

**Response to Petitions of the American
Fuel & Petrochemical Manufacturers
(AFPM) and the American Petroleum
Institute (API) for Reconsideration of
the September 27, 2012 Final Rule
Entitled Regulation of Fuels and Fuel
Additives: 2013 Biomass-Based Diesel
Renewable Fuel Volume**

Response to Petitions of the American Fuel & Petrochemical Manufacturers (AFPM) and the American Petroleum Institute (API) for Reconsideration of the September 27, 2012 Final Rule Entitled Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume

Assessment and Standards Division
Office of Transportation and Air Quality
U.S. Environmental Protection Agency

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I. Introduction

Section 211 (o)(2)(B)(ii) of the Clean Air Act requires that EPA determine the applicable volume of biomass-based diesel to be used in setting annual percentage standards under the renewable fuel standard program for years after 2012. In doing so, EPA is to coordinate with the Secretary of Energy and the Secretary of Agriculture, and base the volume on a review of the implementation of the program to date and an analysis of six specified factors. EPA issued a Notice of Proposed Rulemaking (“NPRM”) on July 1, 2011 which proposed a number of actions², including the proposed applicable volume of biomass-based diesel of 1.28 billion gallons that would apply in 2013. After considering public comments on its proposal, EPA published a final rule on September 27, 2012, establishing 1.28 billion gallons as the applicable volume of biomass based diesel for 2013.³

Petitioners, the American Fuel & Petrochemical Manufacturers (AFPM) and the American Petroleum Institute (API) submitted comments⁴ to EPA during the comment period on the July 1, 2011, proposed rule, and subsequently each individually submitted a Petition for Reconsideration of the September 27, 2012 final rule.⁵

¹ The American Fuel & Petrochemical Manufacturers was formerly known as the National Petrochemical & Refiners Association. In 2012 the organization changed its name to “better describe who we are, what we do and how we benefit the American people.” Comments to proposal were submitted under their former name. See <http://www.afpm.org/our-history/> (last accessed June 25, 2013).

² 76 FR 38844.

³ 77 FR 59458.

⁴ Letter dated August 11, 2011 to Administrator Lisa Jackson from Charles T. Drevna, President National Petrochemical & Refiners Association, “Subject: Docket EPA-HQ-OAR-2010-0133 – Comments on EPA’s proposal for 2012 RFS RVOs and biomass-based diesel volume for 2013”. Letter dated August 11, 2011 to Air and Radiation Docket from Patrick Kelly, Senior Policy Advisor American Petroleum Institute, “Re: Docket ID No. EPA-HQ-OAR-2010-0133 The U.S. Environmental Protection Agency’s Proposed Rule on Regulation of Fuel and Fuel Additives: 2012 Renewable Fuel Standards”.

⁵ Letter dated November 20, 2012 to Honorable Lisa Jackson from Richard Moskowitz, American Fuel & Petrochemical Manufacturers, “Re: Petition for Reconsideration – Docket No. EPA-HQ-OAR-2010-0133. Letter dated November 26, 2012 to Honorable Lisa Jackson from Robert L. Greco, III, American Petroleum Institute, “Re: Request for Reconsideration of EPA’s Final Rulemaking “2013 biomass-Based Diesel Renewable Fuel Volume”.

This decision contains EPA's response to both the AFPM petition submitted on November 20, 2012 and the API petition submitted on November 26, 2012. After considering all the issues raised by petitioners, EPA is denying these petitions.

II. Standard for Reconsideration

The petitions were submitted under the reconsideration provisions of section 307(d)(7)(B) of the Clean Air Act (CAA). This section strictly limits petitions for reconsideration both in time and scope. It states that:

Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Thus the requirement to convene a proceeding to reconsider a rule is based on the petitioner(s) demonstrating to EPA: (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (*i.e.*, within 60 days after publication of the final rulemaking notice in the *Federal Register*, *see* CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule.

Regarding the first criterion for reconsideration, a petitioner must show why the issue or issues could not have been presented during the comment period, either because it was impracticable to raise the issue(s) during that time or because the grounds for the issue(s) arose after the period for public comment (but within 60 days of publication of the final action). Thus, CAA section 307(d)(7)(B) does not provide a forum to request EPA to reconsider issues that actually were raised, or could have been raised, prior to promulgation of the final rule.

Regarding the second criterion for reconsideration, in EPA's view an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised.⁶

⁶ *See* Denial of Petitions to Reconsider Endangerment and Cause or Contribute Findings for Greenhouse Gases under section 202(a), 75 FR 49556, 49560 (August 13, 2010); Denial of Petition to Reconsider, 68 FR 63021 (November 7, 2003), Technical Support Document for Prevention of Significant Deterioration (PSD) and

As discussed in this decision, EPA is denying both petitions because they fail to meet one or both of these criteria. In all cases, the objections raised in these petitions either were or could have been raised during the comment period on the proposed rule, or are not of central relevance to the outcome of the rule because they do not provide substantial support for the argument that the final rule establishing the applicable volume of biomass-based diesel for 2013 should be revised.

III. EPA Response to Petitions for Reconsideration of the Biomass-Based Diesel Renewable Fuel Volume for 2013

A. The Administrator's Discretion to Increase the Biomass Based Diesel Requirements Under the RFS is Framed by the Application of Six Specific Statutory Criteria

1. AFPM claims that the rationale underlying the statutory framework created for biomass-based diesel would prevent an increase in the biodiesel volume requirement if it would result in an increase in diesel fuel costs.

AFPM argues that EPA should reconsider its final rule based on the rationale underlying the statutory framework created for biomass-based diesel. In support of this position, petitioner states that at the time that the Energy Independence and Security Act of 2007 ("EISA 2007") was under debate, the National Biodiesel Board ("NBB") represented that going forward biodiesel would be able to compete with petroleum-based diesel fuel and supported the inclusion of statutory criteria designed to prevent an increase in the biodiesel requirement if it would result in an increase in diesel fuel costs.

We disagree with petitioner's claim. The statute itself refutes their assertions, since there is no criterion in 211(o)(B)(2)(ii) which indicates that an "increase in diesel fuel costs" should prevent increases in the 1.0 bill gal biomass-based diesel requirement. To the contrary, EPA is directed to set the applicable volume for biomass-based diesel in years after 2012 after consideration of six factors set forth in the statute, a review of past implementation of the program, and in consultation with DOE and USDA. Petitioner has not cited to any persuasive legislative history to support its claim of Congressional intent.

Nonattainment New Source Review (NSR): Reconsideration at 5 (Oct. 30, 2003) (EPA-456/R-03-005) (*available at <http://www.epa.gov/nsr/documents/petitionresponses10-30-03.pdf>*); Denial of Petition to Reconsider NAAQS for PM, 53 FR 52698, 52700 (December 29, 1988), *citing* Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54 (December 11, 1980), and decisions cited therein. *See also* EPA's February 17, 2011 denial of petitions by Clean Air Taskforce, World Wildlife Fund, National Wildlife Federation, and Friends of the Earth to reconsider certain elements of the RFS program.

As discussed in our final rule, the statute does not provide any one overarching goal for EPA to achieve in setting the applicable volumes for biofuels in years after those specifically set forth in the statute. Instead, the statute provides a list of six factors we must consider in setting the applicable volumes for biomass-based diesel. While one of those factors is “the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods,” the statute also requires that we consider five other factors including: (1) the impact of production and use on the environment; (2) the impact on energy security of the U.S.; (3) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category; (4) the impact of renewable fuels on the infrastructure of the United States; and (5) the impact on other factors, including job creation, the price and supply of agricultural commodities, rural economic development and food prices.⁷

Regardless of what parties may or may not have argued prior to EISA’s passage, the statute simply does not specify that EPA is prohibited from increasing the biomass-based diesel requirement if it would result in an increase in diesel fuel costs. In the final rule EPA acknowledged that there may be increased costs with increasing the requirement from 1 to 1.28 billion gallons, but determined that the benefits in terms of advancing other statutory objectives warranted such increases.⁸

2. Petitioner’s Claim Could Have Been Raised During the Comment Period.

Petitioner’s arguments with respect to the rationale underlying the statutory framework for biomass-based diesel volume requirements could have been raised during the comment period. A number of commenters in fact did raise issues⁹ concerning the statutory framework and the approach that Congress intended EPA to use in determining the appropriate applicable volume for biomass-based diesel after 2012. As the final rule explains, EPA considered these comments, and nevertheless decided to finalize the 2013 applicable volume for biomass-based diesel as proposed.

Moreover, the petitioner in their NPRM comments did in fact raise the issue of costs to consumers, but they did not raise any statutory arguments with regard to costs as they do now. Rather, petitioner simply stated that, “EISA requires EPA to take the costs to consumers into account in extending the biomass-based diesel mandate”¹⁰ Petitioner could have made the points

⁷ See 42 U.S.C. §7545 (o)(2)(B) (ii).

⁸ 77 FR 59458, 59462.

⁹ 77 FR 59458, 59460.

¹⁰ Letter dated August 11, 2011 to Administrator Lisa Jackson from Charles T. Drevna, President National Petrochemical & Refiners Association, “Subject: Docket EPA-HQ-OAR-2010-0133 – Comments on EPA’s proposal for 2012 RFS RVOs and biomass-based diesel volume for 2013”, at page 6.

they now raise in comments on the proposed rule, but did not do so. This fact alone justifies denial of this component of AFPM's petition for reconsideration.

3. Petitioners' Objections are not of Central Relevance.

In addition, petitioner's objections with respect to the claim that the rationale underlying the statutory framework created for biomass-based diesel would prevent an increase in the biomass-based diesel requirement if it would result in an increase in diesel fuel costs are appropriately denied because petitioner does not provide substantial support for the argument that the regulation should be revised. As noted above, EPA is required to, and did, consider many factors in addition to cost implications in establishing the applicable volume of 1.28 billion gallons for biomass-based diesel in 2013. EPA fundamentally disagrees with petitioner's assertions that cost should be the only, or overriding consideration in EPA's evaluation of the appropriate volume of biomass-based diesel for 2013.

B. AFPM Claims That New Information Compels Reconsideration of the Final Rule

Petitioner AFPM asserts that the 2012 drought is new information that arose after the close of the comment period that warrants reconsideration of the final rule. Petitioners AFPM and API both assert that information regarding the existence of RIN fraud arose after the close of the comment period and warrants reconsideration of the final rule. Both petitioners assert that the new information warrants a lower biomass-based diesel volumetric requirement for 2013.

1. The Drought

AFPM states that the 2012 drought occurred after the comment period closed on August 11, 2011 leading to a dramatic reduction in soybean supplies and multimillion dollar increases in costs to the livestock/food industries. Petitioner asserts that this financial hardship has been exacerbated by the Administrator's decision to increase the 2013 biomass-based diesel volume requirements from 1.0 billion gallons to 1.28 billion gallons, creating unfair competition for soybean products and thus necessitating reconsideration. Petitioner claims both that EPA should have fully evaluated impacts on costs related to the drought before issuing a final rule, and that the impacts are sufficiently severe such that EPA should have finalized a lower applicable volume of biomass based diesel for 2013.

EPA disagrees with petitioner's claim. As discussed in detail below, EPA was aware of the drought and took it into consideration when finalizing the 2013 biomass-based diesel volume of 1.28 billion gallons. While EPA could have taken additional time to more fully study cost implications of the drought before issuing a final rule, that would have led to delay and uncertainty for both renewable fuel producers and obligated parties. EPA did have an opportunity to more fully consider cost implications of its rule in the context of responding to a request for a waiver of the RFS requirements, and in response to this petition for reconsideration, and these additional analyses confirm that cost considerations do not override the benefits of establishing an applicable volume of 1.28 billion gallons for biomass based diesel in 2013. EPA's further analyses indicate that Petitioner's assertion that the drought led to dramatic reductions in soybean supplies that has significantly increased prices of soybeans is not supported by the facts. Therefore EPA finds that this issue is not of central relevance to the outcome of the rule.

a) *Petitioners' Claims Were Considered Prior to Rule Finalization.*

EPA acknowledges that the drought had not yet occurred as of the close of the public comment period on August 11, 2011. However, prior to finalizing the 2013 biomass-based diesel volume rule in September 2012, EPA was fully aware of the drought and took this into consideration when finalizing the 2013 volume requirements. For example, prior to finalizing the rule, EPA received requests from the Governors of the State of Arkansas and North Carolina on August 13 and 14, 2012 respectively, requesting a temporary waiver of the ethanol volume requirements pursuant to section 211(o)(7) of the Clean Air Act based on impacts of the drought, especially higher feed costs for corn. On August 30 2012, prior to finalizing the biomass-based diesel volume rule, EPA published a Federal Register notice inviting public comment on the waiver requests of the RFS program due to the drought.¹¹ Lastly, in finalizing the 2013 biomass based diesel volumes, EPA noted the existence of the drought while acknowledging that, “[g]iven the wide range of feedstocks from which biodiesel can be produced,¹² the ultimate impact of these drought conditions on the mix of biodiesel feedstocks in 2013 is difficult to predict at this time.”¹³

¹¹ 77 FR 52715 (August 30, 2012).

¹² A number of feedstocks can be used in the production of biomass-based diesel. In finalizing the 2013 requirements EPA estimated that soybean oil would contribute around 46 percent of this feedstock with the remaining coming from corn oil (23 percent), and animal fats (30 percent from sources such as poultry fat, tallow, white grease, and yellow grease). EPA also stated that the actual mix of feedstock sources used to product 1.28 billion gallons of biomass-based diesel could also differ substantially from these values as the market adjusts to the new mandate. 77 FR 59458, 59463. United States Department of Agriculture, Economic Research Service, “*Agriculture's Supply and Demand for Energy and Energy Products*”. Economic Information Bulletin Number 112, May 2013.

¹³ See for example 77 FR 59458, 59459, 59463, and 59483. EPA received many comments during and after the close of the comment period on its proposed 2013 biomass-based diesel volume rule. As part of the 2013 biomass-

b) Petitioner's Objections are not of Central Relevance.

As discussed above, the statute provides a list of six factors that the agency must consider (together with review of implementation of the program to date and consultation with the Departments of Energy and Agriculture) in setting the applicable volumes for biomass-based diesel, with no one factor identified in the statute as definitive for EPA's decision-making. While one component of the statute requires that EPA consider the impact of the use of renewable fuels on the price and supply of agricultural commodities and food prices, the statute requires that we also consider many additional factors.

In EPA's view an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised. Petitioner claims that the price impacts of soybean oil meal on animal producers resulting from the drought are "sufficient justification" for reducing the 2013 biomass-based diesel volume. Petitioner's only support for this position, is to point to 2013 soybean oil futures prices on November 8, 2012 as varying from 49 cents to 50.5 cents per pound which they assert is significantly higher (10 percent) than EPA's 45 cents per pound estimate developed as part of the final rulemaking.¹⁴

In our final rule we did take into account the impacts on soybean supply and price and concluded that an increase of 280 mill gal soybean-based biodiesel in 2013 would not unreasonably impact other markets for soybeans such as the livestock/food industries.¹⁵ In proposing to increase the 2013 biomass-based diesel volume, EPA analyzed the availability of all feedstocks to produce 1.28 billion gallons including soybeans and considered what portion of domestically produced soy oil could be available for use in producing biomass-based diesel in 2013. We also examined recent historical trends for domestic consumption and exports and referenced work that had been done in the RFS final rule as well as a recent report released by IHS Global Insight.¹⁶ These two analyses, using fundamentally different approaches, concluded that 1.28 billion gallons of biomass-based diesel was a reasonable volume that could be achieved

based diesel volume rulemaking process, EPA received 28 late comments beginning in early March 2012 through the summer 2012. All late comments received urged EPA to finalize the 1.28 billion volume requirement. No late comments were submitted requesting EPA refrain from finalizing volume requirement due to the drought.

¹⁴ American Fuel & Petrochemical Manufacturers, Petition for Reconsideration, November 20, 2012, page 4.

¹⁵ 77 FR 59458, 59462, 59471 (September 27, 2012). See sections "III.B. Availability of Feedstocks to Produce 1.28 Billion Gallons of Biodiesel"; "IV.A.3 Agricultural Commodities and Food Prices".

¹⁶ 76 FR 38844, 38863-66; 38869. See Table IV.B.2-2 – Feedstocks Contributing to 2013 Volume of 1.3 Bill Gal from HIS Global Insight Modeling" and "Biodiesel Production Prospects for the Next Decade," IHS Global Insight, March 11, 2011.

in 2013 utilizing a mix of feedstock including waste grease and rendered fats, corn oil, soybean oil, canola oil and other feedstock sources.¹⁷

For the final rule, while we continued to rely on both the analysis done for the RFS final rule and the IHS Global Insight report, we also supplemented our analysis in response to comments. First, we updated our analysis of historical and projected soybean oil supplies and used these to verify that there would be sufficient supplies of soybean oil to meet the needs of both biodiesel production and other domestic uses of soybean oil in 2013 and that the biodiesel volumes were achievable in 2013.¹⁸ We also projected that the increase in demand for soybean oil was expected to have a small impact on the price of soybeans. In reaching this conclusion EPA modeled the change in soybean oil prices in 2013 using the CARD stochastic economic model¹⁹ making a conservative assumption that the entire 280 million gallon increment would be met entirely with soybean oil biodiesel in 2013. Using this modeling approach the price of soybean oil was estimated to be \$0.45 per pound (in 2010\$) under this volume requirement, compared to approximately \$0.42 under a 1.0 billion gallon requirement. However, EPA also noted that its cost estimates did not account for possible cost fluctuations that may result from the drought.

EPA had an opportunity to elaborate on its cost analyses for purposes of its November 16, 2012 response to requests for a waiver of the 2012/2013 RFS program requirements. AFPM does not challenge the studies that EPA presented in its November 16, 2012, decision denying requests for waiver of the 2012/2013 RFS program due to the droughts impact on feedstocks used to produce renewable fuel.²⁰ There, EPA also discussed comments it had received pertaining to waiver of the biomass-based diesel volume requirements.²¹ EPA indicated that the agency was aware of two quantitative studies that projected price impacts on soybeans and soybean meal as a result of a possible biomass-based diesel waiver.²² Because most livestock are fed soybean meal, not whole soybeans, both studies projected that a waiver of the biomass-based diesel volumes would very likely *increase* feed costs. EPA concluded that, “It is likely

¹⁷ 77 FR 59548, 59464-66 (September 27, 2012).

¹⁸ 77 FR 59548, 59464 (September 27, 2012). Table II.B.3-1; source: USDA, Agricultural Marketing Service, *Oil Crops Outlook*, February 10, 2012, USDA, Economic Research Service, *Agricultural Long-Term Projections*, February 2012.

¹⁹ 77 FR 59458, 59478 (September 27, 2012). EPA used a stochastic economic model developed by the Center for Agricultural and Rural Development (CARD) at Iowa State University to conduct this analysis. The CARD stochastic model approximates U.S. and Brazilian biofuel productions, consumption, and trade. The model shows the probability of different outcomes by running 500 different potential scenarios.

²⁰ 77 FR 70752 (November 27, 2012).

²¹ 77 FR 70752, 70770 (November 27, 2012).

²² See Babcock-Iowa State and Cardno-ENTRIX studies. Babcock projected that a waiver of the BBD requirements might reduce soybean prices by \$0.61 per bushel or about 3.5 percent, (assuming that rollover RINs are available), but would also increase soybean meal prices by \$22.00 per ton or about 4.2 percent. Cardno-ENTRIX found that under an assumed 500 million gallon decrease in the BBD requirements, that soybean prices would decrease by \$0.74 per bushel or 4.5 percent, while soybean meal prices would increase by \$32.96 per ton or about 6.7 percent.

that waiving any portion of the BBD requirements would cause more economic harm than it would alleviate in food and feed markets.”

Recent data confirms that soybean production for 2012 was not affected by the drought in the dramatic manner that the petitioner suggests, due to late season rains that moderated reductions in soybean yields.²³ The USDA World Agricultural Supply and Demand Estimates (WASDE) report published on June 12, 2013 provides recent U.S. estimates for both the 2012/13 soybean marketing year and forecasted 2013/2014 marketing year.²⁴ The WASDE report indicates that U.S. soybean production for the 2012/2013 marketing year (beginning October 1, 2012) will be 3,015 million bushels, which is a slight reduction from the 2011/2012 marketing year production of 3,094 million bushels. However, soybean production in 2013/2014 is expected to increase to 3,390 million bushels, which is an increase of approximately 10% over the 2011/2012 marketing year.²⁵ It can be expected that soybeans from both the 2012/2013 and 2013/2014 marketing year will be used to make biodiesel in calendar year 2013. The data on soybean production in these marketing years does not support petitioner’s claims that there has been a “dramatic reduction in...soybean supplies”. Additional soybeans could be made available for domestic use by exporting less or by drawing down beginning stocks more,²⁶ further reducing any impacts on domestic consumers of soybeans stemming from the drought.

In summary, the June 2012 WASDE report gives no indication that there will be supply shortages for soybeans or soybean products in 2013.²⁷ Imports will likely be somewhat higher and ending stocks somewhat lower compared to recent history. But there is no indication that the livestock/food industries will not be able to acquire sufficient supplies of soybeans and soy products in 2013.

With regard to price impacts resulting from the drought, EPA also disagrees with the petitioner that a 10 percent variance in projected 2013 prices of soybeans and soybean oil is “significantly higher”. Observed soybean oil prices have fluctuated significantly over the last several years. For example, USDA annual average soybean oil prices ranged

²³ See <http://usda01.library.cornell.edu/usda/current/wasde/wasde-06-12-2013.pdf> The WASDE report is a monthly report published by the U.S. Department of Agriculture (USDA) providing comprehensive forecast of supply and demand for major crops both for the US and globally. Throughout the growing season and afterwards, estimates are compared with new information on production and utilization, and historical revisions are made as necessary. It is widely considered to be the benchmark to which all other private and public agricultural forecasts are compared.

²⁴ The USDA collects data on yearly cycles referred to as a marketing year. Marketing year begins September 1 for soybeans; October 1 for soybean oil and soybean meal. We have reviewed both the 2012/2013 and 2013/2014 marketing year data to better ascertain the impact of the 2012 drought.

²⁵ Production projections are based in part on projections of yield. In the September 2012 WASDE, USDA projected that yields of soybeans would be 35.3 bushels per acre for the 2012/2013 marketing year. The June 2013 WASDE estimates that average yields for marketing year 2012/2013 will actually be 39.6 bushels per acre.

²⁶ Exports for the 2012/2013 and 2013/2014 marketing years are estimated at 1,350 and 1,450 million bushels, while beginning stocks for these marketing years are estimated at 169 and 125 respectively.

²⁷ See <http://www.usda.gov/oce/commodity/wasde/> for more details.

from approximately \$0.25-\$0.54 per pound between 2003 and 2012.²⁸ Looking at the year-to-year variations more specifically demonstrates the variability of soybean oil prices. Prices averaged approximately \$0.31 per pound in 2006, rose to an average of \$0.52 per pound in 2007, and then fell again to an average of \$0.32 per pound in 2008. This represented year-to-year average price changes of 68 percent and -38 percent respectively. The difference in soybean oil prices that the petitioner quoted compared to the prices used by EPA in the final rule are within this observed historical range. Furthermore, the lowest price of the 2012/13 crop year thus far occurred in the week of November 12, 2012, which was after the results of the drought should have been reflected in the price. Since their peak in August and September of 2012 when the potential effects of the drought were most uncertain, prices of soybeans and soybean products have been trending downward. In September 2012, the WASDE price projection for soybean oil was \$0.54-\$0.58 per pound for the 2012/2013 marketing year.²⁹ In the June 2013 WASDE, the estimate for the price of soybean oil was \$0.48 per pound for the 2012/2013 marketing year. Furthermore, the June 2013 WASDE, which takes into account the 1.28 billion gallon biodiesel requirement, projects that soybean oil prices will remain in the \$0.47-\$0.51 per pound range for the 2013/2014 marketing year.

For all the reasons cited above, we continue to believe that there are adequate supplies of soybean oil at reasonable prices to meet the 2013 biomass based diesel volume requirement. Therefore we find that petitioner's claims regarding supply and cost of soybean oil are not of central relevance because they do not provide substantial support for the argument that the regulation should be revised.

2. RIN Fraud

Both AFPM and API contend that the RIN fraud issue is a new issue arising after the close of comment period and AFPM states that "the large number of invalid RINs represents a serious disparity" in the estimates of expected commercial rate of biodiesel production thereby impacting EPA's conclusion that an increase to 1.28 billion gallons represents only a "moderate" increase in the biomass-based diesel requirement.

Although the issue of RIN fraud was not generally known to the public during the comment period which ran from July 1, 2011 through August 11, 2011; prior to finalizing the 2013 BBD volume requirement on September 14, 2012³⁰ the RIN fraud issue received significant public attention including a Congressional hearing on July 11, 2012 at which both

²⁸ See http://www.ers.usda.gov/datafiles/Oil_Crops_Yearbook_2013/table5.xls

²⁹ See <http://usda01.library.cornell.edu/usda/waob/wasde//2010s/2012/wasde-09-12-2012.pdf>

³⁰ Final rule was published in the Federal Register on September 27, 2012; 77 FR 59458

EPA and the petitioner, AFPM³¹ provided testimony. In addition, prior to issuing the final rule establishing the 2013 biomass-based diesel volume requirement EPA met with stakeholders who had purchased invalid RINs and also put in place an interim enforcement response policy³² to address the invalid 2010 and 2011 biomass-based diesel RINs. Finally, the agency also reached out to the oil industry and biodiesel producers prior to finalizing the biomass-based diesel rule to discuss ways to improve the RFS program, and RIN validity in particular. Consequently, EPA was cognizant of fraudulently generated RINs when finalizing the biomass based diesel volumes for 2013.

Petitioners attempt to portray the RIN fraud issue as central to setting the 2013 biomass-based diesel volume. As described below, EPA disagrees and believes that the RIN fraud issue is not of central relevance to the determination of the applicable biomass-based diesel volume for 2013.

Congress passed the original RFS program as part of the Energy Policy Act of 2005³³ which was subsequently amended by the Energy Independence and Security Act (EISA) of 2007³⁴. The statute requires that petroleum refiners and importers (obligated party), many of whom the petitioners represent, blend certain amounts of renewable fuels with gasoline or diesel each year. EPA developed the RIN system at the behest of stakeholders in the fuel production and distribution industries as an alternative to a direct blending requirement.

The RIN system was finalized after extensive collaboration with stakeholders and as part of a notice-and-comment rulemaking process on May 1, 2007³⁵. It provides obligated parties with flexibility in satisfying their responsibility each year under the current RFS program. Each RIN generated by the producer or importer of renewable fuel represents a volume of renewable fuel. Valid RINs are then used by obligated parties to demonstrate compliance with their yearly renewable fuel requirements. To assure that every RIN used for compliance represents renewable fuels that meet the regulatory criteria and which are designated for use in the U.S. for transportation fuel, heating oil or jet fuel, EPA specified conditions under which RINs are invalid, how invalid RINs must be treated, and which parties are liable for transferring or using

³¹ “Written Statement of American Fuel & Petrochemical Manufacturers as Submitted to the Subcommittee on Oversight and Investigations, July 11, 2012” and “Written Statement of Byron Bunker Acting Director Compliance Division Office of Transportation and Air Quality and Phillip Brooks, Director Air Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. EPA, July 11, 2012.” Written testimony may be retrieved at: <http://energycommerce.house.gov/hearing/rin-fraud-epa%E2%80%99s-efforts-ensure-market-integrity-renewable-fuels-program> (last accessed May 31, 2013).

³² U.S. EPA, Office of Enforcement and Compliance Assurance, “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. See <http://www.epa.gov/enforcement/air/renewable-fuels/fuel-novs.html> (last accessed May 30, 2013).

³³ CAA Section 211(o) (2) (A) (i), as added by Section 1501(a) of the Energy Policy Act of 2005.

³⁴ CAA Section 211(o) as revised by the Energy Independence and Security Act of 2007

³⁵ 72 FR 23900 (May 1, 2007).

invalid RINs.³⁶ The provisions concerning invalid RINs and the associated liability have recently come under scrutiny due to several cases of fraudulently generated RINs.

a) EPA engaged all stakeholders, including petitioners, on this issue prior to finalizing the 2013 biomass-based diesel requirements.

EPA has aggressively enforced against parties who generated invalid RINs to ensure the ongoing integrity of the RFS program. 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 during 2010-2011. On November 7, 2011, the EPA issued a Notice of Violation (NOV) alleging that Clean Green Fuels³⁷ generated invalid biomass-based diesel RINs. Clean Green's owner was found guilty of wire fraud, money laundering, and violations of the Clean Air Act on June 25, 2012 in the U.S. District Court for the District of Maryland.

The EPA issued Absolute Fuels, LLC an NOV on February 2, 2012³⁸. The NOV alleges the company generated over 48 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel. On December 14, 2012, the owner of Absolute Fuels, LLC, and other corporate entities associated with Absolute Fuels pleaded guilty to wire fraud, money laundering, and multiple Clean Air Act violations. Lastly, the EPA issued Green Diesel, LLC an NOV³⁹ on April 30 2012 alleging the company generated more than 60 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel.

In response to the RIN fraud issue and prior to the 2013 biomass-based diesel volume finalization, EPA undertook extensive stakeholder outreach to address the issues raised by these cases. For example, EPA met with obligated parties who had purchased invalid RINs and also undertook stakeholder consultation prior to putting in place an Interim Enforcement Response Policy on March 14, 2012. This policy provided a streamlined approach to, among other things, allow parties who used any invalid 2010 and 2011 biomass-based diesel RINs to correct and resolve their violations. The agency also has reached out to the oil industry and biodiesel producers to discuss ways to improve the RFS program, and RIN validity in particular. In

³⁶ 78 FR12158, 12161-12163 (February 21, 2103).

³⁷ Notice of violation of Renewable Fuel Standards issued to Clean Green Fuels, LLC.

For further information see <http://www2.epa.gov/enforcement/civil-enforcement-renewable-fuel-standard-program#clean> (last accessed July 24, 2013)

³⁸ Notice of Violation of Renewable Fuel Standards File Number AED/MSEB#7994 (PDF) for link to letter see: <http://www2.epa.gov/enforcement/notice-violation-renewable-fuel-standards-file-number-aedmseb-7994> (last accessed July 24, 2013).

³⁹ Notice of Violation of Renewable Fuel Standards File Number AED/MSEB#7995 (PDF) for link to letter see: <http://www2.epa.gov/enforcement/notice-violation-renewable-fuel-standards-file-number-aedmseb-7995-0> (last accessed July 24, 2013).

addition, a Congressional Hearing in the U.S. House of Representatives took place on July 11, 2012 concerning the renewable fuels program and EPA's efforts to ensure the integrity of the biodiesel market. Testifiers included a number of industry representatives including petitioner, AFPM.

In summary, although EPA agrees that it was not practicable for petitioners to raise the RIN fraud issue to EPA's attention during the comment period, petitioners and/or their members did have occasion to discuss the matter with EPA over the course of several months prior to issuance of the final rule establishing the 2013 BBD volume requirement. EPA was fully cognizant of the issue in issuing the final rule.

b) Petitioners' claims regarding the RIN fraud issue are not of central relevance to the determination of the applicable biomass-based diesel volume for 2013.

The 1.28 billion gallon volume that was proposed and finalized for 2013 was originally projected for 2013 in the 2010 RFS rulemaking. In finalizing this volume for 2013 we based our consideration on the factors specified in the statute, including a consideration of biodiesel production, consumption, and infrastructure issues. As required under the statute, we also assessed the likely impact of biomass-based diesel production and use in a variety of areas, including climate change, energy security, the agricultural sector, air quality, and others. Finally, as noted above, EPA was fully aware of the RIN fraud issue.

RIN fraud on the part of some biodiesel producers does not affect the principal analyses conducted by EPA in support of the 1.28 billion gallon requirement. For example, the existence of invalidly generated RINs does not change the fact that the production capacity of the industry far exceeds the 1.28 billion gallon applicable volume established in the final rule. Also, the fact that some parties issued fraudulent RINs does not effect EPA's assessment regarding the availability of sufficient feedstocks to produce 1.28 bill gal biodiesel in 2013. These are the primary considerations that support EPA's assessment that the production of 1.28 billion gallons of biomass based diesel in 2013 is technically feasible.

Petitioners argue that the RIN fraud issue renders inaccurate EPA's assessment in the final rule to the effect that an increase in production from 2012 to 2013 volumes is "moderate." While this term is subjective, and may mean different things to different parties, EPA continues to believe that it is an appropriate descriptor given the capacity of the industry, availability of feedstock, and likely reaction of the industry to the guaranteed market provided by the RFS program. RIN fraud does not undermine this assessment.

According to the data available through the EPA Moderated Transactions System (EMTS)⁴⁰ actual production of biomass-based diesel exceeded 1.0 billion gallons in 2012. Furthermore, data in EMTS indicates that 701 million gallons of RIN-generating biomass-based diesel was produced in the first six months of 2013, substantially over the 590 million gallons that EMTS indicates were produced in the first six months of 2012. Continued production at this rate through the end of the year would more than satisfy the 1.28 billion gallon 2013 BBD applicable volume⁴¹. We believe that this data confirms EPA's projection that it is feasible for industry to produce 1.28 billion gallons of qualifying biomass-based diesel in 2013. For all of these reasons, EPA believes that petitioners' claim regarding RIN fraud are not of central relevance and do not warrant EPA reconsideration of the rule establishing the applicable volume for biomass-based diesel in 2013.

C. Other Issues Raised

1. Diesel Fuel Exports - Impact on Domestic Energy Security

Petitioner AFPM contends that EPA mistakenly concluded that the 2013 increase in biomass-based diesel volume beyond the 1 billion gallon statutory floor will improve U.S. energy security. Petitioner claims that it will have no impact upon the amount of crude oil imported and therefore will have no impact on domestic energy security. The petitioner asserts that refiners will respond to the additional 280 mill gal of biomass-based diesel by maintaining their historical production levels of diesel fuel and increasing exports rather than reducing diesel production. Petitioner states that these facts have a direct impact on the Administrator's analysis of the statutory criterion of energy security and warrants reconsideration of the decision to extend the biomass-based diesel requirement beyond the 1.0 billion gallon statutory threshold

As a preliminary matter, the issues petitioner now seeks to raise with regard to energy security could have been raised during the comment period. In the proposal, among other statements EPA made regarding energy security, EPA stated the following:

⁴⁰ The EMTS is available on line at: <http://www.epa.gov/otaq/fuels/rfsdata/2013emts.htm> (last accessed July 24, 2013).

⁴¹ Some of the RINs generated for biomass-based diesel produced to date in 2013 may ultimately be retired by biodiesel exporters, and not be available to obligated parties to demonstrate compliance with the 2013 RFS standard for biomass-based diesel. In addition, it is possible that some of those RINs may be invalid. However, EPA expects that the economic incentive associated with participation in the RFS program will lead industry to only export volumes that are in excess of the applicable volume of biomass-based diesel for 2013. In addition, regardless of any invalid RINs, EPA expects that industry capacity, availability of feedstocks and expected market response to the RFS mandate will all lead to sufficient qualifying fuel being produced in 2013 to satisfy the 1.28 billion gallon applicable volume for biomass-based diesel.

*“increasing usage of renewable fuels including biomass-based diesel helps to reduce U.S. petroleum imports.... Therefore biodiesel production and use will contribute to a U.S. energy security benefit.”*⁴²

The proposal also made it clear that EPA was basing this positive conclusion regarding the energy security impacts of 1.28 billion gallons of biomass-based diesel on the energy security analysis that had previously been done for the 2010 RFS final rule.⁴³ Indeed, the preamble for the proposed 2013 biomass-based diesel rule included a sentence from the earlier RFS rulemaking that petitioner objects to.⁴⁴ Therefore, petitioner had ample opportunity to raise concerns about the energy security assessment in the comment period following the NPRM. However, they did not address energy security issues at all in their comments on the NPRM. This fact alone provides a sufficient basis for denial of this component of AFPM’s petition for reconsideration.

EPA’s assessment of the energy security issue was not limited to consideration of the possibility for reduced imports of petroleum products. As we stated in both the proposal and final rule, “Reducing U.S. petroleum imports and *increasing the diversity of U.S. liquid fuel supplies* (emphasis added) lowers both the financial and strategic risk caused by potential sudden disruptions in the supply of imported petroleum to the U.S. The economic value of reductions in these risks provides a measure of improved U.S. energy security.”⁴⁵ Energy security does not solely relate to the amount of imported oil but also to the ability of the U.S. to diversify and rely on domestic sources of energy to meet the energy needs of the U.S.

In our final rule we stated that the U.S. is projected to be a net exporter of diesel fuel in 2013 and that increased biodiesel production would likely result in less domestic consumption of diesel fuel in the U.S.... Therefore, “regardless of the incremental effect of this rule on net imports, increasing the diversification of the U.S. and global diesel fuel pools would likely confer some reduction in the severity of a future potential disruption in the world oil market.”⁴⁶

If, as petitioner alleges, market forces result in the extra diesel production being used to increase diesel exports, we expect that there will still be energy security benefits to the U.S. Biodiesel produced in the U.S. is not subject to a similar pattern of possible future disruption probabilities as imported petroleum products. Supply disruptions in petroleum markets are typically related to political events such as wars while potential biodiesel disruptions are likely to be caused by weather related events. The two causes of supply disruptions, political events and weather, are essentially unrelated. Creating a new fuel supply that has a different, and likely reduced, probability of disruptions provides an energy security benefit because it reduces

⁴² 76 FR 38844, 38869 (July 1, 2011).

⁴³ 75 FR 1467, 14839 (March 26, 2010).

⁴⁴ See 76 FR83344, 38869 (July 1, 2011).compared with 75 FR 14670, 14839 (March 26, 2010).

⁴⁵ 77 FR 59470 (September 27, 2012).

⁴⁶ 77 FR59458, 59471.

"financial and strategic risks caused by potential sudden disruptions in the supply of imported petroleum to the U.S." as stated in the final rule.

Petitioner also points to a study, released by the National Petroleum Council shortly after the comment period closed, which found that the U.S. had access to more sources of North American energy than previously thought as providing new facts that warrant reconsideration of our conclusions on the impact this rule and the RFS have on U.S. energy security. EPA is familiar with the report highlighted by petitioner, "Realizing the Potential of North America's Abundant Natural Gas and Oil Resources" by the National Petroleum Council which was released in September 2011. For our 2013 biomass-based diesel final rule analysis, EPA relied on the most recent Annual Energy Outlook (AEO) Reference Case for 2012,⁴⁷ which, like the report highlighted by petitioner, includes a more optimistic assessment of the U.S.'s access to North American sources of energy than previous AEO annual forecasts.

Regardless of the precise amount of North American energy that is available in 2013, the United States is expected to import substantial amounts of petroleum products in 2013 and into the foreseeable future. We believe that increased domestic production of biomass-based diesel will increase energy diversity and therefore increase energy security. The precise amount of increased energy security provided by the rule is not determinative for EPA's decision. Rather, this is but one factor, together with other benefits noted in the final rule that support EPA's decision. For all of the reasons noted above, EPA finds that the issues related to EPA's energy security analysis raised by petitioner are not of central relevance and do not warrant reconsideration of the rule establishing the applicable volume of biomass-based diesel for 2013.

2. Job Creation

Petitioner AFPM contends that EPA's conclusions on the employment benefits associated with an increase in biomass-based diesel are overstated due to use of biased information provided by the National Biodiesel Board.

EPA discussed job creation in proposing the 2013 biomass-based diesel volume requirement,⁴⁸ and indicated that,

"Bringing online idle biodiesel plants and expanding biodiesel distribution infrastructure in the U.S. will increase both employment and promote rural economic development."

⁴⁷ The U.S. Energy Information Administration (EIA) collects, analyzes, and disseminates independent and impartial energy information to promote sound policy making, efficient markets, and public understanding of energy and its interaction with the economy and the environment. EIA releases the Annual Energy Outlook (AEO) which was used for the EPA's energy security analysis.

⁴⁸ 76 FR 38844, 38873 (July 1, 2011).

These increases in employment are similar to what EPA anticipated when it analyzed the RFS final rule.”

Petitioner in their comments on the July 1, 2011 notice of proposed rulemaking did not raise questions or any concerns about this statement. In fact, petitioner did not address job creation in their comments on the NPRM at all. While EPA provided some additional details in the assessment of job creation in the final rule,⁴⁹ the conclusions on this issue were the same as EPA had proposed. Thus, no new circumstance has arisen to warrant reconsideration of the 1.28 billion gallon requirement from the perspective of job creation. In addition, reconsideration is not warranted as petitioner could have but failed to raise its objections during the comment period.

With regard to the substantive issue raised by petitioner, EPA believes it relied upon the most complete information available regarding employment impacts associated with increasing the 2013 biomass-based diesel requirement from 1 billion gallons to 1.28 billion gallons, including data developed by industry and other interested parties as well as information obtained through discussions with a wide array of stakeholders including individual biodiesel producers and industry associations. EPA also utilized data provided by U.S. Energy Information Administration (EIA). EIA is required under section 211(o)(3) of the Clean Air Act to provide to EPA each October an estimate of the volumes of transportation fuels, including biomass-based diesel, projected to be sold or introduced into commerce in the U.S. for the following calendar year. On October 18, 2012 EIA sent a letter to EPA stating that there was sufficient domestic production capacity to meet the 2013 biomass-base diesel volume requirement. That letter read in part,

“EIA data indicates that sufficient domestic production capacity exists to produce 1.28 billion-gallons in 2013 as called for in the EPA’s most recent rulemaking. This implies that at least 61 percent of the existing 2.09 billion gallons of U.S, biomass-based diesel capacity reported as of July 2012 in the EIA *Monthly Biodiesel Production Report* will be available to operate in 2013.”⁵⁰

⁴⁹ The analysis petitioner refers to was provided by the National Biodiesel Board (NBB), the national trade association representing the U.S. biodiesel industry. NBB has commissioned a number of research studies that have contributed to the overall understanding of the biofuel industry. For example, see John Urbanchuk’s “Economic Impact of Removing the Biodiesel Tax Credit for 2010 and Implementation of RFS Target through 2015” (June 8, 2011); Urbanchuk’s report entitled, “Economic Impact of Reinstating the Biodiesel Tax Credit through 2013” (November 27, 2012) and E2 Environmental Entrepreneurs, “Advanced Biofuel Market Report 2012: Meeting U.S. Fuel Standards” (2012).

⁵⁰ The U.S. Energy Information Administration as part of its responsibilities under section 1508 of the 2005 Energy Policy Act, amended its ICR and has begun collecting and publishing biodiesel production information on a monthly basis including production of biodiesel in a given month, the number of plants operating and contributing to the monthly total volume by state, and their total operating capacity for the year. U.S. Energy Information Administration/Monthly Biodiesel Production Report, Form EIA-22mMontly Biodiesel Production Survey.

In its latest Monthly Biodiesel Production Report, EIA reported that in May 2013 U.S. the annual production capacity of operating biodiesel facilities was 2.2 billion gallons per year.”⁵¹

Petitioner also argues that EPA’s conclusions on the employment benefits associated with an increase in biomass-based diesel from 1.0 billion gallons to 1.28 billion gallons are overstated given the recent closures of certain biodiesel facilities and the underutilization of facilities that have maintained operations. **Petitioners state that many biodiesel producers are operating at a reduced rate, some have been idled and others have permanently closed.** However, as noted above, EMTS data indicates that biodiesel production has increased in both 2012 and the first part of 2013. While there were significant biodiesel facility closures during the 2009 and 2010 calendar years, since that time the overall number of biodiesel facilities has stabilized and overall capacity in the biodiesel industry has remained stable from 2009-2012 at approximately 2 billion gallons.⁵² It is also clear that overall industry-wide utilization rates, have increased during this time period from an average of 25% in 2009 to approximately 46% in both 2011 and 2012.⁵³

In disputing EPA’s job creation analysis in the final rule, AFPM also claims that we overstate the employment impacts resulting from additional biodiesel plants coming on line due to increasing the biodiesel fuel requirement for 2013. Petitioner states, “[i]t is far more economical to expand production at an existing plant that is underutilized than it is to bring idle biodiesel plants back on line. Unfortunately, the number of jobs that will be created by increasing the throughput at an already operational plant is nowhere near the NBB estimate of 30 to 40 people.” EPA does not dispute petitioner’s point regarding job impacts when expanding operations at an existing plant. Our employment discussion in the final rule anticipated that increasing the biofuel requirement by 280 million gallons in 2013 would bring idle biodiesel plants back online and expand biodiesel distribution infrastructure resulting in increased employment.⁵⁴

EIA’s monthly reports provide insight into what has occurred in the biofuels industry since the 2013 volume was finalized and supports our final rule discussions and assessment that increasing the biodiesel requirement would result in new producers coming on line increasing employment. Specifically, since the rule was finalized 8 new producers have become operational in the U.S. EIA data indicates that in December 2011, after the close of the comment period, 103 biodiesel plants existed with an operating capacity of 2.1 billion gallons per year. In March 2012, 104 biodiesel plants were operational and the report indicates that for the first quarter of 2012 production was up 78% over the first quarter of 2011. As EPA finalized the 2013 volume mandates in September 2012 there were 105 biodiesel producers operating in the U.S. By late November 2012 that number had increased to 112. The latest EIA monthly report indicates that for May 2013, U.S. production came from 116 biodiesel plants in 39 states with total operating capacity of 2.2 billion gallons per year.

⁵¹ U.S. Energy Information Administration, Monthly Biodiesel Production Report, <http://www.eia.gov/biofuels/biodiesel/production/> (release date July 30, 2013).

⁵² U.S. EIA Monthly Biodiesel Production Reports see <http://www.eia.gov/biofuels/biodiesel/production/>

⁵³ Ibid.

⁵⁴ 77 FR 59459, 59477 (September 27, 2012).

AFPM also believes that other estimates of employment provided by the National Biodiesel Board are overstated and EPA should independently investigate these facts. Again, EPA believes it used the best available information to finalize the rule and notes that we outlined that basis for our assumptions, potential uncertainties, and also the limitations of our analysis stating, “moreover, our analysis cannot determine the extent to which new capital invested in biodiesel production displaces investments that otherwise would have occurred in rural areas.”

Finally petitioner AFPM argues it is, “improper to consider only the positive employment benefits associated with an increase in the biomass-based diesel requirement and simultaneously acknowledge that the corresponding loss in employment in other economic sectors is not quantifiable and therefore may be ignored.” First, as noted above, petitioner did not question EPA's assessment of job creation in the NPRM which was based on a review of the analyses done for the 2010 RFS rule. The assessment and discussion in the final rule was intended to provide some additional quantitative information on job creation, but it changed neither the validity of the qualitative comparison to the work done in the 2010 RFS rule nor the proposed finding in the 2013 biomass-based diesel NPRM that, “[b]ringing online idle biodiesel plants and expanding biodiesel distribution infrastructure in the U.S. will increase both employment and promote rural economic development.” Secondly, EPA did not ignore potential losses in employment in other economic sectors. In the final rule EPA acknowledges the potential impacts on the diesel industry and other sectors of the economy. EPA also responded to the specific comment raised by the oleochemical industry regarding the potential loss of U.S. employment in this industry due to the possibility of renewable fuel production consuming an increasing amount of animal fats used as a production input for oleochemical production. For all of these reasons, we find that petitioner's claims regarding EPA's assessment of job creation associated with the final rule are not of central relevance and do not warrant reconsideration of the final rule.

3. Costs and the Impact on the Consumer

AFPM argues that EPA “should have done everything in its power to lower the costs of transportation fuels for consumers and under no circumstances should have exercised its discretion to require the use of biodiesel, a fuel that is significantly more expensive than conventional ultra low sulfur diesel (ULSD). Indeed, Congress requires EPA to consider the cost to consumers as one of the statutory criteria that frames its annual decision to set the biomass-based diesel volumetric requirement.” The petitioner strongly implies that cost must take precedence over all other considerations and factors in determining whether to increase the annual biomass-based diesel volume in 2013.

As a preliminary matter, petitioner AFPM raised the concern about costs and impacts to the consumer in their comments on the NPRM beginning their discussion by stating, “EISA requires EPA to take the costs to consumers into account in extending the biomass-based diesel mandate.” Since AFPM had an opportunity to raise its concerns regarding costs and impacts on the consumer in its comments on the proposed rule, and in fact did so, AFPM has not demonstrated that it was impracticable to raise these issues during the comment period or that the grounds for the issue arose after the close of the comment period. This component of AFPM’s petition is appropriately denied on this basis alone.

Substantively, since the statute provides a list of factors we must consider, only one of which is cost, we disagree with any suggestion that a consideration of costs alone should drive the conclusion, or that cost considerations must necessarily take precedence over other considerations.⁵⁵

AFPM seeks to portray EPA’s cost estimates of increasing the biomass-based diesel requirement as unreasonable and subject to reconsideration. What petitioner fails to mention is that the final rule goes on to translate the total nationwide costs of \$253 - \$381 million into a per-gallon cost estimate of \$0.006 - \$0.008 per gallon. This is actually less than the cost estimate provided in the proposal on which the AFPM commented extensively. In the context of all the statutory factors that we must consider, we do not believe that these costs present an unreasonable burden for helping to assure that the advanced biofuel volume requirement can be met.

Petitioner also asserts we must reconsider our final rulemaking since, “[a]t the close of the comment period, EPA had no way to predict the state of the economy in 2013 or whether the \$1 per gallon blending credit would be extended by Congress...”. We note first that the statute requires EPA to establish the applicable volume for fuels such as biomass-based diesel in 2013 well in advance of the compliance year. Therefore, the statute requires reasonable forecasts by EPA of conditions that will likely occur during the compliance year in question. The statute does not require EPA to predict the overall state of the economy when setting the biomass-based diesel mandate. The specific factors that EPA must consider do include various economic criteria, such as cost to consumers and sufficiency of feedstock supply. These analyses are discussed in the final rule and elsewhere in this petition response (see, for example, Section B.1.b for a discussion of our feedstock analysis). In addition, in the final rule, EPA responded to

⁵⁵ As we stated in the proposal, ...the statute does not provide numerical criteria or thresholds that must be attained when EPA determines the applicable volume of biomass-based diesel for years after 2012 (other than specifying a minimum volume of 1.0 billion gal), nor does it describe any overarching goals for EPA to achieve in setting the applicable volumes for biofuels in years after those specifically set forth in the statute. Instead, the statute provides a list of factors we must consider.” (77 FR 59460).

comments of petitioner and others regarding appropriate consideration of the \$1 per gallon blending credit as follows:

Several parties commented that the analysis of the cost impacts of 1.28 billion gallons of biomass-based diesel must take into account the biodiesel tax subsidy, which expired at the end of 2011. Fuel taxes and tax subsidies function to change the manner in which society pays for transportation fuel through redistribution of costs, but they do not change the total cost to society. For this reason we generally do not quantify the impact of taxes or tax subsidies on price, but instead focus on the costs to produce and distribute transportation fuel. (77 FR 59479)

Petitioner presents no information to suggest that EPA's explanation was unreasonable or flawed.

For all of these reasons, EPA finds that petitioner's claims regarding costs and impact on the consumer were either raised during the comment period or could have been raised, and that they are not of central relevance.

4. Potential Carbon Reductions

AFPM argues that EPA must reconsider its decision to increase the biomass-based diesel requirement by 280 million gallons since that decision will likely ensure the use of additional biomass-based diesel at the expense of ethanol derived from sugarcane, and will lead to an increase in carbon emissions because soy-based biodiesel has an average carbon intensity that is ten percent greater than ethanol derived from sugarcane.

As a preliminary matter, at the time of the proposal, petitioners had available to them EPA's lifecycle GHG emissions assessments for both biodiesel and imported sugarcane ethanol. Moreover, there has been no change in EPA's estimate of these impacts since the proposal. Petitioner could have raised this concern in their comments on the proposal but did not do so. Therefore, for this reason alone, this component of AFPM's petition is appropriately denied.

EPA acknowledged in the proposal that the increase of 280 million gallon biodiesel was unlikely to create a reduction in GHGs:

However, due to the nested nature of the RFS standards, biomass-based diesel is also used to meet the advanced biofuel standard. Moreover, both biomass-based diesel and advanced biofuel must meet a GHG reduction threshold of 50%. If the 2013 advanced biofuel standard were to remain at the 2.75 bill gal specified in the statute, an increase in the biomass-based diesel volume requirement from 1.0

to 1.28 bill gal would not change the total volume of advanced biofuel, and thus the total volume of biofuels that must meet a 50% reduction in GHGs would remain unchanged. (76 FR 38869)

In the final rule, we stated that increasing the standard would provide additional certainty to the biomass-based diesel industry. We cited concerns that if we did not increase the biodiesel requirement, the biodiesel industry would wait before retooling to see if enough sugarcane ethanol was imported to fill the gap.⁵⁶ In that case, the advanced standard might not be met. If the advanced standard were not met, there would be less GHG emissions reductions benefits, since fewer gallons achieving the 50% reduction would be used. Petitioner has not shown EPA's reasoning to be flawed. They have instead presented a hypothetical scenario in which enough sugarcane ethanol could have been imported to satisfy the advanced standard without increasing the consumption of biomass-based diesel beyond 1 billion gallons. While this alternative scenario might lead to more GHG emission reductions compared to an increase in the biomass based diesel standard to 1.28 billion gallons, petitioner has not presented any evidence to suggest that their hypothetical scenario is more likely to come true than the one described by EPA. Therefore, EPA finds that petitioner's assertion is not of central relevance.

5. The Statutory Factors Must be Applied Annually

AFPM maintains that Congress intended EPA to apply the factors specified in the statute for EPA consideration annually for each year that it promulgates a biomass based diesel applicable volume following 2012, and that EPA may not rely upon a long term assessment of costs and benefits of the program.

This statutory interpretation issue could have been raised in petitioner's comments submitted on the proposal but was not. This fact alone justifies denial of the petition for reconsideration as to this issue.

Petitioner asserts that the statute requires consideration of only short-term economic impacts in establishing the applicable volume of biomass-based diesel for 2013, without providing any references to relevant statutory text to support their claim. While EPA agrees that it must consider all statutory factors in each year it establishes an applicable volume under CAA 211(o)(2)(B)(ii), the factors themselves do not limit EPA consideration to either short-term or long-term impacts. For example, one of the factors that EPA is to consider is "the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality and water supply." CAA 211(o)(2)(B)(ii)(I).

⁵⁶ 77 FR 59461-59462.

EPA believes that, given the ambiguity in the statute regarding the time period over which it should consider impacts of renewable fuel production on the environment, it is appropriate, and consistent with the statutory goals and objectives, to consider both short and long- term impacts. Congress enacted the RFS program as a long-term program, and EPA believes it is appropriate to consider long-term implications of its annual volumetric rulemakings, together with any short-term implications. Therefore, EPA also finds that denial of this component of AFPM’s petition is appropriate because their claim is not of central relevance to the outcome of the rule.

6. Other Matters

AFPM also contends in its petition that the biomass-based diesel requirement is a dedicated carve-out from the advanced biofuel category and increasing it creates a disincentive for investments in other advanced renewable fuels that may overcome some of the performance limitations associated with biodiesel. Because of this, petitioner asserts that EPA’s 2013 biomass-based diesel volume requirement is essentially selecting winners and losers without a clear understanding of the impacts upon the capital investment in future fuels.

Petitioner already raised the issue of selecting “winners and losers” in their comments on the NPRM stating, “EPA should not be picking winners and losers by selecting 1.28 billion gallons for biomass-based diesel in 2013. EPA should let the market decide what advanced biofuels will be selected to meet the large advanced biofuels RVO in 2013”⁵⁷ As a result this issue was clearly not impracticable to raise during the comment period and this component of AFPM’s petition is appropriately denied on this basis alone.

On a substantive basis, the fact that the statute provides a mechanism for increasing the required volume of biomass-based diesel above the 1.0 billion gallon minimum level is a clear indication that Congress intended EPA to increase the applicable volume of this fuel if, on the basis of EPA's analysis of the required factors, EPA determines that it is appropriate to do so. While it is true that the increase of 280 million gallons in the required volume of biomass-based diesel reduces the need for other advanced biofuels, this fact was balanced with the other factors we are required to consider.

In balancing the required factors, EPA found that setting the biomass-based diesel standard at 1.28 billion gallons instead of at the statutory minimum of 1.0 billion gallons

⁵⁷ Letter dated August 11, 2011 to Administrator Lisa Jackson from Charles T. Drevna, President National Petrochemical & Refiners Association, “Subject: Docket EPA-HQ-OAR-2010-0133 – Comments on EPA’s proposal for 2012 RFS RVOs and biomass-based diesel volume for 2013” at page 7.

will create greater certainty for both producers of biomass-based diesel and obligated parties and increases the certainty that the intended GHG emissions reductions and energy security benefits in terms of reduced reliance on fossil fuels associated with the use of advanced biofuels will be realized.⁵⁸ Additionally, it provides an incentive for continued investment and innovation in the biodiesel industry and serves the long term goal of the statute to increase volumes of renewable fuels over time so that in the longer term they are more likely to be available to offset the need for crude oil.⁵⁹

Even given the 1.28 billion gallon 2013 biomass-based diesel requirement there is still a very significant volume of advanced biofuel that must be filled and other advanced biofuels can compete with biomass-based diesel for that share of the advanced biofuels requirement. In light of the above, EPA finds that this matter is not of central relevance.

D. Conclusion

For the reasons discussed above, EPA denies the petitions of AFPM and API that it reconsider the applicable volume for biomass-based diesel for 2013 contained in the final rule published on September 27, 2012.

⁵⁸ 77 FR 59462 (col.1)

⁵⁹ 77 FR 59461 (col. 3)