

**VicNRG, LLC - Executive Summary**  
**Thomas Paquin, President**

VicNRG, LLC (“VicNRG”) is a marketer and distributor of biofuels and other commodities whose infrastructure and logistics solutions are critical to the distribution of biofuels, as well as an active participant in the Renewable Identification Number (“RIN”) market.

The fraud in the RIN market has resulted in serious hardship for many in the biofuels sector, including the ultimate fate of bankruptcy of numerous, law-abiding businesses. Fraudulent RINs created by Clean Green Fuels, Absolute Fuels and Green Diesel account for roughly 140 million invalid RINs, valued at hundreds of millions of dollars. The current issues as well as the future fraud threatens tens of thousands of jobs in the renewable fuel industry. Approximately 85% of the biodiesel producers are struggling to keep their doors open and biodiesel distributors and blenders are facing tens if not hundreds of millions of dollars in RIN replacement costs even though they have executed business in good faith.

The EPA has created an Interim Enforcement and Response Policy (IERP) to restore faith in a now dysfunctional RIN trading system, unfortunately, the IERP falls short of restoring the confidence required.

The EPA has the flexibility and can use several regulatory approaches to restore confidence. Three major points should be considered:

1. We propose that the EPA should revise its IERP as it relates to invalidity of all pending biomass-based diesel RINs so that no further RIN substitution would be required. In fact, 42 USC §7545 (o) (2) (B) (ii), specifically states that the EPA must take into account many factors, to include job creation, and in this case, demanding replacement of RINs is the basis for massive job destruction. EPA must also provide companies with the opportunity to present an affirmative defense to ensure that diligent and blameless companies are not penalized for the acts of others. This affirmative defense may be structured by EPA to impose reasonable compliance burdens on industry participants including affirmative duties to act. We also feel the EPA must continue with aggressive prosecution of current, and future pending fraudulent activity.
2. EPA should undertake a 2013 rulemaking to establish a permanent due diligence process and an affirmative defense. Clean Air Act (CAA) case law establishes limits on EPA’s authority to impose sweeping systems of presumptive liability. While Congress has delegated expansive powers to EPA to regulate, it is a fundamental tenet in American law that there must be, at the very least, the right to prove oneself innocent of an offense.
3. If EPA is unwilling to facilitate any of these remedies, the Agency should consider whether a petition to waive the RFS would be appropriate in these circumstances. As an immediate alternative, it may be necessary to resort to the petition process established by 42 U.S.C. §7545(o)(7)(A)(i). This provision authorizes the Administrator to waive the requirements of the RFS after consultations with the Secretaries of Energy and Agriculture, in whole or in part, to avoid severe harm to the economy of a State, a region, or the U.S. Given that the economic costs to U.S. businesses resulting from OECA’s enforcement policy may be anticipated to exceed \$300 million and that EPA’s enforcement policies may force legitimate biofuel producers and petroleum distributors out of business and eliminate countless jobs, this severe harm threshold may be met.

EPA must consider immediate changes to the RFS Program administration and enforcement; specifically, IERP. These assertions and requests are not made lightly but only because of the dire consequences caused by the current enforcement policy. We believe our immediate and short term solutions of modifying IERP, eliminating replacement of RINs for good faith purchasers, and the opportunity for affirmative defense is the foundation necessary to save the system, its associated investments, and, ultimately, jobs in a struggling U.S. economy. Anything other than that will only serve to reduce the effectiveness of the RFS program, as liabilities are much too significant for all but the largest industry participants. We stand ready to assist and contribute to find a solution to this critical problem.

TESTIMONY FOR

Committee on Energy and Commerce

The Subcommittee on Oversight and Investigations

UNITED STATES HOUSE OF REPRESENTATIVES

RIN Fraud: EPA's Efforts to Ensure Market Integrity in the Renewable Fuels Program

Thomas Paquin

President, VicNRG, LLC

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VicNRG, LLC ("VicNRG") is a marketer and distributor of biofuels and other commodities. We would like to thank you for the opportunity to testify as a representative of companies whose infrastructure and logistics solutions are critical to the distribution of biofuels, as well as an active participant in the Renewable Identification Number ("RIN") market.

The fraud in the RIN market has resulted in serious hardship for many in the biofuels sector, to include the ultimate fate of bankruptcy to numerous, law-abiding businesses. More broadly, the fraud committed in the RIN market to date highlights the need for all industry players, which include obligated parties, marketers, producers, and ultimately regulators to remain vigilant about industry practices and participants.

To that end, VicNRG continues to work with all of its counterparties in conducting a due diligence program which we believe is second to none. Furthermore, we have shared our experiences with industry leaders, which include industry organizations, obligated parties, and, ultimately, the Environmental Protection Agency (EPA). While the examination and review of the causes and implications of RIN fraud are ongoing, my testimony provides an overview of the

regulation of biofuels, their associated RINs, the key events leading up to our current situation and the future possibility of additional fraud. This testimony also describes the destabilizing effect the fraud has had on the market, as well as proposed solutions to right the ship known as the Renewable Fuel Standard (RFS), while getting the country back on its feet with regards to being a world leader in the development of next generation biofuels, energy independence and the creation of jobs.

Of critical importance, is our call for Congress and the EPA to revise the EPA Interim Enforcement Response Policy (IERP) dealing with enforcement of fraudulent RINs. The IERP, as addressed by the EPA to Chairman Upton on June 28, 2012, falls short of its goals to “...restore certainty in the market and ensure that the goals of Congress are met...” It is critical that confidence in the RIN market is restored to allow the RIN trading system to function as envisioned by the EPA, which in-turn will allow the industry to meet the Congressional intent of the RFS. The interim solution includes prosecuting the criminals, closing loopholes, defining due diligence and allowing an affirmative defense for good faith participants.

## **Company Background**

VicNRG was started to pursue commercial biofuels opportunities as well as other commodities. The company’s senior management is made up former Marine Corps Officers who have brought forward a culture of excellence, integrity and commitment to the company. Today, VicNRG still has a history of hiring veterans, among other highly qualified individuals, and are proud of the achievements of all members of the VicNRG team.

As the President of VicNRG and manager of other entities within the renewable fuels industry, I have seen tremendous growth of the industry over the last 5 years, one in which our

company has become an industry leader in marketing and the distribution of biodiesel. Our small business has grown significantly as we now employ nearly 40 full-time employees as well as sell more than 3 million gallons of biodiesel each month. Besides biofuels, our company has partnered with several businesses to establish a manufacturing and distribution business that produces a product called Diesel Exhaust Fluid (“DEF”). This fluid reacts with the emission of diesel engines and reduces the harmful compounds so effectively that the air going into the large tractor trailers is in many cases, is dirtier than the air being released from the tailpipe exhaust.

The economic impact of our daily business is much more significant, with many people indirectly employed, such as bankers, truck drivers, train engineers and insurance agents. While we’re proud of our accomplishments, our goal is to continue growing our company, increasing employment opportunities and improving the communities in which we operate.

Under the RFS, biofuels, in this case biodiesel, and the RINs associated with the fuel are of significant importance to the EPA and its initiatives. VicNRG, LLC and the officers of the company view the EPA as a partner with parallel goals. In addressing this market, we intend to create hundreds of new jobs while improving our communities. This is only one example of how programs brought forth by Congress and EPA are working well to reduce our environmental impact.

### **Congressional Intent of the RFS and Background**

The RFS, per Congress and the EPA, lays the foundation for achieving significant reductions of greenhouse gas (GHG) emissions from the use of renewable fuels, reduction of imported petroleum and further development and expansion of our nation’s renewable fuels sector. It is extremely important to consider that the Congressional intent is not to just meet a

‘volumetric’ mandate; instead, the Congressional intent can be met even if the volumetric goal is not achieved. The RFS, per the EPA’s Final Rule, was designed to encourage the blending of renewable fuels into our nation’s motor vehicle fuel. This rule established the annual renewable fuel standards, responsibilities of refiners and other fuel producers; a trading system and other compliance mechanisms, recordkeeping and reporting requirements renewable fuels include ethanol, biodiesel and other motor vehicle fuels made from renewable sources. The program grants credit for both renewable fuels blended into conventional gasoline or diesel and those used in their neat (unblended) form as motor vehicle fuel.

Any party that produces gasoline for use in the U.S., including refiners, importers, and blenders (other than oxygenate blenders), is considered an obligated party (OP) under the RFS program. It is the obligated parties which are required to retire RINs against their respective Renewable Volume Obligation (RVO). They can do this by blending each category of fuel or purchasing RINs representing that blending. There are many reasons why an OP would purchase RINs instead of blending. The EPA recognized that fact and the challenges the OP’s would have in acquiring renewable fuel, and as such, the EPA acknowledged in the Federal Registry, dated 1 May 2007, that the “...RFS program depends on a robust trading program.”

The RFS program specifies compliance and enforcement provisions, such as for facility registration, recordkeeping and reporting requirements, program enforcement and various fuel tracking mechanisms. This rule also specifies who can generate RINs and under what conditions, how RINs may be transferred from one party to another and the appropriate value of RINs generated from different types of renewable fuel. These provisions were designed to enable the

RIN trading program to function properly, but have since been found to be inadequate in preventing fraud and, ultimately, creating confidence in the market.

It is critical to understand the basics of the Renewable Fuel Standard as it relates to production, RIN creation, separation, and retirement – evaluating the process cradle to grave.

### *Production*

Biodiesel is made through a chemical process called transesterification. The feedstocks used for the biodiesel, to meet the RFS requirement, have been determined by the EPA. Examples of qualifying feedstock are: used cooking oil, soybean oil and animal fat, just to name a few. The biodiesel portion of the transesterification process is then available to be registered with the EPA. One and one half (1½ times) each gallon of bio-mass based diesel (“D4”) RINs can then be generated by the producer for each gallon of biodiesel produced. At this point, the RIN is “assigned” to the fuel, and must be moved with the fuel until certain rules are met.

### *Separation*

Typically separation of the RIN can occur when the biodiesel is blended with diesel at a percentage of 80% or less. The majority of users blend to the 5-20% levels, meaning 5-20% biodiesel (B5-B20) and 80-95% diesel. At that point, the RIN can be “separated”. Today, under RFS-2, that action is completed in the EPA’s Moderated Transaction System (EMTS), by selecting the method of blending. Other options include, receiving renewable fuel from an obligated party (who can separate RINs), designation of renewable fuel and used without further blending as a transportation fuel and use as a heating oil or jet fuel.

## *Retirement*

After the RIN has been separated, it can then be freely traded among registered parties until, presumably, it will be purchased and retired by an OP against their respective RVO.

## *Economics*

The economics of the transaction are best understood by providing an example. Biodiesel is priced off of the heating oil futures market (HO). HO is traded daily on the open markets, such as New York Mercantile Exchange (NYMEX). The price of biodiesel is also influenced by the price of the feedstock, for instance soybean oil. After a producer includes its cost of the refinery operation and profit margin, the price of biodiesel is typically offered as a premium to the HO market. For instance, it may cost a producer \$4.50/gallon to make biodiesel, at which point they may sell for \$4.75/gallon. The price of HO, for the purpose of simplicity, is \$3.00/gallon. Let's also assume the RIN is trading for \$1.50, which means that the RIN value of a gallon of biodiesel is \$2.25 ( $\$1.50 \times 1.5$  RINs per gallon). If we were to deduct the RIN value from the cost of a gallon ( $\$4.75 - \$2.25$ ), we would get a value of \$2.50/gallon. In this example, the price is \$0.50 less than the price of HO, or HO-50. At this level, blenders are incentivized to blend biodiesel into HO.

Again, this is a typical example in terms of blending margins over the past several years but is no longer the case. A loss of trust in the market is driving the RIN value lower and eliminating the blending margins, as we will examine. Furthermore, it shows the importance of a functioning RIN market; without it, the program will flounder.

## **Discovery, Enforcement of Fraud and The State of the industry**

With the aforementioned background, we can fast forward to today's situation. To date, a local prosecutor has successfully prosecuted the COO of American Biofuels, a RIN offender in Alabama. Due to a quick identification and prosecution, the damage was limited to \$100,000 in RIN replacement value. Similarly, the EPA has prosecuted one case successfully against Clean Green Fuels. Additionally, the EPA is investigating numerous cases dealing with RIN fraud beyond the three producers named by the EPA as offenders of producing invalid RINs – Clean Green Fuels, Absolute Fuels and Green Diesel (EPA took no action against American Biofuels)- ultimately affecting obligated compliance for both 2010 and 2011 compliance years. Based on EPA press releases of these 3 cases, roughly 140 million RINs have been deemed invalid, for which EPA has issued Notices of Violation (NOV) and is requiring replacement plus payment of cash penalties. The replacement cost of these fraudulent RINs is in excess of \$200 million at current market values. As it currently stands, roughly 10-20% of the RIN market for 2011 volumes are fraudulent, and there is a belief by many in the industry this number could increase. This is significant by any standard. Arguments to the contrary stating that these incidents are isolated and minimal are downplaying the damage inflicted on the industry to date. The fraud in the RIN market has created an uncertainty and loss of credibility in the system that has damaged the effectiveness of the RFS program and its intent.

Prior to the RIN fraud surfacing, the industry was well on its way to achieving those goals. Unfortunately, today, we can no longer say that is the case. Instead, many of the small biodiesel producers, in excess of 85%, have shuttered their plants, reduced employee headcount and even claimed bankruptcy. Much of that has been driven by the lack of trust in the market and the inability of obligated parties and other market participants to truly understand the due diligence required by the EPA, a lack of an affirmative defense and loopholes in the regulations.

Like many industries, there has been a focus by some of the largest institutions to figure out how to operate in the “grey” areas, rather than focusing on the goal of the RFS which is to displace fuel consumed in the U.S. transportation sector. In the meantime, the damage to good faith market participants has been significant and will only increase.

#### *Damages to Biodiesel Producers*

One purpose of the RFS Program is to facilitate the growth and development of the domestic renewable energy sector, including the biodiesel production industry. The RFS Program created RVOs specifically to mandate the purchase of biodiesel and, thereby, create the demand to support biodiesel production plants. Today, only the top 10-15 plants are operating at significant levels, as they have large balance sheets that will support legal action from obligated parties if wrong doing is discovered. Effectively, a two-tiered system has developed, whereby major conglomerates are benefitting from the sale of OP “approved” RINs, while many small producers are unable to sell any of the RINs, and by default, fuel, which they can no longer produce. One can glean from filings of public companies in the biodiesel business that these companies have benefited handsomely in the 1<sup>st</sup> quarter since the NOV’s were announced, with profits, sales and production almost doubling year over year. On the other hand, small producers are currently without the ability to sell their branded RINs and the economics of biodiesel production simply don’t work. Not surprisingly, small biodiesel producers are now under tremendous financial pressure and some have been forced to shut down. The closure of small plants can be devastating to farming communities and entrepreneurs across United States as they have been firing tens of thousands of employees.

#### *Damage to Market-Makers and Deterioration of the RINs Trading Program*

The EPA has stated that the RFS program depends on a robust trading program. The RIN trading portion of the RFS Program, like any market-based approach, can only be successful if there are enough market-makers engaged in the program. Prior to EPA's announced enforcement approach to the RFS Program, there were many marketers, distributors, commodity trading companies, brokers and entrepreneurs purchasing, aggregating and selling RINs via EMTS. This system was created to support the EPA intent of providing RINs to those companies where biodiesel and their associated feedstock may not be as readily available. This created necessary liquidity for the RIN trading program to work, as many participants did not have the volumes or market expertise to monetize those RINs.

Unfortunately, enforcement of the RFS Program as it currently stands penalizes innocent, good faith purchasers of invalid RINs. As such, most of the obligated parties that submitted Clean Green, Absolute and Green Diesel RINs to the EPA, and who are being required by EPA to replace the invalid RINs with valid RINs, are seeking to require the market-makers that provided them with the RINs to compensate them for replacement or provide substitute valid RINs. Essentially, obligated parties are passing the penalty upstream to these good faith market-makers caught in the supply chain. Furthermore, as each OP negotiates directly with the EPA, those caught in the chain are unaware of the actual deals. The EPA, at the annual NBB meeting in 2011, stated that the intent of the penalties and program was not to bankrupt companies, as the maximum fine of \$37,500 per day, per event (each RIN) actually could push fines into the stratosphere. They did want to send a clear message. The problem is that many participating in the program do not have the financial wherewithal to weather these penalties and replacement costs of invalid RINs. It's the marketers, distributors and travel centers, to name a few, that allows the market to function as intended. The current enforcement policies are having the

impact that the EPA stated they were trying to avoid, by actually bankrupting companies behind the scenes. The punishment and fines need to be directed at the criminals to deter the illegal activity. Instead the punishment is directed at those who make the program successful, while those who can survive the financial penalty will most likely be deterred from future participation in the RFS.

Furthermore, some have likened the fraudulent RIN issue to that of counterfeit currency. What many fail to acknowledge is that there is faith in the currency because the government actively prevents fraud, to the extent that counterfeit currency makes up 1/100 of one percent of all currency in circulation. Moreover, one can physically inspect a bill and make an informed determination. If doubt still exists, one can take the bill to a government agency which will definitively conclude the bill's authenticity. As for RINs, the EPA continues to state that it will not make a determination of validity, only invalidity, and may take years in its determination.

Now that obligated parties are seeking to recover damages from other market-makers up the supply chain, it is not surprising that market-makers are withdrawing from the market, and in many cases are at the risk of going out of business. In some cases, individual market-makers are exposed to tens of millions in damages from obligated parties, and may be forced to shut-down, shedding jobs and destroying the investments made as a consequence.

In any other market-based system, if there is fraud, the perpetrator of the fraud is the only party held liable. The victims of the fraud are not penalized. So long as EPA imposes liability on good faith purchasers of RINs, this liability will percolate through the supply chain and have a chilling effect on trading and liquidity.

### *Damage to Obligated Parties*

Certainly, obligated parties are being damaged by EPA's decision not to exempt good faith purchasers of invalid RINs from penalties, as they are the ones being presented with the bills, in the form of NOVs, fines or behind the scenes deals. Although most OPs are large oil companies, there are many that are small, entrepreneurial refiners and importers that could suffer harm from the penalties imposed.

As it sits today, the market is not functioning. Eventually, the market may clear itself and begin to be operating in a more normal fashion, but that's after many jobs, businesses and investment have gone to zero, due to regulations which have harmed the industry.

We firmly believe the fraud associated with the invalid RINs presented to date has only addressed the low hanging fruit, defined in this case by the EPA having identified plants that did not exist, or, if so, did not produce any biofuels, just invalid RINs. The time required to identify, investigate and make public has been significant. The next round of fraud, to include feedstock and export issues, to name a few, will require greater time to investigate and unwind.

A significant amount of concern should be placed at levels downstream from just the producers. Many of the obligated parties now realize this, and are starting to ask even tougher questions regarding blending operations, such as, who the true end users are, where the fuel is going, domestic or export, etc. This is a positive step, but as the system currently stands, there is still not enough trust.

### **Implications of Current Policy and Potential Remedies from the EPA**

At the outset, it is clear that Congress through the passage of EPAct and Energy Independence and Security Act (EISA) delegated broad authority to EPA to develop and implement the RFS program. Congress specifically authorized EPA to develop the RIN credit trading system to facilitate both the production of renewable fuels and market based compliance flexibility for the obligated parties. It was therefore necessary for EPA to fashion a regulatory structure that imposed strict requirements on the generation of RINs and the use of RINs for compliance purposes. The key issue that has arisen is to what extent can EPA administer and enforce the RFS program in a manner that drives diligent and law-abiding companies into insolvency.

Courts reviewing EPA's exercise of its rulemaking and enforcement discretion in other Clean Air Act (CAA) cases have invalidated EPA's regulatory programs that imposed presumption liability based on third party violations. Those courts mandated that EPA provide affirmative defenses in those settings to protect good faith and diligent market participants.

CAA programs consistently present EPA with daunting challenges in terms of rulemaking, enforcement and program efficacy. Protecting air quality presents one of the nation's most comprehensive and intractable problems. Congress' decision to also address America's dependence on foreign oil and GHG emissions under the CAA further expands the scope of EPA's challenges. While recognizing that EPA necessarily has very broad authority to enforce the CAA and RFS, this authority must be exercised in a manner that is consistent with the Constitution and is not an abuse of discretion. A review of this case law establishes that enforcing the RFS in a manner that drives a companies who blend, distribute and produce biofuels out of business and eliminates jobs violates the Constitution, is contrary to law, is

arbitrary and capricious, and an abuse of discretion. However, instead of examining the case law, we are proposing a three point proposal to immediately strengthen the RFS while not punishing good faith participants.

EPA's approach to RIN fraud to date has had a profound impact on the marketplace and has rendered all market participants highly sensitive to the importance of scrutinizing RIN validity to ensure compliance. EPA should take this opportunity to revisit Office of Enforcement and Compliance Assurance (OECA) enforcement policies and fashion a solution that improves the RFS Program in a manner consistent with CAA jurisprudence, beginning with the Green Diesel RINs. Our solution follows:

**1. EPA should revise its Interim Enforcement Response Policy as it relates to invalidity of all pending biomass-based diesel RINs so that no further RIN substitution would be required.**

The regulated community would welcome flexibility from EPA on this issue. The problems described above point to an immediate need to restore confidence in the RIN market which will allow the renewable industry to meet Congressional intent. Most importantly, it will allow all market participants to confidently purchase biodiesel and RINs from small producers. Improving IERP will make an immediate impact on the industry and save thousands of jobs. A more comprehensive and vetted policy can be address in a 2013 rule making. The immediate solution requires and interim policy be adopted by the EPA. The policy should include:

1. Continue to aggressively pursue criminal activity.
2. Define due diligence actions needed to meet minimum EPA standards to prevent fraud.

3. Require the criminals to replace the invalid RINs fraudulently provided to the market up to the maximum equivalent of fraud. Any shortfall will not be required to be substituted by good faith purchasers.

### *Criminal Prosecution*

Intentional deception and fraudulent activity should be prosecuted to the maximum extent of the law. Holding people accountable for fraudulent activity will discourage future potential violators.

### *Due Diligence*

EPA shall more clearly define due diligence and allow companies to comply with those guidelines in good faith. The initial due diligence definition should consist of a basic process that will eventually increase in complexity as the industry has the ability to refine programs like the one being developed by the National Biodiesel Board (NBB) through Genscape or other similar programs. Additionally, the companies that are participating in good faith and executing a due diligence program should be given an opportunity to defend against accusations of wrongdoing. In other words, presumptive liability is an unacceptable path forward and one that must be replaced by affirmative defense.

Defining due diligence is needed because a company performing the due diligence process knows it has, in good faith, met all the requirements and is not liable for neglect. It also removes the risk of later re-defining or retrospectively applying due diligence methods that at the time could not have been anticipated or are not known to be required to detect improper activity.

Having this certainty is required for good faith blenders, marketers and obligated parties to immediately purchase renewable fuel and RINs from small producers.

While defining due diligence the EPA must balance the complexity to ensure the process is sufficient to detect fraudulent activity and not overly complex to make it impractical and costly for market participants to perform the needed process.

### *RIN Replacement*

The Congress passed the Renewable fuel standard to reduce the nation's dependence on foreign oil, help grow the nation's renewable energy industry and achieve significant greenhouse gas emission reductions. The annual requirements set the minimum needed for renewable fuels which provide sufficient incentives for industry growth. This annual requirement should not be used as a measure of success, by saying the industry is successful if it meets the volumetric standard and unsuccessful if it does not. The true success of the program should be based on diversified fuel supply to reduce the dependency on foreign oil, jobs created, infrastructure investment and overall growth of the renewable industry. In fact, 42 USC §7545, Regulations of Fuels, specifically states that the EPA must take into account many factors, to include job creation, and in this case, demanding replacement of RINs is the basis for massive job destruction. The unintended consequences of RIN replacement is described above in the horrific examples of small businesses and renewable industry participants becoming insolvent and bankrupt good faith participants, which in turn will eliminate jobs and destroy the successes of the RFS to date. These are the companies that have invested in infrastructure, technology and created job growth. The entire industry is better served to obligate the criminals who created fraudulent RINs to sell off their assets to make the market whole.

Another incorrect assumption about this approach is that the producers who properly created valid RINs will be punished because there will be invalid RINs in the system and it will drive down the RIN price. In fact, the opposite is true as trust in the system has been broken. Most recently, the market has experienced a decrease in the value of all biodiesel RINs after the Green Diesel NOV was announced. Today, it is not profitable to blend biodiesel as a result. While the market may eventually correct, it's the uncertainty in the regulations and the distrust among counterparties that have prevented the market from improving. Additionally, it is impossible to go back and create biodiesel for the previous year. The increased demand for current year production will not increase the RIN value in 2012, as discussed earlier the pricing of the RIN is based on HO and soybean oil. The biodiesel industry has the ability to exceed the current mandate and the formula to determine RIN value will remain the same; feedstock cost minus RIN value is equal to a discounted HO value (just enough of a discount to incentivize blending). Lastly, the benefit of any increased production requirements will go to the 15% of the industry, the large producers discussed earlier, not the 85% of producers suffering as a result of the distrust.

One portion of the Congressional intent for the RFS is to help grow the nation's renewable energy industry and according to 42 USC §7545, create jobs. Meeting versus not meeting the volumetric goal due to fraud can be measured economically in 2 ways. Let's assume there are 100 million fraudulent RINs discovered.

1. The fraudulent activity displaces legitimate production. 150 million RINs represents 100 million gallons of biodiesel production. The average producer profit margin per gallon of production is approximately \$.15 per gallon. If required to replace volumes and

associated RINs, the entire biodiesel industry will gain an additional profit of approximately \$15 million – shared among only the top 10-15 producers. Those producers suffering now will continue to suffer.

2. The current RIN replacement policy requires one for one RIN replacement. 150 million RINs represent a \$180 million replacement liability (RINs sales price as of July 6<sup>th</sup> of \$1.20). This liability largely falls on good faith market participants. For example, if those who purchased fuel, such as travel centers, are exposed to bad RINs, there will be a disincentive to blend as the risk-reward equation tilts to the risky side.

If one assumes that there are an additional 90 million invalid RINs beyond the 60 million Green Diesel RINs already announced, the market will otherwise be required to replace 150 million RINs this year at an anticipated cost of over \$180 million. This \$180 million represents \$180 million in unnecessary market costs for renewable fuel and will likely undermine rather than achieve the objectives of EISA by driving companies out of business. The money will go not to biofuel production but instead to RIN traders who hold inventories of 2011 RINs. It is the most conscientious market participants who will pay these costs. Fraudulent biofuel producers are either already out of business or will shortly be so. If the facts revealed by Clean Green Fuels and Absolute Fuels are any indication, the proceeds from the original RIN sales have been squandered already and there will be limited estate remaining. The remaining contractual liability will flow upstream until the last solvent and responsible company is found, and that company will be required to bear the entire replacement cost. By revising OECA's enforcement policy, EPA could limit further economic damage to the biofuels market, and scale back the scope of vicarious liability.

## **2. EPA should undertake a rulemaking to establish a permanent due diligence process and an affirmative defense.**

As described in the preceding legal analysis, CAA case law establishes limits on EPA's authority to impose sweeping systems of presumptive liability. While Congress has delegated expansive powers to EPA to regulate, it is a fundamental tenet in American law that there must be, at the very least, the right to prove oneself innocent of an offense. Under the RFS Program as currently administered and enforced by EPA, no such right is recognized and innocent companies are subject to penalties and harsh economic burdens, even after performing due diligence and conforming to RFS regulations in all known respects. EPA must modify OECA's enforcement policies to establish an affirmative defense.

Specifically, the request is that in the event that EPA determines that a RIN was improperly generated and is therefore invalid, EPA should provide notice to the regulated community through the posting of an NOV on EPA's Civil Enforcement of the Renewable Fuel Standard Website. Upon the posting of such an NOV, any company that purchased RINs directly from the RIN generator ("RIN Purchaser") should be entitled to assert an affirmative defense to establish the affirmative defense as to the RINs purchased if the following elements are satisfied:

- a. The RINs were purchased by written contract in an arm's-length transaction;
- b. The RIN Purchaser was properly registered with the EPA;
- c. The RIN Purchaser had affirmatively established a due diligence program to either evaluate RIN validity by its own efforts or had employed the services of a third-party service provider to evaluate RIN validity; and
- d. The RIN Purchaser had not become aware of any indications that the RIN generator was not in compliance with RFS regulations. To the extent that the RIN Purchaser is able to satisfy the

elements of the affirmative defense, the RINs purchased should then be deemed valid RINs for RVO compliance purposes.

Separately, our company has been a strong partner with the EPA in helping to identify and eliminate fraud in the industry. The due diligence conducted by our company is second-to-none in the industry; to include RIN pattern analysis, informal charting of volumes, site visits, feedstock checks, etc. It is what many in the industry are pursuing today, such as the Genscape program, but it's not enough. As part of a longer term solution, the EPA must work with the private sector to come up with a better way forward, and much of has started and will be more formally addressed with the 2013 rulemaking process.

**3. If EPA is unwilling to facilitate any of these remedies, the Agency should consider whether a petition to waive the RFS would be appropriate in these circumstances.**

As an immediate alternative, it may be necessary to resort to the petition process established by 42 U.S.C. §7545(o)(7)(A)(i). This provision authorizes the Administrator to waive the requirements of the RFS after consultations with the Secretaries of Energy and Agriculture, in whole or in part, to avoid severe harm to the economy of a State, a region, or the U.S. Given that the economic costs to U.S. businesses resulting from OECA's enforcement policy may be anticipated to exceed \$300 million and that EPA's enforcement policies may force legitimate biofuel producers and petroleum distributors out of business and eliminate countless jobs, this severe harm threshold may be met. This direct economic cost may be expected to be amplified to the extent that the renewable fuels industry is damaged. In our case, and many others similar to

us, our company is threatened with insolvency and will have to release 40 employees as a result of current enforcement actions where the company engaged in no wrongdoing.

Similarly, to the extent that there are significant additional invalid RINs found by EPA to exist in 2010 and/or 2011, the waiver process under 42 U.S.C. §7545(o)(7)(A)(ii) may become applicable. To the extent that obligated parties face a shortfall in replacing RINs, this establishes a strong factual showing that there is an inadequate domestic supply for that year. In such a scenario, the invalid RINs represent domestic supply that was illusory. Under these facts, it may be appropriate for the Administrator to waive any unfulfilled portion of the RFS for the applicable year.

Like the Unleaded Fuel Regulations, EPA has developed a regulatory system that holds all system participants presumptively liable for violations regardless of who caused the violation. As case law establishes, EPA must provide companies with the opportunity to present an affirmative defense to ensure that diligent and blameless companies are not penalized for the acts of others. This affirmative defense may be structured by EPA to impose significant compliance burdens on industry participants including affirmative duties to act, deploy personnel and expend resources. Thus EPA retains substantial discretion and the ability to administer and enforce a comprehensive and viable program.

## **Conclusion**

EPA must consider immediate changes to the RFS Program administration and enforcement; specifically, IERP. These assertions and requests are not made lightly but only because of the dire consequences caused by the current enforcement policy.

It is because of this complexity in the market place and the fact the criminals are intending to deceive other companies, which no amount of due diligence or private sector solutions can make the market 100% secure. Instead, it requires a long-term solution from the EPA to offer some type of assurance through a published due diligence program that once RINs enter their system, they are valid. The foundation to return the system back to a functioning level would be set.

We believe our immediate and short term solutions of modifying IERP, eliminating replacement of RINs for good faith purchasers, and the opportunity for affirmative defense is the foundation necessary to save the system, its associated investments, and, ultimately, jobs in a struggling U.S. economy. Anything other than that will only serve to reduce the effectiveness of the RFS program, as liabilities are much too significant for all but the largest industry participants. We stand ready to assist and contribute to find a solution to this critical problem.