



100 Middle Street  
PO Box 9729  
Portland, ME 04104-5029

Robert E. Cleaves IV  
207 228-7376 direct  
207 774-1127 facsimile  
207 671-0152 mobile  
bob@usabiomass.org

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**BY ELECTRONIC MAIL AND CERTIFIED MAIL**

Hon. Andrew R. Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

William L. Wehrum, Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: Renewable Electricity Fuel Production Pursuant to Congressional Mandate Under the  
Section 211(o) Renewable Fuels Program; Request for Action and Statutory Notice

Dear Administrator Wheeler,

Nearly 11 years ago, Congress directed the U.S. Environmental Protection Agency (“EPA”) to provide incentive credits (*i.e.*, RINs) to producers of renewable transportation fuels in order to increase the production of clean renewable fuels. In 2007, 2010 and 2014, EPA appropriately finalized rulemakings recognizing electricity from renewable biomass as renewable transportation fuel eligible to receive RINs. The members of the Biomass Power Association include biogas, biomass and municipal solid waste-to-energy fuel producers that have invested hundreds of millions in infrastructure to carry out Congress’ vision of building a strong domestic renewable transportation fuels sector but have been denied RINs.

For nearly a decade, electricity from renewable biomass has been legally qualified as a renewable fuel, but yet not a single RIN has been credited to producers of this fuel. Over this decade, the use of renewable biomass for electricity has increased dramatically with the expansion of alternative clean fuel and electric vehicle fleets. However, despite the fact that dozens of RIN registrations have been filed for electricity used as transportation fuel, EPA has refused to process these registrations and associated RINs to producers of this American-made clean fuel.

EPA’s unjustified delay in issuing RINs for electricity fuel is denying clean fuels producers millions of dollars of revenue, thwarting Congress’ goal of promoting clean fuels, and hobbling the American clean fuels production system. Although EPA sought public comment on some nuances of

the RIN program in 2016 relating to RIN issuances, the existing 2010 and 2014 rules unambiguously qualify electricity from renewable biomass for RINs. Under the Clean Air Act and the Administrative Procedure Act (“APA”), EPA cannot legally delay issuance of RINs to which producers are entitled unless it were to change the RFS program through notice-and-comment rulemaking procedures, something which the agency has not done and indeed cannot do consistent with Congress’ statutory mandate.

Accordingly, the Biomass Power Association respectfully requests that EPA immediately (1) process all pending RIN registrations, (2) acknowledge RINs for electricity renewable fuel volumes that producers can show on a case-by-case basis have been used by electric vehicles, and (3) finalize pending pathway petitions for biomass-derived bioelectricity including from the biogenic fraction of municipal solid waste. The grounds for this request are set forth in more detail below. This letter also constitutes statutory notice under the citizen suit provisions of the Clean Air Act.

### **Congress’ Renewable Fuel Program**

Congress created the Renewable Fuel Program (commonly referred to as the Renewable Fuel Standard or “RFS”) in 2005 to promote the production of renewable transportation fuels. *See* Energy Policy Act of 2005 § 1501, Pub. L. 109–58 (Aug. 8, 2005) (“EPAAct”), *codified at* Clean Air Act § 112(o), 42 U.S.C. § 7545(o). In order to administer the renewable fuel program, Congress expressly directed EPA to create a program to credit the renewable biomass content of transportation fuel. *See* Clean Air Act § 112(o)(5), 42 U.S.C. § 7545(o)(5)<sup>1</sup>; *Americans for Clean Energy v. EPA*, 864 F.3d 691, 699 (D.C. Cir. 2017) (Kavanaugh, J.) (“Congress directed EPA to establish a ‘credit program’ through which obligated parties can acquire and trade credits”).

Although the 2005 renewable fuel program initially focused primarily on corn ethanol, Congress and President Bush amended and expanded the program in the 2007 Energy Independence and Security Act (“EISA”) to include all types of transportation fuel, with the express goal “To move the United States toward greater energy independence and security [and] to **increase the production of clean renewable fuels**” *See* *Energy Independence and Security Act*, Pub. L. 110-140 (Dec. 19, 2007) (preamble) (emphasis added); *Americans for Clean Energy*, 864 F.3d at 697 (Kavanaugh, J.) (emphasizing focus on production of renewable fuels). In EISA, Congress broadened the definition of “renewable fuel” to include any form of renewable fuel “produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.”<sup>2</sup> Section 206 of

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<sup>1</sup> *See* EPAAct § 1501 (“(5) CREDIT PROGRAM.—(A) IN GENERAL.—The regulations promulgated under paragraph (2)(A) shall provide—(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2)”).

<sup>2</sup> *See* EISA § 201, Pub. L. 110-140 (Dec. 19, 2007) (“TITLE II—ENERGY SECURITY THROUGH INCREASED PRODUCTION OF BIOFUELS Subtitle A—Renewable Fuel Standard SEC. 201. DEFINITIONS. Section 211(o)(1) of the Clean Air Act (42 U.S.C. 7545(o)) is amended to read as follows: “(1) DEFINITIONS.—In this section: \* \* \* (J) RENEWABLE FUEL.—The term ‘renewable fuel’ means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.”).

EISA specifically directed EPA to study renewable electricity as a transportation fuel.<sup>3</sup> Importantly, Congress established a deadline for EPA to promulgate regulations implementing the revised Renewable Fuel Standard no later than December 19, 2008. *See* CAA 112(o)(2)(A)(i), 42 U.S.C. 7545(o)(2)(A)(i). It is now more than a decade after that Congressionally mandated deadline.

### **EPA's Implementing Regulations**

EPA has implemented the Renewable Fuel Program through a series of rulemakings, which have the effect of qualifying electricity derived from biogas as an eligible biofuel when used as transportation fuel. Currently, pathways have been approved for electricity derived from biogas. *See* 40 C.F.R. § 80.1426 Table 1 (Q) (D-Code 3 assigned to Biogas from landfills, municipal wastewater treatment facility digesters, agricultural digesters, and separated MSW digesters; and biogas from the cellulosic components of biomass processed in other waste digesters) *and* § 80.1426 Table 1 (T) (D-Code 3 assigned to Renewable Electricity from Biogas from waste digesters). In addition, one or more pathway petitions are currently pending for electricity derived from combustion of solid biomass.<sup>4</sup> These existing rules entitle biofuel producers to issuance of RINs when they submit a proper RIN registration.

#### **2007 RFS1 Regulations**

Pursuant to Congress' mandate to implement the Renewable Fuel Program, EPA initially promulgated regulations implementing the original RFS1 program in 2007. *See Regulation of Fuels*

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<sup>3</sup> Section 206 of EISA specifically directed EPA to consider renewable electricity as a transportation fuel: "SEC. 206. STUDY OF CREDITS FOR USE OF RENEWABLE ELECTRICITY IN ELECTRIC VEHICLES. (a) DEFINITION OF ELECTRIC VEHICLE.—In this section, the term 'electric vehicle' means an electric motor vehicle (as defined in section 601 of the Energy Policy Act of 1992 (42 U.S.C. 13271)) for which the rechargeable storage battery— (1) receives a charge directly from a source of electric current that is external to the vehicle; and (2) provides a minimum of 80 percent of the motive power of the vehicle. (b) STUDY.—The Administrator of the Environmental Protection Agency shall conduct a study on the feasibility of issuing credits under the program established under section 211(o) of the Clean Air Act to electric vehicles powered by electricity produced from renewable energy sources. (c) REPORT.—Not later than 18 months after the date of enactment of this Act, the Administrator shall submit to the Committee on Energy and Natural Resources of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives a report that describes the results of the study, including a description of—(1) existing programs and studies on the use of renewable electricity as a means of powering electric vehicles; and (2) alternatives for— (A) designing a pilot program to determine the feasibility of using renewable electricity to power electric vehicles as an adjunct to a renewable fuels mandate; (B) allowing the use, under the pilot program designed under subparagraph (A), of electricity generated from nuclear energy as an additional source of supply; (C) identifying the source of electricity used to power electric vehicles; and (D) equating specific quantities of electricity to quantities of renewable fuel under section 211(o) of the Clean Air Act." *See* EISA § 206, Pub. L. 110-140 (Dec. 19, 2007). Ultimately, EPA did not prepare a study report because it had decided the essential issues in the 2010 Rule. *See* U.S. EPA, FOIA Response from W. Charmley (Office of Air and Radiation OTAQ) to J. Lemon (Biogas Researchers), dated Mar. 3, 2016 ("There was no study [for electricity fuel under EISA 206(c)] because EPA put in place a mechanism for credit generation in the March 26, 2010 final rule").

<sup>4</sup> Various fuel pathway petitions have been submitted by: Plainfield Renewable Energy, LLC, dated Sept. 28, 2018; Wadham Energy LP., dated August 10, 2018; Deerrhaven Renewable, dated August 9, 2018; Pacific Ultrapower Chinese Station, dated May 7, 2018; and ReEnergy Stratton, LLC, dated May 5, 2018.

*and Fuel Additives: Renewable Fuel Standard Program*, 72 Fed. Reg. 23,900 (May 1, 2007) (“RFS1 Final Rule”). The RIN credit program was specifically created to carry out Congress’ directive in the Renewable Fuel Program to incentivize biofuel producers by creating credits that could be transferred to transportation fuel refiners and importers (*i.e.*, obligated parties) for compliance with the biofuel production volume obligations. *See* 72 Fed. Reg. at 23,929 (EPA acknowledgment that “RINs Serve the Purpose of a Credit Trading Program. According to the Act, we must promulgate regulations that include provisions for a credit trading program.”). The final RFS1 regulations unequivocally decided that RINs could be generated only by fuel producers, as opposed to any other party in the fuel supply chain. *See* RFS1 Final Rule, 72 Fed. Reg. at 23,938 (“Responsibilities of Renewable Fuel Producers and Importers. The initial generation of RINs and their assignment to batches of renewable fuel will be the sole responsibility of renewable fuel producers and renewable fuel importers.”); *accord Americans for Clean Energy*, 864 F.3d at 705 (“By requiring upstream market participants such as refiners and importers to introduce increasing volumes of renewable fuel into the transportation fuel supply, Congress intended the Renewable Fuel Program to be a ‘market forcing policy’ that would create ‘demand pressure’ to increase consumption of renewable fuel.”) (citing 80 Fed. Reg. 77,420, 77,423 (Dec. 14, 2015)).

### 2010 RFS2 Regulations

Because Congress later that same year amended the RFS1 program, EPA appropriately (although belatedly) finalized new regulations in 2010 establishing renewable fuel obligations for obligated parties under the expanded RFS2 program created by EISA. In those regulations, EPA continued the crediting system created under the RFS1 program for incentivizing and tracking production of renewable fuels and associated credits, called Renewable Identification Numbers (“RINs”), a system in which RINs could only be generated by, and would initially be owned, by fuel producers. Under this system, which continues to this day, RINs are generated by fuel producers with each batch of renewable fuel, and those RINs are credited initially in the fuel producer’s account in the EPA Moderated Transaction System (EMTS) until the fuel producer transfers the RINs to another registered market participant. *See Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule*, 75 Fed. Reg. 14,670, 14,673 (Mar. 26, 2018) (“2010 Rule”) (“The RFS2 program will replace the RFS1 program promulgated on May 1, 2007 (72 FR 23900).”); 14,709 (“Under RFS2, each RIN will continue to be generated by the producer or importer of the renewable fuel.”).

Acknowledging the expanded definition of renewable fuel mandated by EISA, EPA recognized in the 2010 Rule that electricity and renewable natural gas derived from renewable biomass that displaced fossil fuels as transportation fuel must be credited under the RIN system on a similar footing as other transportation fuels, as long as such electricity or natural gas was generated from feedstocks that met the statutory definition of renewable biomass. *See* 75 Fed. Reg. at 14,686 (“we are allowing fuel producers, importers and end users to include electricity, natural gas, and propane made from renewable biomass as a RIN-generating renewable fuel in RFS”); 14,711 (“the generation of RINs also requires as a prerequisite that the feedstocks used to make the renewable fuel meet the definition of ‘renewable biomass’”).

Because electricity or renewable natural gas derived from renewable biomass and used as transportation fuel is distributed in a somewhat different fashion than conventional liquid fuels, EPA

appropriately conditioned issuance of RINs on a factual showing by the fuel producer tracing the supply chain of the fuel from production to ultimate use as a transportation fuel. *See* 75 Fed. Reg. at 14,686 (producers can generate RINs “only if they can identify the specific quantities of their product which are actually used as a transportation fuel”).<sup>5</sup> Importantly, as noted, EPA also decided in the 2010 Rule that RINs for electricity and natural gas derived from renewable biomass would be generated by the fuel generator like any other fuel in the RFS system, which was a continuation of the policy that EPA had established in the original RFS1 regulations. *See* 75 Fed. Reg. at 14,709 (“Under RFS2, each **RIN will continue to be generated by the producer** or importer of the renewable fuel.”) (emphasis added).

There can be no doubt that the 2010 Rule reflects EPA’s final action regarding implementation of the RFS2 program required by Congress, as EPA stated this explicitly in the final rule preamble. *See* 75 Fed. Reg. at 14,670 (“Under the Clean Air Act Section 211(o), as amended by the Energy Independence and Security Act of 2007 (EISA), the Environmental Protection Agency is required to promulgate regulations implementing changes to the Renewable Fuel Standard program . . . This action finalizes the regulations that implement the requirements of EISA.”). Accordingly, the 2010 Rule established the rules that govern generation of RINs by fuel producers under the current Renewable Fuels Program, and the policy decisions in the 2010 Rule must be applied faithfully by EPA until modified or withdrawn.

#### 2014 RFS2 Pathway Regulations

After four more years of delay, in 2014, EPA finalized pathways for electricity, compressed gas, and liquefied gas derived from biogas.<sup>6</sup> As of today, EPA has still not finalized a pathway for

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<sup>5</sup> The 2010 Rule discusses at length the policy justification for allowing bioelectricity and biogas producers to generate RINs if used as transportation fuel. *See, e.g.*, 75 Fed. Reg. 14,670, 14,712 (Mar. 26, 2010) (“Producers may therefore take into account such displacement provided that they demonstrate that a verifiable contractual pathway exists and that such pathway ensures that (1) a specific volume of landfill gas was placed into a commercial pipeline that ultimately serves the transportation fueling facility and (2) that the [*sic*] drawn into this facility from that pipeline matches the volume of landfill gas placed into the pipeline system. Thus facilities using such a fuel pathway may then use an appropriate D code for generation of RINs. This approach also applies to biogas and electricity made from renewable fuels and which are used for transportation. Producers of such fuel will be able to generate RINs, provided that a contractual pathway exists that provides evidence that specific quantities of the renewable fuel (either biogas or electricity) was purchased and contracted to be delivered to a specific transportation fueling facility. We specify that the pipeline (or transmission line) system must ultimately serve the subject facility . . . We are also providing for those situations in which biogas or renewable electricity is provided directly to the transportation facility, rather than using a commercial distribution system such as pipelines or transmission lines. For both cases—dedicated use and commercial distribution—producers must provide contractual evidence of the production and sale of such fuel, and there are also reporting and recordkeeping requirements to be followed as well.”).

<sup>6</sup> *See Regulation of Fuels and Fuel Additives: RFS Pathways II, and Technical Amendments to the RFS Standards and E15 Misfueling Mitigation Requirements*, 79 Fed. Reg. 42,128, 42,128 (July 18, 2014) (“2014 Rule”) (“We also modify regulatory provisions related to renewable fuel made from biogas, including a new compressed natural gas (CNG)/liquefied natural gas (LNG) cellulosic biofuel pathway, and add a new cellulosic biofuel pathway for renewable electricity (used in electric vehicles) produced from biogas.”); 40 C.F.R. § 80.1426, Table 1 (reflecting as modified by the 2014 Rule that “renewable electricity” is a “fuel type”; that the feedstock is biogas from landfills, municipal wastewater treatment facility digesters, agricultural digesters, and separated MSW

electricity produced directly from combustion of solid fuel renewable biomass.<sup>7</sup> Despite the addition of a biogas pathway, EPA stated unequivocally that the existing 2010 Rule was adequate for the issuance of RINs to biogas and bioelectricity producers. *See* 79 Fed. Reg. at 42,143 (“in general the existing regulations are sufficient for present purposes and only minor clarifications are warranted at this time”).

EPA did clarify in the 2014 Rule that biogas electricity fuel producers would be required to “match” production of biofuels with end-use by alternative fuel or electric vehicles by demonstrating through affidavits or contracts how the fuel was ultimately used as transportation fuel. *See* 79 Fed. Reg. at 42,144 (“These provisions allow for the use of signed affidavits, when written contracts are not available, to prove the use or sale of renewable electricity and renewable CNG/LNG for transportation purposes . . . These affidavits would then be matched, by the registered fuel producer, to the delivery or sale of an equivalent amount of qualifying renewable electricity or renewable CNG/LNG.”).<sup>8</sup> Despite the fact that the existing 2010 Rule clearly recognized that only fuel producers can generate RINs, EPA alluded to requests by other entities in the biomass electricity supply chain (for example, energy transmission, vehicle manufacturers or vehicle owners) that wanted to appropriate for themselves the value of RINs associated with biogas and bioelectricity fuel production. In order to not delay implementation of the program further, EPA stated in the 2014 Rule that it would evaluate registrations on a case-by-case basis. *See* 79 Fed. Reg. at 42,145 (“For purposes of biogas-related pathways, EPA does not interpret its regulations as specifying where the producer must lie on the value chain. EPA will evaluate the situation on a case by case basis through the registration process; any company that is registered to generate RINs must be in a position to oversee the entire process and provide all necessary documentation.”).<sup>9</sup> However, the 2014 Rule did not change the pre-existing

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digesters, and biogas from cellulosic components of biomass processed in other waste digesters; and that “any” production process is permissible).

<sup>7</sup> *See* 79 Fed. Reg. 42,128, 42,143 (July 18, 2014) (“In addition to the comments discussed above, we also received comment suggesting that we include electricity from biomass sources such as woody biomass as a pathway in Table 1 to § 80.1426. However, evaluation of the lifecycle GHG emissions associated with generating electricity from woody biomass or other biomass sources would involve substantially different considerations from our analysis of electricity production from biogas sources, and is beyond the scope of this rule. Therefore EPA is not finalizing an electricity pathway from other types of biomass at this time”).

<sup>8</sup> *See* 40 C.F.R. § 80.1426(f)(11)(i) (“For purposes of this section, electricity that is introduced into a commercial distribution system (transmission grid) is considered renewable fuel for which RINs may be generated if all of the following apply: (A) The electricity is produced from renewable biomass and qualifies for a D code in Table 1 of this section or has received approval for use of a D code by the Administrator. (B) The RIN generator has documentation for the sale and use of a specific quantity of renewable electricity as transportation fuel, or has obtained affidavits from all parties selling or using the electricity as transportation fuel. (C) The quantity of electricity for which RINs were generated was sold for use as transportation fuel and for no other purpose. (D) The renewable electricity was loaded onto and withdrawn from a physically connected transmission grid. (E) The amount of electricity sold for use as transportation fuel corresponds to the amount of electricity derived from biogas that was placed into the commercial distribution system. (F) No other party relied upon the renewable electricity for the creation of RINs.”).

<sup>9</sup> *See* 40 C.F.R. § 80.1450 (“What are the registration requirements under the RFS program? . . . (D) For all facilities producing renewable electricity or other renewable fuel from biogas, submit all relevant information in § 80.1426(f)(10) or (11), including: (1) Copies of all contracts or affidavits, as applicable, that follow the track of the biogas/CNG/LNG or renewable electricity from its original source, to the producer that processes it into renewable fuel, and finally to the end user that will actually use the renewable electricity or the renewable CNG/LNG for transportation

RFS rules which specified that RINs must be generated by fuel producers, nor the statutory basis under which EPA had consistently recognized that RINs are initially owned by fuel producers for all types of renewable fuel, consistent with the statutory mandate of the 2005 EPCA and the 2007 EISA. Accordingly, despite the statement made in the 2014 Rule regarding the “interpretation” of the 2010 Rule, and notwithstanding EPA’s decision to evaluate registrations on a case-by-case basis, the 2010 Rule (as well as the 2007 Rule and the statutory language itself as interpreted by the federal courts) clearly require EPA to reject registrations by any entity other than the fuel producer, that is, the entity that generates the renewable electricity in the first instance.<sup>10</sup>

### 2016 Proposal

In 2016, EPA solicited public comment on the RIN issuance rules after receiving registration requests from various entities in the biofuel supply chain (other than fuel producers) who were seeking to capture the value of RINs under the Renewable Fuel Program. *See Renewables Enhancement and Growth Support Rule; Proposed Rule*, 81 Fed. Reg. 80,828, 80,831 (Nov. 16, 2016) (“2016 Proposal”) (“The EPA has received a number of registration requests for approval under the existing RFS regulations and these requests envision generation of RINs by different types of entities in the renewable electricity production, distribution or use sectors . . . EPA seeks input on the approach to RIN generation for renewable electricity that would best further the goals of the RFS program, but does not propose a preferred approach.”). EPA also noted that various entities competing for RINs were submitting different data, which purportedly complicated EPA’s review of RIN registrations. *See* 81 Fed. Reg. at 80,891 (“This has created an untenable environment for the approval of any single registration request by the EPA to date. Many of the registration requests submitted envision generating RINs using different types of information to verify the use of electricity as transportation fuel.”).<sup>11</sup> In the end, however, the 2016 proposal was never finalized, and did not legally alter the RFS rules put in place by prior rulemakings.

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purposes. (2) Specific quantity, heat content, and percent efficiency of transfer, as applicable, and any conversion factors, for the renewable fuel derived from biogas.”).

<sup>10</sup> A registration application submitted on behalf of a fuel producer by an agent or aggregator would also be consistent with the existing regulations, provided that evidence of the contractual relationship was submitted with the registration application.

<sup>11</sup> In the 2016 Proposal, EPA seems to confuse the entitlement to RIN issuance (which legally lies with the fuel producer under the 2007 Rule and 2010 Rule) with ownership of supply chain data. *See, e.g.*, 81 Fed. Reg. at 80,891 (“it is possible that the vehicle owner, charging station owner, and vehicle manufacturer would all have record of the amount of renewable electricity used in this single charging event”); 81 Fed. Reg. at 80,891 (“for a given quantity of renewable electricity, at most one party—whether it is the electricity producer, the utility distributing the electricity, the EV owner, the charging station, or the manufacturer—can generate the corresponding RINs”). However, this is no actual problem for administration of the RIN program. Fuel producers who seek RINs can obtain the necessary data, by purchase from vehicle owners if necessary, and if they cannot obtain that data no RINs will be issued. The DriveGreen program (*infra*, n. 14) was designed precisely to address this need for data and was structured to provide a portion of the RIN value to vehicle owners in exchange for access to this data.

### Current Regulatory Status

Accordingly, the current status of the Renewable Fuel Program is that only fuel producers may generate RINs, as has been the case since 2007. With respect to electricity derived from renewable biomass, the rules are, and can be, no different. EPA may not legally consider RIN registrations submitted by any entities other than fuel producers, nor recognize RINs purported to be generated by non-producers, even if those entities may have data relating to biogas or bioelectricity transmission or vehicle usage.

The evaluation of RIN registrations is not complicated, despite EPA's hand-wringing in its discussions in the 2016 proposal. Under EPA's current regulations, each fuel producer must document the supply chain of the electricity derived from renewable biomass produced by that production facility and EPA can evaluate this documentation on a case-by-case basis, as it decided to do in the 2014 Rule. Where renewable biomass electricity generation is "matched" to transportation use in this manner, there is no potential for double counting; moreover, because the RIN registrations are public documents, fuel producers will police any attempt by one fuel producer to claim credit for contracts of another fuel producer.<sup>12</sup>

With respect to electricity derived from renewable biomass that is not "matched" to a particular transportation end-use – for example bioelectricity fed into the electric grid without a power purchase agreement with particular vehicle fleet owners – EPA can allocate the RINs associated with those biofuels based on statistical calculations of how much biofuel is used for transportation purposes, and allocate RINs on a proportional basis to all fuel producers that have not documented a consumer-facing arrangement.<sup>13</sup> No changes to EPA's existing RFS rules are necessary to evaluate registrations and acknowledge generation of RINs. Fuel producers can easily provide all the data necessary to these calculations, and by backing out "matched" fuel use from overall "energy system" fuel use, there is no potential for double counting or other concerns about the integrity of the program.

### Delayed Agency Action

Since EPA finalized its 2010 Rule qualifying producers of electricity derived from renewable biomass, producers have on information and belief submitted dozens of valid RIN registrations and

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<sup>12</sup> Issuing RINs to electricity fuel producers is exactly the same as EPA's practice (as required by the existing rules) of issuing RINs to biogas fuel producers when applied to biogas fed into the gas distribution system and not nominated to any particular consumer. Similarly, with respect to liquid fuels such as ethanol EPA has never considered issuing RINs to gas station owners, nor owners of vehicles powered by internal combustion engines, nor any other entity other than the fuel producer. Moreover, as noted, EPA's existing regulations explicitly limit RIN generation to fuel producers. *See* 40 C.F.R. § 80.1104 ("How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers? . . . a batch RIN must be generated by a renewable fuel producer").

<sup>13</sup> This system for allocation of RINs to bioelectricity producers is described in greater detail in the Fuel Pathway Petition submitted by Plainfield Renewable Energy, LLC, dated Sept. 28, 2018 (*supra*, n. 4), and can be applied on a case-by-case basis with respect to all bioelectricity registrants, or through an annual rulemaking in conjunction with EPA's annual renewable volume obligation (RVO) rulemakings.



accompanying requests for RIN issuance.<sup>14</sup> However, EPA has refused to process the RIN registrations or to even commit to any reasonable timeline for doing so. *See, e.g.*, Letter from Byron Bunker, Director, Compliance Division Office of Transportation and Air Quality (U.S. EPA) to Michael McKenna (representative of Biomass Power Association), dated Oct. 4, 2018 (“Bunker Letter”) (“The Agency . . . does not have a timeline to share regarding when further decisions [relating to RIN registrations and issuance under the electric RIN-generation program] will be made”).<sup>15</sup> Contrary to Congress’ intent, not a single RIN has actually been acknowledged as generated for electricity fuel despite the undeniable fact that producers have generated significant volumes of renewable transportation fuel that has actually been used by electric vehicles in the transportation system. EPA’s long unjustified delay in issuing RINs to qualified fuel producers is illegal for several reasons.

### 1. De Facto Delay Rulemaking

Where EPA wishes to change or delay a regulation, the Clean Air Act requires EPA to follow detailed rulemaking procedures, and an agency rule cannot be finalized without adherence to these procedures. *See* Clean Air Act § 307(d), 42 U.S.C. § 7607(d). To the extent that EPA is withholding action on RIN registrations on the basis of the 2016 solicitation of public comment or any other purported agency action, this constitutes an illegal change to the existing RFS regulations without notice-and-comment rulemaking. The Clean Air Act requires that all final rules be promulgated with a statement of basis and purpose and explanation of reason, and published in the *Federal Register*.<sup>16</sup> None of those procedures, nor substantive rulemaking requirements, have been satisfied with respect to EPA’s apparent decision to not acknowledge generation of RINs by producers of electricity derived from renewable biomass, including EPA’s inaction on registrations specifically for biogas derived electricity where EPA has finalized a valid pathway. In addition, to the extent not displaced pursuant

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<sup>14</sup> For example, DriveGreen, LLC, submitted an application for registration as a RIN generator on January 9, 2015, as an aggregator of RINs generated by its contract partners, including Commonwealth New Bedford Energy, LLC, which produces renewable biogas from landfill operations from which it generates renewable electricity, which in turn is sold to an electric utility and ultimately used as a transportation fuel by electric vehicles. Nearly four years later, EPA has failed to process the registration, issue RINs, or even respond to DriveGreen’s application.

<sup>15</sup> BPA respectfully requests that EPA confirm within 10 days whether the Bunker letter is intended to be a “final decision” of the Administrator deferring performance of the nondiscretionary statutory action of issuing RINs or a change to the existing RFS rules, or alternatively, whether the Administrator intends to respond to this letter such that the Bunker letter is not a final decision. *See* CAA § 307(b)(2).

<sup>16</sup> *See* Clean Air Act § 307(d)(1), 42 U.S.C. § 7607(d)(1) (“RULEMAKING (1) This subsection applies to . . . (E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title”); (d)(6) (“(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule. (B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period. (C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.”).

to section 307(d)(1) of the Clean Air Act,<sup>17</sup> the Administrative Procedure Act requires informal rulemaking procedures to be followed in respect of final agency actions. *See* 5 U.S.C. § 553. Accordingly, by refusing to acknowledge generation of RINs, EPA is in violation of the Clean Air Act and APA.

EPA's inaction can also be viewed as an illegal extension of the effective date of the 2010 Rule and 2014 Rule as applied to electricity derived from renewable biomass. As noted, EPA finalized the 2010 Rule (providing generally that electricity derived from renewable biomass qualifies for RINs as a renewable transportation fuel) nearly a decade ago, and finalized the 2014 Rule (establishing a pathway specifically for compressed natural gas, liquefied natural gas, and electricity when such fuels are derived from biogas using a case-by-case evaluation of RIN registrations) four and half years ago. Following the 2014 Rule, EPA proceeded to approve registrations for renewable CNG and LNG but refused to act on any RIN registrations for electricity derived from biogas, presumably in reliance on its 2016 Proposal – a rulemaking action that has never been finalized. By withholding action on RIN registrations for electricity fuel, EPA is essentially working a *de facto* withdrawal or moratorium of the 2010 Rule and 2014 Rule as applied to electricity derived from renewable biomass, contrary to Clean Air Act and APA rulemaking procedures.

Both the Clean Air Act and the APA provide for judicial review – and remedies – for failures of the Administrator to follow rulemaking procedures and substantive violations of law.<sup>18</sup> The D.C. Circuit recently chastised the agency in strong terms for attempting to delay the effect of rules that had been finalized through the public rulemaking process. *See Air Alliance Houston v. EPA*, 2018 WL 4000490 (D.C. Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (under Clean Air Act § 307, agency action effectively delaying a rule's effective date is “tantamount to amending or revoking a rule” which can be done only thru CAA and APA rulemaking procedures); *see also Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983) (“[S]uspension of the permit process . . . amounts to a suspension of the effective date of regulation . . . and may be reviewed in the court of appeals as the promulgation of a regulation.”); *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 nn.26 & 28 (D.C. Cir. 1981) (rejecting the argument that the court lacked jurisdiction to review an order “defer[ring] the implementation of regulations”); *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 823 F.2d 608, 614–15 & n.5 (D.C. Cir. 1987) (“[i]n effect, the Administrator has granted a modification of the mandatory safety standard”); *cf. Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (“[T]he D.C. Circuit correctly read Section 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”);

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<sup>17</sup> *See* CAA § 307(d)(1), 42 U.S.C. § 7607(d)(1) (“The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.”).

<sup>18</sup> *See* CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) (“In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) [relating to objections] has been met, and (iii) the condition of the last sentence of paragraph (8) [relating to serious errors] is met.”).

*National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (holding that “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and “may not alter [such a rule] without notice and comment.”).

Unless and until the 2016 Proposal or the Bunker Letter becomes a valid regulation, the Agency’s refusal to process registrations and acknowledge generation of RINs for electricity derived from renewable biomass is arbitrary, capricious, and in excess of its authority under the Clean Air Act and the APA. *See, e.g., Clean Air Council*, 862 F.3d at 7 (vacating agency-imposed stay of rulemaking as arbitrary, capricious, and in excess of statutory authority).

## 2. Unreasonably Delayed Agency Action

When it promulgated the 2010 Rule to implement Congress’ directive to create a RIN credit program, the agency took on a duty to approve registrations and acknowledge generation of associated RINs by qualified fuel producers. By refusing to provide these incentives to qualified electricity producers, EPA has unreasonably delayed and withheld such action. The Clean Air Act provides a citizen suit remedy for “failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” *See* Section 3, *infra*. Similarly, the Administrative Procedure Act requires a federal agency to “conclude a matter” presented to it “within a reasonable time,” 5 U.S.C. § 555(b), and authorizes federal courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). If necessary, fuel producers may seek a writ of mandamus from the federal courts to compel issuance of RINs which have been improperly delayed. *See* 28 U.S.C. § 1331 (jurisdiction of federal courts); 5 U.S.C. § 702 (“[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof”); 5 U.S.C. § 704 (agency action made reviewable by statute and final agency action for which there is no other adequate remedy); 5 U.S.C. § 706 (courts may “compel agency action unlawfully withheld or unreasonably delayed.”); *see also* All Writs Act, 28 U.S.C. § 1651 (authorizing federal courts to issue all writs appropriate “in aid of their respective jurisdictions”); *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004) (mandamus remedy warranted when “the agency has a duty to act” that has been “unreasonably delayed”). *See also Clean Air Council*, 862 F.3d at 7 (vacating agency-imposed stay of rulemaking as arbitrary, capricious, and in excess of statutory authority).

The federal courts have recognized that a significant passage of years without agency action is deserving of judicial intervention to compel action. *See, e.g., Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (“TRAC”) (establishing factors to evaluate agency delay). Applying the TRAC factors, as noted above, EPA was required to finalize the RFS2 regulations and RIN credit program no later than 2008. It is now over a decade later. In addition, EPA’s refusal to acknowledge generation of RINs for all qualified transportation fuels has wreaked prejudice and hardship on the renewable biomass power sector as well as feedstock suppliers, resulting in the loss of millions of dollars that should have flowed to renewable fuel production.<sup>19</sup> EPA has also created an unlevel playing field by allowing biogas derived from municipal solid waste to receive benefits under

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<sup>19</sup> As but one example, a landfill gas facility which submitted a RIN registration in 2015 has been denied over \$7.2 million in revenue while EPA has illegally delayed action on its registration.

the RFS when it is sold as renewable natural gas in the form of CNG or LNG, but denied these same RIN benefits when that same gas (derived from the same feedstock) is used to make a different transportation fuel in the form of electricity or when solid renewable feedstocks are used to produce electricity. Similarly, producers of liquid fuels, such as corn ethanol, have received RINs for many years, earning billions in revenue. EPA's disparate treatment of RNG and electricity has created "winners and losers," with the "winners" receiving nearly \$30 per mmbtu for qualified RNG while the "losers" receive nothing and face closure of their facilities.

The D.C. Circuit has ruled that "a reasonable time for agency action is typically counted in weeks or months, not years" and thus a "six-year-plus delay is nothing less than egregious." *In re American Rivers & Idaho Rivers United*, 372 F.3d at 419. With respect to bioelectricity RINs, the delay of over 11 years since Congress' passage of the revised Renewable Fuel Program in 2007, and 8 years since EPA recognized electricity as a renewable transportation fuel in the 2010 Rule, is far beyond the range of bureaucratic delay that federal courts have countenanced. *See, e.g., In re American Rivers & Idaho Rivers United*, 372 F.3d at 419 ("six-year-plus delay is nothing less than egregious"); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (14-month time period without more is not unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (six-year delay unreasonable for rulemaking); *In re Core Communications Inc.*, 531 F.3d 849, 857 (same); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (nine-year delay unreasonable); *cf. Marbury v. Madison*, 5 U.S. 137 (1803) ("every right, when withheld, must have a remedy, and every injury its proper redress"). Indeed, in a recent environmental case granting mandamus relief for delayed agency action, a federal circuit court noted that "EPA fails to identify a single case where a court has upheld an eight year delay as reasonable." *In Re a Community Voice v. EPA*, 878 F.3d 779, 787 (9th Cir. 2017). In short, it has been eleven years since Congress qualified biomass-derived electricity and EPA still hasn't registered a single qualifying facility or a single RIN for electricity fuel. Under any legal theory, that delay is unreasonable.

### 3. Nondiscretionary Duty to Acknowledge Registrations and RINs

EPA's failure to approve registrations to producers of electricity derived from renewable biomass (and the agency's failure to credit the associated RINs in producer accounts) is also a failure to perform a nondiscretionary duty under section 304 of the Clean Air Act, as EPA has already determined in prior rulemakings that fuel producers who demonstrate eligibility are entitled to RINs.<sup>20</sup> Although EPA had discretion in prior rulemakings to decide how to structure the RIN program, once EPA determined that electricity derived from biomass was an eligible transportation fuel, the processing of RIN registrations is a ministerial duty that does not require additional discretion, but rather requires EPA only to determine that the registrant has submitted sufficient documentation showing that it is a fuel producer, that the fuel qualifies under the definition of renewable fuel, and that the fuel was used as a transportation fuel.

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<sup>20</sup> *See* CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) ("AUTHORITY TO BRING CIVIL ACTION; JURISDICTION. Except as provided in subsection (b), any person may commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . The district courts shall have jurisdiction . . . to order the Administrator to perform such act or duty [and] compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed").

The RIN crediting program became effective as of September 1, 2007. *See* 40 C.F.R. § 80.1104; *see also* 40 C.F.R. § 80.1150(b) (“Registration information may be submitted to EPA at any time after promulgation of this rule”) (initial RFS1 program). EPA’s regulations for the RFS2 program provide for issuance of RINs to any fuel producer that submits the appropriate documentation showing production of renewable fuel. *See* 40 C.F.R. § 80.1426 (“How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers? . . . producers and importers of renewable fuel must generate RINs to represent that fuel”) (RFS2 Subpart M rules).<sup>21</sup> The Subpart M rules for RIN generation require fuel producers to register with EPA prior to generating RINs, and thus EPA’s refusal to act on registrations prevents fuel producers from generating RINs, thereby thwarting Congress’ renewable fuels program and resulting in economic losses for fuel producers. *See* 40 C.F.R. § 80.1450(b) (“Producers. Any RIN-generating foreign or domestic producer of renewable fuel . . . must provide EPA the information specified under §80.76 . . . and must receive EPA-issued company and facility identification numbers prior to the generation of any RINs for their fuel . . . Unless otherwise specifically indicated, all the following registration information must be submitted and accepted by EPA . . . 60 days prior to the generation of RINs”). As noted, numerous fuel producers have submitted registrations, yet EPA has indicated in the Bunker Letter and by its inaction that it will not process those registrations notwithstanding that there is no deficiency asserted by the agency.

Because EPA has refused to fulfil its nondiscretionary duty to process valid registrations, this letter constitutes statutory notice of intent to sue required by section 304(b) of the Clean Air Act.<sup>22</sup> However, we would much prefer to resolve this matter without litigation, and request that EPA negotiate regarding these matters within the statutory notice period.

#### 4. Taking of Right to RINs

EPA’s failure to credit RINs to bioelectricity producers is a taking of property without just compensation in violation of the Takings Clause of the Article V of the U.S. Constitution, and in addition constitutes violations of the Due Process and Equal Protection Clauses to the extent RINs are credited to other fuel producers. *See* U.S. Const. (“nor shall any person . . . be deprived of life, liberty,

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<sup>21</sup> 40 C.F.R. § 80.1426 provides as follows: “How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers? (a) General requirements. (1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if all of the following occur: (i) The fuel qualifies for a D code pursuant to §80.1426(f), or the EPA has approved a petition for use of a D code pursuant to §80.1416. (ii) The fuel is demonstrated to be produced from renewable biomass pursuant to the reporting requirements of §80.1451 and the recordkeeping requirements of §80.1454. (A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at §80.1454(g) are deemed to be renewable biomass. (B) [Reserved] (iii) Was produced in compliance with the registration requirements of §80.1450, the reporting requirements of §80.1451, the recordkeeping requirements of §80.1454, and all other applicable requirements of this subpart M. (iv) The renewable fuel is designated on a product transfer document (PTD) for use as transportation fuel, heating oil, or jet fuel in accordance with §80.1453(a)(12).”

<sup>22</sup> CAA § 304(b)(1), 42 U.S.C. § 7604(b)(1) (“NOTICE No action may be commenced . . . (2) under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator”); CAA § 304(a), 42 U.S.C. § 7604(a) (“In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.”).

or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

5. Failure to List Biomass Electricity Pathway

Because EPA recognized bioelectricity as a qualified renewable transportation fuel in the 2010 Rule, EPA had a duty to create a “D code” pathway for electricity generated directly from solid biomass feedstock, as contrasted with electricity generated from biogas for which a pathway was created in the 2014 Rule. As noted, a formal pathway petition was submitted to EPA for biomass feedstock on September 28, 2018. However, EPA was required under the 2010 Rule to acknowledge generation of RINs for all qualified transportation fuel, and EPA’s delay in taking steps necessary to create a D-code and pathway is unwarranted as an unreasonably delayed agency action, illegal rulemaking, and failure to act, for the reasons discussed above.

\* \* \*

We understand that EPA has many priorities; however, due to the critical importance of this issue in fulfilling Congress’ vision for renewable fuels in the United States, we ask you to consider making resolution of the this long-overdue action a top priority for 2019. In order to resolve this matter expeditiously, we ask you to honor the commitment made in the 2018 RVO that “EPA will continue to work with all companies interested in generating cellulosic RINs to address any outstanding technical and regulatory issues, and may include projected production from these sources in the future as appropriate.”<sup>23</sup>

To that end, we respectfully request a meeting with you and your staff to discuss how to move forward with electricity fuel registrations and RIN generation on an expedited basis, as well as including electricity fuel in the 2020 Renewable Volume Obligation (“RVO”) projections.

Thank you for your consideration.

Sincerely,



Robert E. Cleaves IV  
President & CEO  
Biomass Power Association

cc: (by electronic mail)

Byron Bunker, Director, Compliance Division, Office of Transportation and Air Quality

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<sup>23</sup> See U.S. EPA, Office of Transportation and Air Quality, *Renewable Fuel Standard Program - Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, EPA-420-R-17-007 (Dec. 2017).