that conducts QAP audits and verifies RINs.

* * * * *

*Non-ester renewable diesel,* also known as renewable diesel, means renewable fuel which is all of the following:

(1) A fuel which can be used at a blend level approved under 40 CFR Part 79 in an engine designed to operate on conventional diesel fuel, or be heating oil or jet fuel.

(2) Not a mono-alkyl ester.

*Non-qualifying fuel use* means a use of renewable fuel in an application other than transportation fuel, heating oil, or jet fuel.

*Quality Assurance Audit* means an audit of a renewable fuel production facility conducted by an independent third-party auditor in accordance with a QAP that meets the requirements of § 80.1469.

*Quality Assurance Plan,* or QAP, means the list of elements that an independent third-party auditor will check to verify that the RINs generated by a renewable fuel producer or importer are valid.

* * * * *

*Verified RIN* means a RIN generated by a renewable fuel producer that was subject to a QAP audit executed by an independent third-party auditor, and determined by the independent third-party auditor to be valid. Verified RINs include both A–RINs and B–RINs.

■ 3. Section 1402 is added to read as follows.

**§ 80.1402 Information Submitted under 40 CFR part 80 Subpart M.**

Sections 2.201 through 2.215 of 40 CFR part 2, subpart B, do not apply to the following information:

(a) Registration information submitted pursuant to §§ 80.1450(b), (c), and (g) that is not entitled to confidential treatment includes company name, facility name, facility type, fuel type, permitted capacity, production volume, feedstocks, production process, D-Code, and co-products.

(b) Reporting information submitted pursuant to reporting requirements in 40 CFR 1452(b) that is not entitled to confidential treatment includes company name, RIN-generating company name, renewable fuel producer, facility name and address, facility location, renewable fuel production month and year, fuel type, D-Code, feedstocks, production process, volume of fuel produced, and number of RINs generated.

■ 4. Section 80.1426 is amended as follows:

■ a. By revising paragraph (a)(1)(i) and (a)(1)(ii);

■ b. Adding paragraphs (a)(1)(iii);

■ c. By revising paragraphs (c)(1) and (c)(6);

■ d. By revising paragraphs (f)(4)(i)(A)(1) and (f)(4)(i)(B);

■ e. By adding paragraph (f)(4)(iii);

■ f. By revising paragraph (f)(12); and

■ g. By adding paragraph (f)(14).

The additions and revisions reads as follows:

**§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?**

(a) * * *

(1) * * *

(i) Qualifies for a D code pursuant to § 80.1426(f), or as otherwise approved by EPA, and is demonstrated pursuant to the reporting requirements of § 80.1451 and the recordkeeping requirements of § 80.1454, or other records maintained by the producer, to be produced in accordance with the applicable pathway.

(ii) Is designated on a product transfer document (PTD) for use as transportation fuel, heating oil, or jet fuel in accordance with § 80.1453(a)(12); and

(iii) For renewable electricity, biogas, and any renewable fuel other than ethanol, biodiesel, or renewable diesel, is distributed and sold in accordance with § 80.1426(f)(10), § 80.1426(f)(11), or § 80.1426(f)(12), as appropriate.

* * * * *

(c) * * *

(1) Fuel producers and importers may not generate RINs for fuel that does not satisfy the requirements of subsection (a)(1) of this section.

* * * * *

(6) A party is prohibited from generating RINs for a volume of fuel that it produces if the fuel has been produced by a process that uses a renewable fuel as a feedstock, and the renewable fuel that is used as a feedstock was produced by another party, except that RINs may be generated for such fuel if allowed by EPA in response to a petition submitted pursuant to § 80.1416 and the petition approval specifies a mechanism to prevent double counting of RINs.

* * * * *

(f) * * *

(4) * * *

(i) * * *

(A) * * *

(*1*) $V_{RIN}$ shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * FE_R/(FE_R + FE_{NR})$$

Where:

$V_{RIN}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

$V_s$ = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$FE_R$ = Feedstock energy from renewable biomass used to make the transportation fuel, in Btu.

$FE_{NR}$ = Feedstock energy from non-renewable feedstocks used to make the transportation fuel, heating oil, or jet fuel, in Btu.

* * * * *

(B) *Method B.* $V_{RIN}$ shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * R$$

Where:

$V_{RIN}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

$V_s$ = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

R = The renewable fraction of the fuel as measured by a carbon-14 dating test method as provided in paragraph (f)(9) of this section.

* * * * *

(iii) In determining the RIN volume $V_{RIN}$ according to paragraph (f)(4)(i)(A) or (f)(4)(i)(B) of this section, the equivalence value used to determine $V_{RIN}$ which is calculated according to § 80.1415 shall use a value of 1.0 to represent R, the renewable content of the renewable fuel.

* * * * *

(12)(i) For purposes of this section, any renewable fuel other than ethanol, biodiesel, or renewable diesel is considered renewable fuel and the producer or importer may generate RINs for such fuel only if all of the following apply:

(A) The fuel is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has been otherwise approved by the Administrator;

(B) The fuel producer or importer maintains records demonstrating that the fuel was produced for use as a transportation fuel, heating oil or jet fuel by:

(*1*) Blending the renewable fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards;

(*2*) Entering into a written contract for the sale of a the renewable fuel, which specifies the purchasing party shall blend the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards; or

(*3*) Entering into a written contract for the sale of the renewable fuel, which specifies that the fuel shall be used in its neat form as a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(C) The fuel was sold for use in or as a transportation fuel, and for no other purpose; and

(ii) Reserved.

(iii) Reserved.

* * * * *

(14) For purposes of Table 1 to this section, process heat produced from combustion of gas at a renewable fuel facility is considered derived from biomass if the gas is biogas.

(i) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(ii) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately serves the producer's renewable fuel facility.

(iii) The process heat produced from combustion of gas at a renewable fuel facility described in paragraph (f)(12)(i) of this section shall not be considered derived from biomass if any other party relied upon the contracted volume of biogas for the creation of RINs.

■ 5. Section 80.1429 is amended by adding paragraph (b)(10) and removing and reserving paragraph (f) to read as follows:

**§ 80.1429 Requirements for separating RINs from volumes of renewable fuel.**

* * * * *

(b) * * *

(10) Any party that produces a volume of renewable fuel may separate any RINs that have been generated to represent that volume of renewable fuel or that blend if that party retires the

separated RINs to replace invalid RINs according to § 80.1474.

* * * * *

■ 6. In § 80.1430 revise paragraph (a), (b), and (e) to read as follows:

**§ 80.1430 Requirements for exporters of renewable fuel.**

(a) Any party that owns any amount of renewable fuel, whether in its neat form or blended, that is exported from any of the regions described in § 80.1426(b) shall acquire sufficient RINs to comply with all applicable Renewable Volume Obligations under paragraphs (b) through (e) of this section representing the exported renewable fuel.

(b) *Exporter Renewable Volume Obligations.* An exporter of renewable fuel shall determine its Exporter Renewable Volume Obligations from the volumes of the renewable fuel exported.

(1) *Cellulosic biofuel.*

$ERVO_{CB,k} = VOL_k * EV_k$

Where:

$ERVO_{CB,k}$ = The Exporter Renewable Volume Obligation for cellulosic biofuel for discrete volume k in gallons.

k = A discrete volume of renewable fuel that the exporter knows or has reason to know is cellulosic biofuel that is exported in a single shipment.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(2) *Biomass-based diesel.*

$ERVO_{BBD,k} = VOL_k * EV_k$

Where:

$ERVO_{BBDI,k}$ = The Exporter Renewable Volume Obligation for biomass-based diesel for discrete volume k, in gallons.

k = A discrete volume of renewable fuel that is biodiesel or renewable diesel and is exported in a single shipment.

$VOL_k$ = The standardized volume of discrete volume k calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(3) *Advanced biofuel.*

$ERVO_{AB,k} = VOL_k * EV_k$

Where:

$ERVO_{AB,k}$ = The Exporter Renewable Volume Obligation for advanced biofuel for discrete volume k, in gallons.

k = A discrete volume of renewable fuel that is advanced biofuel (including biomass-based diesel, renewable diesel, cellulosic biofuel and other advanced biofuel) and is exported in a single shipment.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(4) *Renewable fuel.*

$ERVO_{RF,i} = VOL_k * EV_k$

Where:

$ERVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for discrete volume k, in gallons.

k = A discrete volume of exported renewable fuel that is exported in a single shipment.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

* * * * *

(e) For renewable fuels that are in the form of a blend at the time of export, the exporter shall determine the volume of exported renewable fuel based on one of the following:

* * * * *

■ 7. Section 80.1431 is amended by removing and reserving paragraph (a)(1)(viii) and revising paragraph (b) introductory text to read as follows:

**§ 80.1431 Treatment of invalid RINs.**

(a) * * *

(1) * * *

(viii) [Reserved]

* * * * *

(b) Except as provided in *§ 80.1473, the following provisions apply* in the case of RINs that are invalid:

* * * * *

■ 8. Section 80.1433 is added to read as follows:

**§ 80.1433 Requirements for parties that designate fuel for which RINs were generated for an application that is not transportation fuel, heating oil, or jet fuel.**

(a) Any party that designates any amount of fuel originally produced as renewable fuel, whether in its neat form or blended, for an application that is not transportation fuel, heating oil, or jet fuel shall retire an appropriate number and type of RINs according to one of the following equations and as specified in paragraph (b).

(1) Except as provided in (a)(5), *Cellulosic biofuel.*

$RINRET_{CB,i} = \Sigma(VOL_k * EV_k)_i$

Where:

$RINRET_{CB,i}$ = The quantity of cellulosic biofuel RINs that must be retired for day i, in gallons.

k = A discrete volume of fuel which the party designated for use in an application other than as transportation fuel, heating oil or jet fuel and which the party knows or has reason to know would have qualified as cellulosic biofuel if not put to a non-qualifying fuel use.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with paragraph (c) of this section and § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(2) Except as provided in (a)(5), *Biomass-based diesel.*

$RINRET_{BBD,i} = \Sigma(VOL_k * EV_k)_i$

Where:

$RINRET_{BBD,i}$ = The quantity of biomass-based diesel RINs that must be retired for day i, in gallons.

k = A discrete volume of fuel which the party designated for use in an application other than as transportation fuel, heating oil or jet fuel and which the party knows or has reason to know would have qualified as biomass-based diesel if not put to a non-qualifying fuel use.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(3) *Advanced biofuel.*

$RINRET_{AB,i} = \Sigma(VOL_k * EV_k)_i$

Where:

$RINRET_{AB,i}$ = The quantity of advanced biofuel RINs that must be retired for day i, in gallons.

k = A discrete volume of fuel which the party designated for use in an application other than as transportation fuel, heating oil or jet fuel and which the party knows or has reason to know would have qualified as advanced biofuel if not put to a non-qualifying fuel use.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with paragraph (c) of this section and § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(4) *Renewable fuel.*

$RINRET_{RF,i} = \Sigma(VOL_k * EV_k)_i$

Where:

$RINRET_{RF,i}$ = The quantity of renewable fuel RINs that must be retired for day i, in gallons.

k = A discrete volume of fuel which the party designated for use in an application other than as transportation fuel, heating oil or jet fuel and which the party knows or has reason to know would have qualified as renewable fuel if not put to a non-qualifying fuel use.

$VOL_k$ = The standardized volume of discrete volume k, in gallons, calculated in accordance with § 80.1426(f)(8).

$EV_k$ = The equivalence value associated with discrete volume k.

(5) If the party has reason to know that the fuel would have qualified as cellulosic diesel if not put to a non-qualifying fuel use, it must choose either the formula specified in paragraph (a)(1) or that in paragraph (a)(2) to calculate the number and type of RINs that must be retired.

(b) For the purposes of calculating the number of RINs that must be retired under paragraphs (a) of this section:

(1) If the equivalence value for the discrete volume k can be determined pursuant to § 80.1415 based on its

composition, then the appropriate equivalence value shall be used in the calculation pursuant to paragraph (a).

(2) If the discrete volume k is known to be biomass-based diesel but the composition is unknown, the $EV_k$ shall be 1.5.

(3) If neither the category nor composition of discrete volume k can be determined, the $EV_k$ shall be 1.0.

(c) $VOL_k$ shall be based on one of the following:

(1) Information from the supplier of the blend of the concentration of fuel originally produced as renewable fuel in the blend;

(2) Determination of the renewable portion of the blend using Method B or Method C of ASTM D 6866 (incorporated by reference, see § 80.1468), or an alternative test method as approved by the EPA; or

(3) Assuming the maximum concentration of the renewable fuel in the blend as allowed by law and/or regulation.

(d) [Reserved]

(e) All RINs retired pursuant to this section shall be identified in EMTS according the following schedule:

(1) Within ten (10) business days of the designation of a fuel for which RINs were generated for a use other than as transportation fuel, heating oil, or jet fuel.

(f) Any volume of fuel which is designated for a purpose other than as transportation fuel, heating oil or jet fuel cannot be redesignated as renewable fuel.

■ 9. Section 80.1450 is amended as follows:

■ a. By adding paragraph (b)(1)(ix); and

■ b. By revising paragraph (g) and

■ c. By adding paragraph (h).

The revisions and additions read as follows:

**§ 80.1450 What are the registration requirements under the RFS program?**

* * * * *

(b)* * *

(1)* * *

(ix) For a producer or importer or any renewable fuel other than ethanol, biodiesel, renewable diesel, biogas or renewable electricity:

(A) A description of the renewable fuel and how it will be blended to into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards;

(B) A statement regarding whether the renewable fuel producer or importer will blend the renewable fuel into gasoline or diesel fuel or enter into a written contract for the sale and use of a specific quantity of the renewable fuel with a party who blends the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards;

(C) If the renewable fuel producer or importer enters into a written contract for the sale and use of a specific quantity of the renewable fuel with a party who blends the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel, provide

(*1*) the name, location and contact information for the party that will blend the renewable fuel, and

(*2*) a copy of the contract that requires the party to blend the renewable fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards;

* * * * *

(g) Any independent third-party auditor described in § 80.1471 must register with EPA as an independent third-party auditor and receive an EPA issued company identification number prior to conducting quality assurance audits pursuant to § 80.1472. Registration information must be submitted at least 30 days prior to conducting audits of renewable fuel production facilities. The independent third-party auditor must provide to EPA the following:

(1) The information specified under § 80.76, if such information has not already been provided under the provisions of this part.

(2) Documentation of professional qualifications as described in § 80.1450(b)(2)(i)(A) and § 80.1450(b)(2)(i)(B).

(3) Documentation of professional liability insurance as described in § 80.1471(c).

(4) Any quality assurance plans as described in § 80.1469.

(5) Name, address, and company and facility identification number of all renewable fuel production facilities that the independent third-party auditor intends to audit under § 80.1472.

(6) An affidavit from each renewable fuel producer or foreign renewable fuel producer stating its intent to have the independent third-party auditor conduct a quality assurance audit of any of the renewable fuel producer's or foreign renewable fuel producer's facilities.

(7) An affidavit stating that an independent third-party auditor is independent, as described in paragraphs § 80.1471(b), of any renewable fuel producer or foreign renewable fuel producer.

(8) Proof of a RIN replacement instrument, if applicable, as described under § 80.1470.

(9) The name and contact information for each person employed (or under contract) by the independent third-party auditor to conduct audits or verify RINs, as well as the name and contact information for the Professional Engineer performing the review.

(10) *Registration updates.*—

(i) Any independent third-party auditor who makes changes to its quality assurance plan(s) that will allow it to audit new renewable fuel production facilities, as defined in § 80.1401 that is not reflected in the producer's registration information on file with EPA must update its registration information and submit a copy of an updated QAP on file with EPA at least 60 days prior to producing the new type of renewable fuel.

(ii) Any independent third-party auditor who makes any other changes to a QAP that will affect the third-party auditor's registration information but will not affect the renewable fuel category for which the producer is registered per paragraph (b) of this section must update its registration information 7 days prior to the change.

(iii) Independent third-party auditors must update their QAPs at least 60 days prior to verifying RINs generated by a renewable fuel facility uses a new pathway.

(iv) Independent third-party auditors must update their QAPs at least 60 days prior to verifying RINs generated by any renewable fuel facility not identified in their existing registration.

(11) *Registration renewal.* Registrations for independent third-party auditors expire at the end of the calendar year, December 31, after EPA has approved a registration under this paragraph (g) unless:

(i) The independent third-party auditor resubmits all information, updated as necessary, described in § 80.1450(g)(1) thru (g)(7) no later than October 31; and

(ii) The independent third-party auditor submits an affidavit affirming that he or she has only verified RINs using a QAP approved under § 80.1469, notified all appropriate parties of all potentially invalid RINs as described in § 80.1471(d), and fulfilled all of his or her RIN replacement obligations under § 80.1474.

(12) *Revocation of Registration.*

(i) The Administrator may issue a notice of intent to revoke the registration of a third-party auditor if the Administrator determines that the auditor has failed to fulfill any requirement of this subpart. The notice of intent shall include an explanation of the reasons for the proposed revocation.

(ii) Within 60 days of receipt of the notice of intent to revoke, the independent third-party auditor may submit written comments concerning the notice, including but not limited to a demonstration of compliance with the requirements which provide the basis for the proposed revocation. Communications should be sent to the following address:

U.S. Mail: U.S. Environmental Protection Agency, Fuels Programs Registration (6406J), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

*Commercial Delivery:* U.S. Environmental Protection Agency, Fuels Programs Registration, Room 647C, 202–343–9038, 1310 L Street NW., Washington, DC 20005.

The Administrator shall review and consider any such submission before taking final action concerning the proposed revocation.

(iii) If the auditor fails to respond in writing within 60 days to the notice of intent to revoke, the revocation shall become final by operation of law and the Administrator shall notify the independent third-party auditor of such revocation.

(iv) EPA may deny the registration of an independent third-party auditor if the independent third-party auditor employs any person that was previously employed by an independent third-party auditor whose registration was revoked.

* * * * *

(h) Registration shall be on forms, and following policies, established by the Administrator.

■ 10. Section 80.1451 is amended as follows:

■ a. By revising paragraphs (a)(1)(ix) through (xiii);

■ b. By adding paragraphs (a)(1)(xiv) through (xvi);

■ c. By revising paragraph (b)(1)(ii)(T);

■ d. By revising paragraphs (c)(2)(x) through (xvi);

■ e. By adding paragraphs (c)(2)(xvii) and (c)(2)(xviii);

■ f. By revising paragraph (g); and

■ g. By adding paragraph (h).

The revisions and additions read as follows:

**§ 80.1451 What are the reporting requirements under the RFS program?**

(a) * * *

(1) * * *

(ix) The total current-year RINs by category of renewable fuel, as those fuels are defined in § 80.1401 (i.e., cellulosic biofuel, biomass-based diesel, advanced biofuel, renewable fuel, and cellulosic diesel), retired for compliance that are invalid as defined in § 80.1431(a).

(x) The total prior-year RINs by renewable fuel category, as those fuels are defined in § 80.1401, retired for compliance.

(xi) The total prior-year RINs by renewable fuel category, as those fuels are defined in § 80.1401, retired for compliance that are invalid as defined in § 80.1431(a).

(xii) The total cellulosic biofuel waiver credits used to meet the party's cellulosic biofuel RVO.

(xiii) A list of all RINs generated prior to July 1, 2010 that were retired for compliance in the reporting period.

(xiv) A list of all RINs that were retired for compliance in the reporting period and are invalid as defined in § 80.1431(a).

(xv) Any deficit RVO(s) carried into the subsequent year.

(xvi) Any additional information that the Administrator may require.

* * * * *

(b) * * *

(1)(i) * * *

(ii) * * *

(T) Producers or importers of any renewable fuel other than ethanol, biodiesel, renewable diesel, biogas or renewable electricity, shall report, on a quarterly basis, all the following for each volume of fuel:

(*1*) Total volume of renewable fuel produced or imported, total volume of renewable fuel blended into gasoline and diesel fuel by the producer or importer, and the percentage of renewable fuel in each batch of finished fuel;

(*2*) If the renewable fuel producer or importer enters into a written contract for the sale of a specific quantity of the renewable fuel to a party who blends the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel, or who uses the neat fuel for a qualifying fuel use, the name, location and contact information for each puchasing party, and one or more affidavits from that party including the following information:

*(i)* Quantity of renewable fuel received from the producer or importer;

*(ii)* Date the renewable fuel was received from producer;

*(iii)* A description of the fuel that the renewable fuel was blended into and the blend ratios for each batch, if applicable;

*(iv)* A description of the finished fuel, and a statement that the fuel meets all applicable standards and was sold for use as a transportation fuel, heating oil or jet fuel;

*(v)* Quantity of assigned RINs received with the renewable fuel, if applicable; and

*(vi)* Quantity of assigned RINs that the end user separated from the renewable fuel, if applicable.

(c) * * *

(2) * * *

(x) The total current-year RINs retired that are invalid as defined in § 80.1431(a).

(xi) The total prior-year RINs retired.

(xii) The total prior-year RINs retired that are invalid as defined in § 80.1431(a).

(xiii) The number of current-year RINs owned at the end of the quarter.

(xiv) The number of prior-year RINs owned at the end of the quarter.

(xv) The number of RINs generated.

(xvi) The volume of renewable fuel (in gallons) owned at the end of the quarter.

(xvii) The total 2009 and 2010 retired RINs reinstated.

(xviii) Any additional information that the Administrator may require.

* * * * *

(g) All independent third-party auditors. Any party that is an independent third-party auditor as defined in § 80.1471 that verifies RINs must submit to EPA reports according to the schedule, and containing all the information, that is set forth in this paragraph (g).

(1)(i) For RINs verified beginning on January 1, 2014, RIN generation verification reports for each facility audited by the independent third-party auditor shall be submitted according to the schedule specified in paragraph (f)(2) of this section.

(ii) The RIN generation verification reports shall include all the following information for each batch of renewable fuel produced or imported verified, where ''batch'' means a discrete quantity of renewable fuel produced or imported and assigned a unique batch-RIN per § 80.1426(d):

(A) The RIN generator's name.

(B) The RIN generator's EPA company registration number.

(C) The renewable fuel producer EPA facility registration number.

(D) The importer EPA facility registration number and foreign renewable producer company registration number, if applicable.

(E) The applicable reporting period.

(F) The quantity of RINs generated for each batch according to § 80.1426.

(G) The production date of each batch.

(H) The fuel type of each batch.

(I) The volume of denaturant and applicable equivalence value of each batch.

(J) The volume of each batch produced.

(K) The volume and type of each feedstock used to produce the batch.

(L) Which batches met the definition of Renewable Biomass.

(M) The quantity and type of co-products produced.

(N) Any additional information the Administrator may require.

(2) RIN verification activity reports shall be submitted to EPA according to the schedule specified in paragraph (f)(2) of this section. Each report shall summarize RIN verification activities for the reporting period. The quarterly RIN verification activity reports shall include all of the following information:

(i) The submitting party's name.

(ii) The submitting party's EPA company registration number.

(iii) The number of current-year RINs verified at the start of the quarter.

(iv) The number of prior-year RINs verified at the start of the quarter.

(v) The total current-year RINs verified.

(vi) The total prior-year RINs verified.

(vii) The number of current-year RINs verified at the end of the quarter.

(viii) The number of prior-year RINs verified at the end of the quarter.

(ix) A list of all RINs subject to the audit that were not verified or that were identified as Potentially Invalid RINs (PIRs) pursuant to 80.1474, along with a narrative description of why the RINs were not verified or were identified as PIRs.

(x) Any additional information that the Administrator may require.

(3) All reports required under this paragraph (g) must be signed and certified as meeting all the applicable requirements of this subpart by the independent third-party auditor or a responsible corporate officer of the independent third-party auditor.

(h) All reports required under this section shall be submitted on forms and following procedures prescribed by the Administrator.

■ 11. Section 80.1452 is amended by revising paragraph (d) and adding paragraph (e), to read as follows.

**§ 80.1452 What are the requirements related to the EPA-Moderated Transaction System (EMTS)?**

* * * * *

(d) *Alternative method of reporting buy and sell transactions in EMTS.* For buyers and sellers of assigned RINs that agree to utilize this alternative reporting method, the reporting requirements of paragraph(c) of this section are modified as follows:

(1) The seller of assigned RINs shall do the following:

(i) Report the sell transaction in EMTS within five (5) business days of shipping, and;

(ii) Indicate that the alternative reporting method is being utilized; and

(iii) Report the date the renewable volume is shipped in place of the date of transfer (c)(7) in the EMTS sell transaction report; and

(iv) Report a unique identifier and provide a product transfer document (PTD) that meets all requirement of § 80.1453 and that includes the unique identifier agreed upon by the buyer and seller.

(2) The buyer of assigned RINS shall do the following:

(i) Report the buy transaction in EMTS within five (5) business days of receipt;

(ii) Indicate that the alternative reporting method is being utilized;

(iii) Include the unique identifier provided by the seller under paragraph (g)(1)(iii) in the EMTS buy transaction report; and

(iv) Report the date the renewable volume is received in place of the date of transfer (c)(7) in the EMTS buy transaction report.

(e) All information required under this section shall be submitted on forms and following procedures prescribed by the Administrator.

■ 12. Section 80.1453 is amended as follows:

■ a. Revising paragraph (a) introductory text; and

■ b. Adding paragraphs (a)(5), and (a)(12)

The revisions and additions read as follows:

**§ 80.1453 What are the product transfer document (PTD) requirements for the RFS program?**

(a) On each occasion when any party transfers ownership of neat and/or blended renewable fuels or separated RINs subject to this subpart, the transferor must provide to the transferee documents that include all of the following information, as applicable:

* * * * *

(5) Name and blend level of all blending components in a product containing renewable fuel, if applicable.

* * * * *

(12) For the transfer of renewable fuel with or without RINs, an accurate and clear statement on the product transfer document of the fuel type from Table 1 to § 80.1426, and designation of the fuel use(s) intended by the transferor, as follows:

(i) Ethanol. ''This volume of neat or blended ethanol is designated and intended for use as transportation fuel or jet fuel in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(ii) Biodiesel. '' This volume of neat or blended biodiesel is designated and intended for use as transportation fuel, heating oil or jet fuel in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(iii) Renewable Heating oil. ''This volume of heating oil is designated and intended for use as heating oil in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(iv) Renewable Diesel. ''This volume of neat or blended renewable diesel is designated and intended for use as transportation fuel, heating oil or jet fuel in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(v) Naphtha. '' This volume of neat or blended naphtha is designated and intended for use as transportation fuel or jet fuel in the 48 U.S. contiguous states and Hawaii. This naphtha may only be used as a gasoline blendstock or jet fuel. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(vi) Butanol. ''This volume of neat or blended butanol is designated and intended for use as transportation fuel or jet fuel in the 48 U.S. contiguous states and Hawaii. This butanol may only be used as a gasoline blendstock or jet fuel. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

(vii) Renewable fuels other than ethanol, biodiesel, heating oil, renewable diesel, naptha or butanol. ''This volume of neat or blended renewable fuel is designated and intended to be used as transportation fuel, heating oil, or jet fuel in the 48 U.S. contiguous states and Hawaii. Any other use in the 48 U.S. contiguous states and Hawaii is a violation of 40 CFR 80.1460(g), unless the requirements in § 80.1433 are met.''

■ 13. Section 80.1454 is amended as follows:

■ a. By adding paragraph (b)(7);

■ b. By revising paragraphs (l), (m), (n), (o), and (p); and

■ c. By adding paragraphs (q) and (r).

The revisions and additions read as follows:

**§ 80.1454 What are the recordkeeping requirements under the RFS program?**

* * * * *

(b) * * *

(7) Records related to the implementation of a QAP under § 80.1469.

* * * * *

(l) Requirements for producers or importers of any renewable fuel other than ethanol, biodiesel, renewable diesel, biogas or renewable electricity. A renewable fuel producer that generates RINs for any renewable fuel other than ethanol, biodiesel, renewable diesel, biogas or renewable electricity shall keep all of the following additional records:

(1) Documents demonstrating the total volume of renewable fuel produced, total volume of renewable fuel blended into gasoline and diesel fuel, and the percentage of renewable fuel in each batch of finished fuel;

(2) Contracts and documents memorializing the sale of renewable fuel to parties who blend the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel, or who use the renewable fuel in its neat form for a qualifying fuel use; and

(3) Such other records as may be requested by the Administrator.

(m) Requirements for independent third-party auditors. Any independent third-party auditor (as described at § 80.1471) must keep all of the following records for a period of at least five (5) years:

(1) Copies of all reports submitted to EPA under § 80.1451(g), as applicable.

(2) Records related to the implementation of a QAP under § 80.1469 for each facility including records from facility audits and ongoing and quarterly monitoring activities.

(3) Records related to the verification of RINs under § 80.1471(e).

(4) Copies of communications sent to and received from renewable fuel producers or foreign renewable fuel producers, feedstock suppliers, purchasers of RINs, and obligated parties.

(5) Copies of all notes relating to the implementation of a QAP under § 80.1469.

(6) List of RINs reported to EPA and renewable fuel producers or foreign renewable fuel producers as potentially invalidly generated under § 80.1474 compliance.

(7) Records related to the professional liability insurance requirement under § 80.1471(c).

(8) Copies of all records related to any financial assurance instrument as required under § 80.1470 under a quality assurance plan implemented under § 80.1469(a).

(9) Such other records as may be requested by the Administrator.

(n) The records required under paragraphs (a) through (d) and (f) through (l) of this section and under § 80.1453 shall be kept for five years from the date they were created, except that records related to transactions involving RINs shall be kept for five years from the date of the RIN transaction.

(o) The records required under paragraph (e) of this section shall be kept through calendar year 2022.

(p) On request by EPA, the records required under this section and under § 80.1453 must be made available to the Administrator or the Administrator's authorized representative. For records that are electronically generated or maintained, the equipment or software necessary to read the records shall be made available; or, if requested by EPA, electronic records shall be converted to paper documents.

(q) The records required in paragraphs (b)(3) and (c)(1) of this section must be transferred with any renewable fuel sent to the importer of that renewable fuel by any foreign producer not generating RINs for his renewable fuel.

(r) Copies of all reports required under § 80.1464.

■ 14. Section 80.1460 is amended by adding paragraphs (g), (h), and (i) to read as follows.

**§ 80.1460 What acts are prohibited under the RFS program?**

* * * * *

(g) *Failing to retire RINs when fuel for which RINs have been generated is designated for use in an application other than transportation fuel, heating oil or jet fuel.* No person shall designate fuel for which RINs were generated for a non-qualifying fuel use, unless the requirements of 80.1433 have been met.

(h) *RIN Separation Violations.* No person shall do any of the following:

(1) Identify separated RINs in EMTS with the wrong separation reason code.

(2) Identify separated RINs in EMTS without having a qualifying separation event pursuant to 80.1429.

(3) Separate more than 2.5 RINs per gallon of renewable fuel that has a valid qualifying separation event pursuant to § 80.1429.

(4) Separate RINs outside of the requirements in § 80.1452(c).

(5) [Reserved]

(6) Improperly separate RINs in any other way not listed in paragraphs (i)(1)–(5) of this section.

(i) Independent third-party auditor violations. No person shall do any of the following:

(1) Fail to fully and competently implement a QAP approved under § 80.1469.

(2) Fail to notify appropriate parties of potentially invalid RINs under § 80.1474(b).

(3) Identify a RIN as verified in accordance with § 80.1471(e) that is invalid under § 80.1431.

■ 15. Section 80.1461 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows.

**§ 80.1461 Who is liable for violations under the RFS program?**

* * * * *

(a) * * *

(1) Any person who violates a prohibition under § 80.1460(a) through (d) or § 80.1460(g) through (h) is liable for the violation of that prohibition.

(2) Any person who causes another person to violate a prohibition under § 80.1460(a) through (d) or § 80.1460(g) through (h) is liable for a violation of § 80.1460(e).

* * * * *

■ 16. Section 80.1469 is added to read as follows:

**§ 80.1469 Requirements for Quality Assurance Plans.**

This section specifies the requirements for two types of Quality Assurance Plan (QAP).

(a) Option A QAP Requirements.

(1) *Feedstock-related* components.

(i) Components requiring ongoing monitoring:

(A) Feedstocks are renewable biomass as defined in § 80.1401.

(B) Feedstocks are being separated according to a separation plan, if applicable under § 80.1426(f)(5)(ii).

(C) Crop and crop residue feedstocks meet land use restrictions, or alternatively the aggregate compliance provisions of § 80.1454(g).

(D) If applicable, verify that feedstocks with additional recordkeeping requirements meet requirements of § 80.1454(d).

(E) Feedstocks are valid for the D code being used, and are consistent with information recorded in EMTS.

(F) Feedstock is consistent with production process and D code being used as permitted under Table 1 to Section 80.1426 or a petition approved through section 80.1416.

(G) Feedstock is not renewable fuel for which RINs were previously generated.

(ii) Components requiring quarterly monitoring:

(A) Separated food waste or separated yard waste plan is accepted and up to

date, if applicable under § 80.1426(f)(5)(ii).

(B) Separated municipal solid waste plan is approved and up to date, if applicable under § 80.1426(f)(5)(ii).

(C) Contracts or agreements for feedstock acquisition are sufficient for facility production.

(D) Feedstock processing and storage equipment are sufficient and are consistent with engineering review under § 80.1450(b)(2).

(E) If applicable, accuracy of feedstock energy (FE) calculation factors related to feedstocks, including average moisture content m and feedstock energy content E.

(2) *Production process-related* components.

(i) Components requiring ongoing monitoring:

(A) Production process is consistent with that reported in EMTS.

(B) Production process is consistent with D code being used as permitted under Table 1 to § 80.1426 or a petition approved through § 80.1416.

(C) Certificates of analysis verifying fuel type and quality, as applicable.

(ii) Components requiring quarterly monitoring:

(A) Mass and energy balances are appropriate for type and size of facility.

(B) Workforce size is appropriate for type and size of facility, and sufficient workers are on site for facility operations.

(C) If applicable, process-related factors used in feedstock energy (FE) calculation are accurate, in particular the converted fraction (CF).

(D) Verify existence of quality process controls designed to ensure that fuel continues to meet applicable property and quality specifications.

(E) Volume production is consistent with that reported to EPA and EIA, as well as other federal or state reporting.

(F) Volume production is consistent with storage and distribution capacity.

(G) Volume production capacity is consistent with RFS registration.

(3) *RIN generation-related* components.

(i) Components requiring ongoing monitoring:

(A) Standardization of volumes pursuant to § 80.1426(f)(8) are accurate.

(B) Renewable fuel type matches the D code being used.

(C) RIN generation is consistent with wet gallons produced or imported.

(D) Fuel shipments are consistent with production volumes.

(E) If applicable, renewable content R is accurate pursuant to 80.1426(f)(9).

(F) Equivalence value EV is accurate and appropriate.

(G) Renewable fuel was intended and sold for qualifying uses as transportation fuel, heating oil, or jet fuel.

(H) Verify that appropriate RIN generation calculations are being followed under § 80.1426(f)(3), (4), or (5), as applicable.

(ii) Components requiring quarterly monitoring:

(A) Registration, reporting and recordkeeping components.

(4) *RIN separation-related* components.

(i) Components requiring ongoing monitoring:

(A) If applicable, verify that RIN separation is appropriate under § 80.1429(b)(4).

(B) If applicable, verify that RINS were retired for any fuel that the producer produced and exported.

(ii) Components requiring quarterly monitoring:

(A) Verify that annual attestation report is accurate.

(b) Option B QAP Requirements.

All components specified in this paragraph (b) require quarterly monitoring.

(1) *Feedstock-related* components.

(i) Feedstocks are renewable biomass as defined in § 80.1401.

(ii) If applicable, separated food waste or separated yard waste plan under § 80.1426(f)(5)(ii) is accepted and up to date.

(iii) If applicable, separated municipal solid waste plan under § 80.1426(f)(5)(ii) is approved and current.

(iv) Feedstocks are being separated according to a separation plan, if applicable under § 80.1426(f)(5)(ii).

(v) Crop and crop residue feedstocks meet land use restrictions, or alternatively the aggregate compliance provisions of § 80.1454(g).

(vi) Feedstock is consistent with production process and D code being used as permitted under Table 1 to Section 80.1426 or a petition approved through section 80.1416, and is consistent with information recorded in EMTS.

(vii) Feedstock is not renewable fuel for which RINs were previously generated.

(viii) If applicable, accuracy of feedstock energy (FE) calculation factors related to feedstocks, including average moisture content m and feedstock energy content E.

(2) *Production process-related* components.

(i) Production process is consistent with that reported in EMTS.

(ii) Production process is consistent with D code being used as permitted under Table 1 to § 80.1426 or a petition approved through § 80.1416.

(iii) Mass and energy balances are appropriate for type and size of facility.

(iv) If applicable, process-related factors used in feedstock energy (FE) calculation are accurate, in particular the converted fraction CF.

(3) *RIN generation-related* components.

(i) Renewable fuel was intended and sold for qualifying uses as transportation fuel, heating oil, or jet fuel.

(ii) Certificates of analysis verifying fuel type and quality, as applicable.

(iii) Renewable fuel type matches the D code being used.

(iv) If applicable, renewable content R is accurate pursuant to 80.1426(f)(9).

(v) Equivalence value EV is accurate and appropriate.

(vi) Volume production capacity is consistent with RFS registration.

(vii) Verify that appropriate RIN generation calculations are being followed under § 80.1426(f)(3), (4), or (5), as applicable.

(4) *RIN separation-related* components.

(i) If applicable, verify that RIN separation is appropriate under § 80.1429(b)(4).

(ii) Verify that fuel that is exported was not used to generate RINs, or alternatively that were generated but retired.

(iii) Verify that annual attestation report is accurate.

(c) Each QAP shall represent a specific RIN-generating pathway as provided in Table 1 to § 80.1426 or as approved by the Administrator pursuant to § 80.1416, and shall contain elements specific to particular feedstocks, production processes, and fuel types as applicable.

(d) Submission and approval of a QAP.

(1) Each independent third-party auditor shall annually submit a QAP to the EPA which demonstrates adherence to the requirements of paragraphs (a) and (c) or (b) and (c) of this section, as applicable, and request approval on forms and using procedures specified by the Administrator.

(2) No third-party independent auditor may present a QAP as approved by the EPA without having received written approval from the EPA.

(3) A QAP is approved on the date that EPA notifies the third-party independent auditor of such approval.

(4) EPA may revoke its approval of a QAP for cause, including, but not limited to, an EPA determination that the approved QAP has proven to be inadequate in practice.

(5) EPA may void *ab initio* its approval of a QAP upon EPA's determination that the approval was based on false information, misleading

information, or incomplete information, or if there was a failure to fulfill, or cause to be fulfilled, any of the requirements of the QAP.

(e) Conditions for revisions of a QAP.

(1) A new QAP shall be submitted to EPA according to paragraph (d) of this section whenever the following changes occur at a production facility audited by a third-party independent auditor using an approved QAP:

(i) Change in feedstock.

(ii) Change in type of fuel produced.

(iii) Change in facility operations or equipment that may impact the capability of the QAP to verify that RINs are validly generated.

(2) An original QAP ceases to be valid as the basis for verifying RINs until a new QAP, submitted to EPA under this paragraph (e), is approved pursuant to paragraph (d).

■ 17. Section 80.1470 is added to read as follows:

**§ 80.1470 RIN Replacement Mechanisms for Option A Independent Third Party Auditors.**

(a) *Applicability.* This section applies to independent third party auditors using a QAP approved under Option A pursuant to § 80.1469(a) and (c).

(b) *Requirements.* An independent third party auditor must establish or participate in the establishment of a RIN replacement mechanism. The RIN replacement mechanism must fulfill, at a minimum, the following conditions:

(1) The RIN replacement mechanism must be capable of fulfilling the independent third party auditor's RIN replacement responsibility, as described in section 1474(b)(5)(i) of this subpart.

(2) The independent third party auditor is responsible for calculating and maintaining the minimum coverage afforded by the RIN replacement mechanism at all times.

(3) RINs held by the RIN replacement mechanism (if any) must be identified in a unique EMTS account designated for the exclusive use of the replacement mechanism.

(4) Distribution and removal of RINs from the replacement mechanism may not be under the sole operational control of the third-party auditor.

(5) An originally signed duplicate of the agreement or contract establishing the RIN replacement mechanism must be submitted to EPA by the independent third party auditor in accordance with 40 CFR 1450(g)(7).

(6) Any substantive change to the agreement establishing the RIN replacement mechanism must be submitted to EPA within 30 days of the change.

(c) *Cap on RIN Replacement for Independent Third Party Auditors of A–RINs.*

(1) If required to replace invalid A–RINs pursuant to paragraph (b) of this section, the independent third party auditor shall be required to replace no more than the percentage specified in paragraph (c)(2) of this section of each D code of A–RINs verified by the auditor in the current calendar year and four previous calendar years.

(2)(i) The cap on RIN replacement for auditors of A–RINs shall be 2% for A–RINs generated in 2013, 2014, and 2015.

(ii) The cap on RIN replacement for auditors of A–RINs shall be [to be determined] for A–RINs generated in 2016 and beyond.

(3) The auditor's potential replacement responsibility for a given RIN will expire at the end of the fourth calendar year after the calendar year in which the RIN was verified.

(4) The minimum RIN replacement coverage (RRC) that must be held by the third-party auditor's RIN replacement mechanism is the lesser of:

(i)

$$RRC_y = \sum_{i=0}^{4} 0.02 \times ARINVER_{y-i}$$

Where:

$RRC_y$ = RIN replacement coverage in year y in units of A–RINs that the mechanism is capable of replacing

y = The current year

$ARINVER_{y-i}$ = The sum of all A–RINs of a particular D code verified by the third-party auditor in year y-i

or

(ii)

$$RRC_y = 0.02 \times ARINVER_y + RRC_{y-1} - ARINREP_{y-1},$$

Where:

$RRC_y$ = RIN replacement coverage in year y in units of A–RINs that the mechanism is capable of replacing

y = The current year

$ARINVER_y$ = The sum of all A–RINs of a particular D code verified by the third-party auditor in year y

$RRC_{y-1}$ = RIN replacement coverage in year y-1 in units of A–RINs that the mechanism is capable of replacing

$ARINREP_{y-1}$ = The sum of all A–RINs of a particular D code that were replaced by the third-party auditor in year y-1

(d) The cap on RIN replacement does not apply when invalid verified RINs are a result of auditor error, omission, negligence, fraud, collusion with the renewable fuel producer, or a failure to implement the QAP properly or fully.

■ 18. Section 80.1471 is added to read as follows:

**§ 80.1471 Requirements for QAP Auditors**

(a) QAP audits conducted pursuant to § 80.1472 must be conducted by an independent third-party auditor that is a professional engineer, as specified in paragraphs § 80.1450(b)(2)(i)(A) and § 80.1450(b)(2)(i)(B).

(b) To be considered an independent third-party auditor under paragraph § 80.1471(a):

(1) The independent third-party auditor shall not be owned or operated by the renewable fuel producer or foreign ethanol producer, or any subsidiary or employee of the renewable fuel producer or foreign ethanol producer.

(2) The independent third-party auditor shall be free from any interest in the renewable fuel producer or foreign ethanol producer's business.

(3) The renewable fuel producer or foreign renewable fuel producer shall be free from any interest in the third-party auditor's business.

(4) The independent third-party auditor must not be debarred, suspended, or proposed for debarment pursuant to the Government-wide Debarment and Suspension regulations, 40 CFR part 32, or the Debarment, Suspension and Ineligibility provisions of the Federal Acquisition Regulations, 48 CFR, part 9, subpart 9.4.

(c) Independent third-party auditors shall maintain professional liability insurance, as defined in 31 CFR 50.5(q), of a minimum amount equal to 2% of the RINs the auditor verifies in a year to cover replacement of any invalid verified RINs due to auditor error, omission, or negligence. Independent third-party auditors shall use insurance providers that possess a financial strength rating in the top four categories from either Standard & Poor's or Moody's, i.e., AAA, AA, A or BBB for Standard & Poor's and Aaa, Aa, A, or Baa for Moody's. Replacement of any such invalid verified RINs is not subject to the cap on RIN replacement set forth in § 80.1474(e).

(d)(1) In the event that an independent third-party auditor identifies a RIN that may have been invalidly generated, the independent third-party auditor shall, within 24 hours, send notification of the potentially invalidly generated RIN to EPA and the renewable fuel producer that generated the RIN.

(2) The independent third-party auditor shall provide the notification required under paragraph (d)(1) of this section in writing (which includes email or facsimile) and, if requested by the party being notified of a potentially invalidly generated RIN, by telephone.

(e) The independent third-party auditor shall identify RINs generated from a renewable fuel producer or foreign renewable fuel producer as having been verified under a QAP.

(1) For RINs verified under QAP Option A pursuant to § 80.1469(a), RINs shall be designated as A–RINs.

(2) For RINs verified under QAP Option B pursuant to § 80.1469(b), RINs shall be designated as B–RINs.

(3) The independent third-party auditor shall not indentify RINs generated from a renewable fuel producer or foreign renewable fuel producer as having been verified under a QAP if a revised QAP must be submitted to and approved by EPA under § 80.1469(e).

(f)(1) Except as specified in paragraph (f)(2) of this section, auditors may only verify RINs that have been generated after the audit required under § 80.1472 has been completed.

(i) For A–RINs, ongoing monitoring must have been initiated.

(ii) Verification of RINs may continue for no more than 100 days following an audit.

(2) Auditors may verify RINs that were generated before the audit required under § 80.1472 has been completed, under the following conditions:

(i) The RINs in question were generated between January 1, 2013 and December 31, 2013 inclusive.

(ii) The audit is completed between January 1, 2013 and the effective date of the final rule.

(iii) The audit is performed in accordance with the elements specified in a QAP that has been approved by the EPA per § 80.1469(c).

(iv) The audit requirements of § 80.1472(e)(1) are met for every batch of renewable fuel for which RINs were generated and are being verified.

(v) The auditor may not perform more than one (1) audit under this subparagraph for any single RIN generator.

(g) The independent third-party auditor shall permit any representative of EPA to monitor at any time the implementation of QAPs and renewable fuel production facility audits.

(h) Any person who fails to meet a requirement under (f)(1) of this section shall be subject to a separate violation pursuant to section 1460(f) of this subpart.

■ 19. Section 80.1472 is added to read as follows:

**§ 80.1472 Requirements for Quality Assurance Audits**

(a) General requirements.

(1) An audit shall be performed by an auditor who meets the requirements of § 80.1471.

(2) An audit shall be based on either an Option A QAP per § 80.1469(a) or an Option B QAP per § 80.1469(b).

(3) Each audit shall verify every element contained in an applicable and approved QAP.

(4) Each audit shall include direct contact with all feedstock suppliers to the facility to obtain documents related to the feedstocks used in the production of renewable fuel at the facility.

(5) Each audit shall include a review of documents generated by the renewable fuel producer.

(6) Each audit shall include direct contact with all purchasers of renewable fuel produced at the facility to obtain documents related to renewable fuel purchased from the facility.

(b) On-site visits.

(1) Option A QAP.

(i) The auditor shall conduct an on-site visit at the renewable fuel production facility at least 4 times per calendar year.

(ii) The on-site visits specified in paragraph (b)(1)(i) of this section shall occur at least 60 days apart. The 60-day period shall start the day after the previous on-site ends.

(iii) The on-site visit shall include verification of all QAP elements that require inspection or evaluation of the physical attributes of the renewable fuel production facility, except for any physical attribute that is verified through remote monitoring equipment per the applicable QAP.

(2) Option B QAP.

(i) The auditor shall conduct an on-site visit at the renewable fuel production facility at least 4 times per calendar year.

(ii) The on-site visit specified in paragraph (b)(2)(i) of this section shall occur at least 60 days after the previous on-site visit. The 60-day period shall start the day after the previous on-site visit ends.

(iii) An on-site visit shall include verification of all QAP elements that require inspection or evaluation of the physical attributes of the renewable fuel production facility.

■ 20. Section 80.1473 is added to read as follows:

**§ 80.1473 Affirmative Defenses**

(a) Any person who engages in actions that would be a violation of the provisions of either § 80.1460(b)(2) or (c)(1), other than the generator of an invalid RIN, will not be deemed in violation if the person demonstrates that the criteria under § 80.1473 (c) or (d) are met.

(b) *Applicability of affirmative defenses.* The following provisions apply to affirmative defenses asserted under subsection (a) of this section:

(1) Affirmative defenses only apply to RINs that were invalidly generated and verified through a quality assurance audit using an EPA-approved Option A or Option B QAP.

(2) Affirmative defenses only apply in situations where an invalidly generated verified RIN is either transferred to another person (violation of § 80.1460(b)(2)) or used for compliance for an obligated party's RVO (use violation of § 80.1460(c)(1)).

(3) Affirmative defenses do not apply to the generator of an invalid RIN.

(c) *Asserting an affirmative defense for invalid A–RINs.* To establish an affirmative defense to a violation of § 80.1460 (b)(2) or (c)(1) involving invalid A–RINs, the person must meet the notification requirements of § 80.1473(e) and prove by a preponderance of evidence that:

(1) The RIN in question was verified through a quality assurance audit pursuant to § 80.1472 using an approved Option A QAP as defined in § 80.1469(a).

(2) The person did not know or have reason to know that the RINs were invalidly generated prior to being verified by the independent third-party auditor.

(3) If the person self-identified the RIN as having been invalidly generated, the person notified EPA within the next business day of discovering the invalidity.

(4) The person did not cause the invalidity.

(5) The person did not have a financial interest in the company that generated the invalid RIN.

(d) *Asserting an affirmative defense for invalid B–RINs.* To establish an affirmative defense to a violation of § 80.1460 (b)(2) or (c)(1) involving invalid B–RINs, the person must meet the notification requirements of § 80.1473(e) and prove by a preponderance of evidence that:

(1) The RIN in question was verified through a quality assurance audit pursuant to § 80.1472 using an approved Option B QAP as defined in § 80.1469(b).

(2) The person did not know or have reason to know that the RINs were invalidly generated at the time of transfer or use for compliance, unless a remedial action as defined in § 80.1474 was implemented.

(3) If the person self-identified the RIN as having been invalidly generated, the person notified EPA within the next business day of discovering the invalidity.

(4) The person did not cause the invalidity.

(5) The person did not have a financial interest in the company that generated the invalid RIN.

(6) If the person used the invalid B–RIN for compliance, the person adjusted its records, reports, and compliance calculations in which the invalid B–RIN was used as required by § 80.1431, unless a remedial action as defined in § 80.1474 was implemented.

(e) *Notification Requirements.* A person asserting an affirmative defense to a violation of § 80.1460 (b)(2) or § 80.1460(c)(1), arising from the transfer or use of an invalid A–RIN or B–RIN, must submit a written report to the EPA, including all pertinent supporting documentation, demonstrating that the requirements of § 80.1473(c) or (d) were met. The written report must be submitted within 30 days of the person discovering the invalidity.

■ 21. Section 80.1474 is added to read as follows:

**§ 80.1474 Replacement Requirements for Invalidly Generated RINs.**

(a) *Responsibility for replacement of invalid verified RINs.*

(1) The generator of the A–RIN and the independent third-party auditor that verified the A–RIN are required to replace invalidly generated A–RINs with valid RINs pursuant to the procedures specified in paragraph (b) of this section.

(2) The generator of the B–RIN and the obligated party that owns the B–RIN are required to replace invalidly generated B–RINs with valid RINs pursuant to the procedures specified in paragraph (b) of this section.

(3) The producer of an unverified RIN and the obligated party that owns an unverified RIN are required to replace invalidly generated and unverified RINs pursuant to the procedures specified in paragraph (b) of this section.

(b) *Identification and treatment of Potentially Invalid RINs (PIRs)*

(1) Any RIN can be identified as a PIR by the RIN generator, an independent third-party auditor that verified the RIN, or EPA.

(2) For PIRs identified by the RIN generator, the generator is required to notify EPA within 24 hours of the identification, including a detailed explanation of why the RIN is believed to be invalid, and is required to take one of the following corrective actions within 30 days:

(i) Retire the PIR, or

(ii) Retire a valid RIN meeting the requirements of paragraph (c) of this section.

(3) For PIRs identified by the independent third-party auditor that verified the RIN, the independent third-party auditor is required to notify EPA and the RIN generator in writing within 24 hours of the identification, including a detailed explanation of why the RIN is believed to be invalid.

(4) Within 30 days of being notified by EPA or the independent third-party auditor that verified the RIN that a RIN is a PIR, the RIN generator is required to take one of the following actions:

(i) In the event that EPA identifies a RIN as a PIR:

(A) Retire the PIR,

(B) Retire a valid RIN following the requirements of paragraph (c) of this section, or

(C) Submit a demonstration in writing to EPA that the PIR is valid.

(*1*) If EPA determines that the demonstration is satisfactory, the PIR will be deemed to be a valid RIN.

(*2*) If EPA determines that the demonstration is not satisfactory, the PIR will be deemed invalid and the PIR generator must retire the PIR or a valid RIN following the requirements of paragraph (c) of this section within 30 days of notification by EPA.

(ii) In the event that the independent third-party auditor identifies a RIN as a PIR:

(A) Retire the PIR,

(B) Retire a valid RIN following the requirements of paragraph (c) of this section, or

(C) Submit a demonstration in writing to the independent third-party auditor that the PIR is valid.

(*1*) If the independent third-party auditor determines that the demonstration is satisfactory, the PIR will be deemed to be a valid RIN; however, EPA reserves the right to make a determination regarding the validity of the RIN.

(*2*) If the independent third-party auditor determines that the demonstration is not satisfactory, EPA will then make a determination whether the demonstration is not satisfactory, and if so, the PIR will be deemed invalid and the PIR generator must retire the PIR or a valid RIN following the requirements of paragraph (c) of this section within 30 days of notification by EPA.

(5) Within 60 days of receiving a notification from EPA that a PIR generator has failed to perform a corrective action required pursuant to this section,

(i) For A–RINs, the independent third-party auditor that verified the PIR is required to retire valid RINs meeting the requirements of paragraph (c) of this section.

(ii) For B–RINs and unverified RINs, the obligated party that owns the PIR is required to either

(A) Retire the PIR.

(B) If the PIR has already been used for compliance with the obligated party's RVO, correct the RVO to subtract the PIR.

(c) *The following specifications apply when retiring valid RINs to replace PIRs or invalid RINs:*

(1) When a RIN is retired to replace a PIR or invalid RIN, it must be of the same verification type, either A–RIN, B–RIN, or unverified. The D code of the retired RIN must be eligible to be used towards meeting all the renewable volume obligations as the PIR or invalid RIN it is replacing, as specified in paragraph (a)(2) of § 80. 1427.

(2) The number of RINs retired must be equal to the number of PIRs or invalid RINs being replaced, subject to paragraph (d) of this section and paragraph (c) of § 80.1470.

(d) *Limited Exemption for invalid B–RINs.*

(1) In the event that an obligated party is required to retire or replace a PIR that is a B–RIN pursuant to paragraph (b) of this section, the obligated party will be afforded a ''limited exemption'' equal to 2% of its annual Renewable Volume Obligation (RVO) for calendar years 2013 and 2014.

(2) Limited exemptions are calculated as follows:

$$LE_{CB,i} = 0.02 \times RVO_{CB,i}$$
$$LE_{BBD,i} = 0.02 \times RVO_{BBD,i}$$
$$LE_{AB,i} = 0.02 \times RVO_{AB,i}$$
$$LE_{RF,i} = 0.02 \times RVO_{RF,i}$$

Where:

$LE_{CB,i}$ = Limited exemption for cellulosic biofuel for year i

$LE_{BBD,i}$ = Limited exemption for biomass-based diesel for year i

$LE_{AB,i}$ = Limited exemption for advanced biofuel for year i

$LE_{RF,i}$ = Limited exemption for renewable for year i

$RVO_{CB,i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

$RVO_{BBD,i}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year i after 2010, in gallons, pursuant to § 80.1407.

$RVO_{AB,i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

$RVO_{RF,i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party for calendar year i, in gallons, pursuant to § 80.1407.

(3) If the number of invalidly generated B–RINs required to be retired or replaced in a calendar year is less than or equal to LE as calculated in paragraph (d)(2) of this section, the entire RIN retirement obligation is excused.

(4) If the number of invalidly generated B–RINs required to be retired or replaced in a calendar year is greater than LE as calculated in paragraph (d)(2) of this section, the retirement of a number of B–RINs equal to 2% of the obligated party's RVO is excused.

(5) The limited exemption applies only in calendar years 2013 and 2014.

(e) *Failure to Take Corrective Action.* Any person who fails to meet a requirement under paragraph (b)(5) of this section shall be liable for full performance of such requirement, and each day of non-compliance shall be deemed a separate violation pursuant to section 1460(f) of this subpart.

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