Response to Petition of the American Petroleum Institute ("API") and the National Petrochemical and Refiners Association ("NPRA") for Reconsideration of Portions of the December 9, 2010 Rule Amending the Renewable Fuel Standard Program Regulations and Response to Petitions by API, NPRA Western States Petroleum Association ("WSPA") and Coffeyville Resources Refining & Marketing, LLC, ("Coffeyville") for a Waiver of the 2011 Cellulosic Biofuel Standard

I. Response to API/NPRA Petition for Reconsideration

A, Introduction

Major changes to the Clean Air Act ("CAA") Renewable Fuel Standard ("RFS") program to implement the requirements of the Energy Independence and Security Act of 2007 ("EISA") were published in the *Federal Register* on March 26, 2010, and became effective in July 2010.[1] The statute requires that EPA establish on an annual basis the renewable fuel standards that will apply in the following calendar year, including requirements for cellulosic fuels.[2] EPA issued a Notice of Proposed Rulemaking ("NPRM") on July 20, 2010, to establish the renewable fuel standards for 2011.[3] At that time, EPA proposed to use the authority in CAA section 211(o)(7)(D)(i) to reduce the applicable volume of cellulosic biofuel for 2011 from the 250 million gallons set forth in the statute to a level between 6.5 and 25.5 million gallons. EPA based that proposed range on an estimate of anticipated production provided by the Energy Information Administration ("EIA"), a review of production plans by individual biofuel producers, and other information.[4] EPA also proposed that it would not reduce the applicable volumes of advanced biofuel and total renewable fuel below the applicable volumes set forth in the statute, because it appeared likely that there would be sufficient volumes to satisfy the statutorily specified levels.[5] EPA also proposed to allow the issuance of delayed renewable identification numbers ("RINs") in limited circumstances.[6] In its December 9, 2010 Final Rule, EPA set the applicable volume of cellulosic biofuel at 6.6 million gallons, at the low end of the range that had been proposed.[7] Consistent with the proposal, EPA did not modify the applicable volume of advanced biofuel or total renewable fuel, but instead derived the 2011 percentage standards for those fuel types based on the applicable volumes of those fuels set forth in the statute.[8] EPA's Final Rule allowed for the issuance of delayed RINs, but with certain modifications from the proposal reflecting public comment and further consideration by EPA.[9]

Subsequently, the American Petroleum Institute ("API") and the National Petrochemical and Refiners Association ("NPRA") (jointly, "Petitioners" in Section I of this document) submitted a Petition for Reconsideration of the December 9, 2010 Rule.[10] In EPA's Notice of

[1] 75 FR 14670 (March 26, 2010).
[2] Clean Air Act section 211(o)(3).
[3] 75 FR 42238 (July 20, 2010).
[4] *Id*. at 42443.
[5] *Id*. at 42247.
[6] *Id*. at 42262.
[7] 75 FR 76792 (December 9, 2010).
[8] *Id*.
[9] *Id*.
[10] EPA-HQ-OAR-2010-0133-0100

Proposed Rulemaking ("NPRM") concerning the 2012 renewable fuel standards,[11] EPA proposed to deny the petition, and solicited comments on this proposed response.[12] Petitioners commented on the proposed denial of their petition, and both clarified and elaborated upon their petition.[13]

This decision contains EPA's response to the API/NPRA petition, as clarified by their comments on EPA's proposed denial. After considering all comments received on its proposal, EPA is denying the petition.

The petition requested EPA reconsideration of three regulatory requirements:

1. The 2011 cellulosic biofuel volume requirement of 6.6 million gallons (6.0 million ethanol-equivalent gallons).

2. The 2011 advanced biofuel requirement of 1.35 billion gallons.

3. The regulatory provision allowing the generation of delayed RINs in certain situations.

B. Standard for Reconsideration

The petition was 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. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

Thus the requirement to convene a proceeding to reconsider a rule is based on the petitioner demonstrating to EPA: (1) that it was impracticable to raise the objection during the

[11] 76 FR 38844 (July 1, 2011).
[12] *Id*. at 38879.
[13] 76 FR 338848 (July 1. 2011)

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 could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue 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.[14]

As discussed in this decision, EPA is denying the petition because it fails to meet these criteria. In all cases, the objections raised in the petition to reconsider 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 Renewable Fuel Standard program regulations should be revised as suggested by petitioners.

C. EPA Response to Petitions for Reconsideration of the RFS2 Standards for 2011

1. The 2011 Cellulosic Biofuel Volume Requirement of 6.6 Million Gallons (6.0 Million Ethanol-Equivalent Gallons)

a. Role of EIA Estimate in EPA's Projection of Cellulosic Biofuel Production

EPA initially interpreted the API/NPRA petition as suggesting that EPA must, as a matter of law, establish the applicable volume of cellulosic biofuel at the level of production estimated by EIA, regardless of other information available to the agency.[15] In our proposed denial of the petition, we noted that EPA's intent to base its cellulosic biofuel projection on all of the information before it (rather than solely on the EIA estimate) was clear from its proposal (and the earlier RFS2 rulemaking), and that Petitioners could have commented on it during the comment period on either rule, and were therefore precluded from doing so in a petition for

[14] *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 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 RFS2 program.

[15] 76 FR 38880 (col.1-2).

reconsideration.[16] However, in their comments on EPA's proposed denial, Petitioners state that EPA misunderstood their argument. According to API:

> . . . the petition argues that cellulosic biofuel requirement must be "based on the estimate provided by the EIA," and that this requirement is not satisfied by merely 'considering" EIA's estimate along with other information. Congress directed EPA to do more than merely "consider" EIA's estimate as one piece of relevant information among many. By requiring that EPA's projections be "based on" the EIA's estimate, Congress has expressed its intention that the EIA's estimate should provide the "foundation" for EPA's projection, that it should be the "principal element or ingredient' of the projection, and that it should be used as the "starting point or point of departure." [*citing* Random House Dictionary of the English language 123 (1966) (defining "base")] To fulfill its responsibilities under the statute, EPA is required to begin its analysis with the EIA's estimate, and use that estimate as the "foundation" for the cellulosic biofuel requirement. Although EPA is not required to adopt the EIA's estimate without modification, any modification requires adequate justification. In the Final Rule EPA failed to acknowledge the significance that Congress accorded to EIA's estimate, and failed to provide an adequate justification for departing from that estimate in such a substantial way.[17]

NPRA states that "EPA must base its cellulosic biofuel requirements on reasonable information and not 'unlikely' scenarios and . . . EPA has a duty to explain why the agency rejected EIA's expert advice in the matter of projected production volumes."[18]

API's position could be interpreted to suggest that EPA should give no consideration to a possible reduction in the cellulosic biofuel applicable volume before EIA's October estimate, since in that way it could be the "starting point" for EPA's analysis. If EPA were to adopt that position, EPA would not have an opportunity to seek public comment on a proposed cellulosic biofuel volume, since the statute requires that EPA establish the final volumes by November 30 of the year prior to their applicability. EPA does not believe that it is required to forgo public input on this matter, or to delay analyzing and considering alternative sources of information until so late in the timeframe allowed for its decision-making, in order to make the EIA estimate a "starting point" for its analysis. API's comments could also be interpreted as not foreclosing a proposed rule and opportunity for comment, but as suggesting that in developing our Final Rule, we should begin with a discussion of the EIA estimate, that it should be the "principal element or ingredient" we consider, and that there would be a substantial burden involved in justifying any deviation from the estimate. We believe this second interpretation is most likely what API was suggesting, since they did not specifically state in their comments that we improperly issued a proposed rule and, in fact, they participated in the comment process on the proposed rule. NPRA argues simply for a "duty to explain" a deviation from the EIA estimate.

[16] *Id*.
[17] API Comments on Proposed 2012 Rule at 5.
[18] NPRA comments on 2012 NPRM at 15.

As an initial matter, API and NPRA had an opportunity to raise these points both in comments on the proposed RFS2 rule, and in comments on the proposed 2011 standards. In the preamble to the 2010 RFS2 Notice of Proposed Rulemaking, we stated that when projecting cellulosic biofuel production volumes annually "[w]e intend to examine EIA's projected volumes and other available data including the production outlook reports . . ." which EPA proposed to require renewable fuel producers to submit annually.[19] EPA further explained that the production outlook reports "would be used . . . to set the annual cellulosic biofuel" standard.[20] EPA's proposed cellulosic biofuel volume for 2010 was derived through a review of company-specific information described in the preamble. In its comments, API did not recommend a prominent role for the EIA projection as it does now, but instead suggested that EPA base the cellulosic biofuel volume on "demonstrated rated (existing continuous operation for at least three months) annual capacity as of the required November 30 notice." [21] NPRA also proposed that the annual cellulosic biofuel volume be established based on "demonstrated production capability" rather than the EIA projection.[22] Thus, both Petitioners had an opportunity to make the arguments they now assert in their petition, but actually suggested a different, and contradictory, position.

Petitioners had another opportunity to raise this issue in the context of the rulemaking establishing the 2011 RFS standards. EPA made it clear in its proposed rule that EPA intended the estimate provided to us by the EIA to be only one of several sources of information we would use in determining the applicable cellulosic biofuel volume for 2011:

> We will complete our evaluation based on comments received in response to this proposal, the Production Outlook Reports due to the Agency on September 1, 2010, the estimate of projected biofuel volumes that the EIA is required to provide to EPA by October 31, and other information that becomes available, and will finalize the standards for 2011 by November 30, 2010.
>
> These standards are to be based in part on transportation fuel volumes estimated by the Energy Information Administration (EIA) for the following year.
>
> As described in the final rule for the RFS2 program, we intend to examine EIA's projected volumes and other available data including the Production Outlook Reports required under § 80.1449 in making the determination of the appropriate volumes to require for 2011.
>
> ...each year by October 31 EIA is required to provide an estimate of the volume of cellulosic biofuel they expect to be sold or introduced into commerce in the United States in the following year. EPA will consider this information as well when finalizing a single volume for use in setting the 2011 cellulosic biofuel standard.[23]

[19] 74 FR 24966.
[20] *Id*. at 24970.
[21] EPA-HQ-OAR-2005-0161-2393 at page 40.
[22] EPA_HQ_OAR_2005-0161-2124, attachment at 16.
[23] 75 FR 42240.

In addition, EPA presented for public comment its own detailed review of individual biofuel producers' production plans for 2011, upon which EPA based its proposed applicable volume of cellulosic biofuel.[24] Petitioners commented on the proposed rule, but did not make the argument that API now raises, that the EIA estimate must be the "foundation" and "starting point" for EPA's assessment. Indeed, API did not mention the EIA estimate at all in its comments on the proposed 2011 cellulosic biofuel applicable volume.[25] NPRA stated in its comment that it "supports the use of this [EIA] information for the Agency's determination" of the cellulosic biofuel level for 2011, but also noted that EPA "may consider Production Outlook Reports" and concluded by saying "the revised standard should be based primarily on a proven record of production rather than projections of production for 2011."[26] Through this concluding sentence, NPRA appears to suggest, as it did in its comments on the RFS2 rule, that EPA should place little if any reliance on EIA's estimate and the Production Outlook Reports but instead rely on a "proven record of production[27]

Thus, it is clear that Petitioners had ample opportunity to raise their current arguments regarding the role of the EIA estimate in EPA's assessment of cellulosic biofuel production in response to two different NPRMs – the RFS2 NPRM and the NPRM for the 2011 RFS standards – and they did not do so. This alone is sufficient reason to deny this aspect of the API/NPRA petition. However, as described below, we also reject as a substantive matter API's conclusion that the statutory reference to EPA "basing" its projection on the EIA's estimate necessarily leads to the result they suggest.

The statutory provision requiring EPA to set a cellulosic biofuel standard "based on the estimate provided by the EIA" is an ambiguous statutory provision. CAA section 211(o)(7)(D)(i) states:

> (i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator *based* on the estimate provided under paragraph (3)(A*)*, not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume. (emphasis added)

API presents synonyms of the word "base" in its challenge to EPA's reading of the statute. API highlights dictionary definitions of the word "base" that include "foundation," "principle element or ingredient," and "starting point or point of departure." Other synonyms not

[24] *Id*. at 42443.
[25] *See* API Comments on 2011 NPRM, EPA-HQ-OAR-2010-0133-0062.
[26] NPRA Comments on 2011 NPRM, EPA-HQ-OAR-2010-0133-0055.
[27] EIA estimates are not based on a proven record of production, but instead take into account expected start-ups in the coming year.

highlighted by API include "a supporting or carrying ingredient," "a point to be considered," "the starting point or line for an action or undertaking," "the bottom of something considered as its support."[28] The variety of these definitions indicates the inherent ambiguity in the statutory reference to the term "base." Considering that Congress gave EPA, rather than EIA, the authority to establish the cellulosic biofuel applicable volume under CAA section 211(o)(7)(D)(i), and also considering the ambiguity in the term "based," EPA's approach of considering the EIA estimate together with other available information was reasonable. Therefore, we find that API's claims regarding EPA's use of EIA data do not provide substantial support for the argument that the regulation should be revised and are, therefore, not of central relevance to the outcome of the rule.

Furthermore, regarding NPRA's position that EPA should explain any difference in our projections as compared to EIA's, EPA fully agrees. Indeed, we took this exact approach in the Final Rule, which makes clear that this is not a basis for reconsideration of the Final Rule.[29] EPA explained that EPA's projection was designed to take into account uncertainties in a manner that best furthers the objectives of the CAA. The EIA, when making their projections, would not be expected to consider the broader objectives of the CAA since it is not the EIA's responsibility to set the applicable CAA standards. This fact is reflected in EIA's general use of standard utilization factors of 10% and 25%[30] which are not based on the levels that each company is capable of achieving based on company-specific information, but instead on historical production rates for facilities in their first year of production. Thus, the EIA approach does not take into account what is reasonably achievable based on more company-specific information on startup dates and volume ramp up schedules. We believe it is appropriate to consider such company specific information and make adjustments to our volume projections accordingly, rather than treat all companies who plan to begin cellulosic biofuel production in a given year identically, regardless of these potentially significant differences. As directed by the statute, when making our determinations for the volume estimates, we worked closely with EIA and were well aware of the parameters that went into their estimates and took into account those parameters as well as additional company specific information collected during our review process in establishing the required 2011 cellulosic biofuel volume. Therefore, we find that NPRA's claims regarding EPA's use of EIA data do not provide substantial support for the argument that the regulation should be revised and are, therefore, not of central relevance to the outcome of the rule.

b. Inadequate Basis For the Final Cellulosic Biofuel Projection

Petitioners also argue for reconsideration of the 2011 cellulosic biofuel applicable volume on the basis that EPA's projection is "overly optimistic." Specifically, they note that developments concerning two biofuel companies – Bell BioEnergy and Cello Energy – illustrate the pitfalls of basing projections on unproven business plans. EPA had counted volumes from these facilities towards its proposed cellulosic biofuel volume for 2011, but did not do so in its Final Rule due to difficulties each company experienced. API made exactly the same argument

[28] http://www.merriam-webster.com/dictionary/base
[29] 75 FR 76796-7..
[30] The EIA assumed a utilization rate of 46% for Fiberight only because they had more specific information about the expected production volume from this company.

in its comments on the proposed 2011 standards rule, where it also suggested that EPA's projection be based only on capacity that was in operation for at least three months.[31] EPA responded to these comments in the preamble to the Final Rule.[32] In a footnote in their petition, Petitioners cite to an additional company – Range Fuels – that has experienced setbacks since publication of the final rule. However, this is just another example, like the Bell Energy and Cello Energy examples cited by API in their comments on the NPRM, of individual companies experiencing difficulties.

In addition, CAA section 211 (o)(7)(D)(i) requires that EPA reduce the applicable volume of cellulosic biofuel required to the projected volume available during that year. The approach suggested by API effectively assumes no growth in cellulosic biofuel production in the year for which a projection is made. This is an unrealistic assumption for any new and growing industry, and would not promote the statutory purposes of the RFS provisions on cellulosic biofuel, which are to promote growth in the use of cellulosic biofuel . While the approach adopted by EPA may in some cases result in our projected volumes exceeding actual production levels, other options such as the purchase of cellulosic waiver credits and deficit carry over exist to allow obligated parties to remain in compliance.

Petitioners also assert that EPA set the 2011 cellulosic biofuel standard at an "aspirational level" and that because there has been little or no actual cellulosic biofuel production as of the date of the Final Rule that "there is an insufficient basis for concluding" that 6.6 million gallons of cellulosic biofuel can be produced for sale in the U.S. in 2011.[33] These assertions are a re-packaging of API's comments on the proposed rule, to the effect that EPA should base the annual standard on proven production rather than on expected production. EPA already responded to these comments in its Final Rule.[34]

Thus, it is evident that Petitioners had an opportunity to raise the concerns described above during the comment period on the proposed rule, and in many instances that they in fact did so. Petitioners' opportunity to raise their concerns during the comment period is sufficient justification to deny their request for reconsideration of those issues. However, Petitioners also fail to provide substantial evidence that the rule should be changed. EPA did not set the applicable volume of cellulosic fuel at an aspirational level. EPA investigated each and every potential cellulosic biofuel producer and individually assessed their production plans. This information formed the basis of EPA's projection. Petitioners had an opportunity to submit information or data to refute the information that EPA relied on, but failed to do so. Petitioners continue to argue for a degree of certainty in EPA's projections that EPA does not believe is warranted given the current status of the cellulosic biofuels industry. Basing projections only on proven production levels would be unlikely to provide the market incentives for this fuel that are needed to meet Congressional goals in establishing cellulosic biofuels as a growing part of the RFS program. Additionally, the statute clearly contemplates that there will be a degree of uncertainty associated with setting the annual standards, as these values are forward looking. For an industry, whether it be an emerging one like the cellulosic biofuels one, or a mature one like

[31] API Comments on 2011 NPRM, EPA-HQ-OAR-2010-0133-0062.
[32] 75 FR at 76797-98.
[33] Petition at 5.
[34] 75 FR at 76797-98.

the oil industry, market factors, technology complications or unforeseen barriers will determine how accurate production forecasts actually are when reviewed afterwards. EPA previously rejected Petitioners' proposed approach for the reasons described in the preamble to the Final Rule.[35] We find that Petitioners' claims regarding the degree of uncertainty that EPA accepted in its projections do not provide substantial support for the argument that the regulation should be revised and are, therefore, not of central relevance to the outcome of the rule.

c. New Information

Petitioners describe as new information not available to them during the comment period, the October 2010 final EIA estimate of cellulosic biofuel production in 2011, information on production problems with Range Fuels, production outlook reports provided to EPA by biofuel producers in September, 2010, and information from the EMTS database indicating that no cellulosic biofuel RINs were generated between July 2010 and June 2011 as new information that supports reconsideration of the cellulosic biofuel applicable volume.[36] In addition they generally claim that all other information available to EPA as of the date of its response to the petition should also be considered, and NPRA asserts that it was not provided an opportunity to comment on production outlook reports. .

With respect to the October 2010 final EIA data, while this information was not available to Petitioners at the time of the proposed rule, EPA was engaged with EIA throughout the process and was considering their ongoing preliminary evaluations in concert with our own efforts. Further, once the final data was issued by EIA, it was fully considered and evaluated in the context of developing the final rule. Thus, these information sources do not represent new information that was not available to the Agency at the time of the final rule that would justify reconsideration. To the extent that Petitioners claim they were not able to comment on the EIA data in the context of the rulemaking to present their views of the matter, Petitioners have now, in the context of their petition for reconsideration, had an opportunity to do so. Based on the arguments raised in the petitions on this information, Petitioners' claims that the rule is deficient do not provide substantial support for the argument that the regulation should be revised and, therefore are not of central relevance to the outcome of the rule.

As described above, the new information on Range fuels is the type of individual-facility development that can be expected. EPA believes it should avoid reconsidering its annual rules on the basis of such expected individual-company developments, where the change in circumstances are limited in nature and magnitude, as otherwise the annual standards would be in a constant state of flux. The resulting uncertainty would make it difficult for the nascent cellulosic biofuels industry to obtain financing and plan for orderly growth in production. The statute requires EPA to undertake a new evaluation of cellulosic biofuel production each and every year, and EPA believes that more frequent evaluation would not be consistent with the goals of the Act to provide a stable and defined growing market for biofuels. For similar reasons, information from the EMTS database indicating that no cellulosic biofuel RINs were generated as of June 2011, or more recent information indicating that no cellulosic biofuel RINs were generated in all of 2011, does not justify reconsideration of the 2011 standards. First, EPA notes

[35] *Id*.
[36] Petition, NPRA Comments on 2012 NPRM, EPA-HQ-OAR-2010-0133-0148.

that a considerable quantity of excess RFS1 cellulosic RINs generated in the first part of 2010 were available to regulated parties for use (subject to a 20% roll over cap) in complying with their 2011 cellulosic biofuel obligations, as well as the option of purchasing cellulosic biofuel waiver credits or carrying a deficit forward. Second, EPA will soon re-evaluate anticipated cellulosic biofuel production for purposes of setting the 2013 standards. More frequent reevaluation based on current developments would not be consistent with the goal of the Act to provide market certainty to the developing biofuels industry, and would impose a considerable burden on EPA. Thus, as we stated in our NPRM proposing to deny the petition, "[t]he compliance flexibilities, the short time period at issue, and the disruption that would occur from a change in the standard within the compliance year, indicate that a relatively larger change in circumstances with respect to cellulosic production would need to occur before EPA would determine that new circumstances provide substantial support for revising the volume standard for cellulosic biofuel for a specific year."[37] This remains true even though there was no cellulosic biofuel produced for compliance use under the RFS program in 2011. The 6 million ethanol equivalent gallon projection that we used to derive the standard is less than 1 percent of the volumes set forth in the Act, and in light of the availability of 2010 cellulosic RINs for use in demonstrating 2011 compliance, other compliance flexibilities, the fact that the standard will be re-visited annually, and the deleterious impact on biofuels market certainty that would result from such an effort, EPA does not believe that the shortfall in actual production is sufficient to justify reconsideration of the rule. The circumstances here are not of a nature or magnitude that indicate substantial support for the argument that the 2011 cellulosic biofuel volume requirement should be revised. Therefore, EPA finds that Petitioners references to reduced production by Range fuels, and information that cellulosic RINs were not produced in 2011, are not of central relevance to the outcome of the rule. (EPA responds to the API/NPRA petition for a waiver of the requirements, rather than reconsideration of the 2011 cellulosic biofuel standard, in a separate section of this document.)

Regarding production outlook reports, EPA noted in the preamble that the production outlook reports submitted in 2010 were of limited value (75 Fed. Reg. 76,794) and described in detail the company-specific information it actually relied on for its projection. Id. at 14794-9. In reviewing Petitioners claims regarding production outlook reports, EPA has determined that in 2010 no production outlook reports were submitted from cellulosic biofuel producers. Production outlook reports are only required for registered facilities and no cellulosic biofuel production facilities were registered as of September 1, 2010 when these reports were due. Because no relevant production outlook reports were filed in the context of 2011 rule, and EPA therefore did not rely on production outlook reports in its action establishing the final rule, Petitioners' assertions that the reports contain new information not available to them and that they have not had an opportunity to comment on them do not provide substantial support for the argument that the regulation should be revised and, therefore, are not of central relevance to the outcome of the rule.

No Petitioner alleges that compliance will be impossible; their concern is that the 6.6 million gallon requirement "all but ensures that obligated parties will owe fees to EPA for circumstances outside their control."[38] EPA notes that although EPA collects the cellulosic waiver credit fees, that all moneys collected are transferred to the U.S. Treasury. Thus, EPA

[37] 76 FR 38844, 38882.
[38] Petition at 6.

does not directly benefit from its collection of these moneys. While it is true that EPA's denial of Petitioners' request for reconsideration of the rule may mean that they will choose to purchase cellulosic waiver credits to demonstrate compliance (rather than carrying a compliance deficit forward to next year for any obligation not satisfied through use of 2010 cellulosic RINs), EPA notes that as a result of EPA waiving the vast majority of the cellulosic biofuel applicable volume set forth in the statute for 2011 in setting the cellulosic biofuel applicable volume, that Petitioners' compliance costs are likely far less than would be the case if cellulosic biofuel production were occurring at levels anticipated by Congress. Petitioners do not allege or demonstrate that obligated parties will not be able to afford to comply with the volume requirement by making use of the compliance flexibilities that are offered in the program. Petitioners' claims regarding compliance costs do not provide substantial support for the argument that the regulation should be revised and, therefore, are not of central relevance to the outcome of the rule.

d. Petitioners' Objections Do Not Meet the Standard for Reconsideration

As noted above, petitioners' claims either: (1) could have been, or were, raised during the comment period or (2) do not provide substantial support for the argument that the Administrator's decision to set the cellulosic biofuel level at 6.6 million gallons should be revised.

Thus, EPA denies the petition for reconsideration of the 2011 cellulosic biofuel standard. (EPA addresses the separate petitions from API , NPRA and others for EPA to exercise its general waiver authority under CAA 211(o)(7)(A) to waive the 2011 cellulosic biofuel requirement in a separate section of this document.)

2. The 2011 Advanced Biofuel Requirement of 1.35 Billion Gallons

a. Petitioners' Claim the Final Rule Should Have Reduced the Requirement for Advanced Biofuel

Petitioners argue that EPA should have exercised its discretion pursuant to CAA section 211(o)(7)(D)(i) to reduce the volume requirement for advanced biofuel by as much as the cellulosic biofuel reduction.[39] In the Final Rule, EPA decided not to reduce the advanced biofuel requirement after analyzing the volume production and import potential for 2011. We found that there "are sufficient sources of other advanced biofuel, such as additional biodiesel, renewable diesel, or imported sugarcane ethanol, such that the standard for advanced biofuel can remain at the statutory level of 1.35 billion gallons."[40] At that time, we responded to comments from Petitioners suggesting those other sources were speculative:

> We disagree with the suggestion that volumes of other advanced biofuels are too uncertain and that the applicable volume of advanced biofuel should be lowered. As described above, we believe that there are sufficient potential sources of other advanced biofuel to make up for the reduction in the applicable volume of

[39] Petition at 8.
[40] 75 FR 76792.

> cellulosic biofuel. Moreover, our authority to lower the advanced biofuel and/or total renewable fuel applicable volumes is discretionary, and we believe that actions to lower these volumes should only be taken if it appears that insufficient volumes of qualifying biofuel can be made available, based on such circumstances as insufficient production capacity, insufficient feedstocks, competing markets, constrained infrastructure, or the like. Since this is not the case for 2011, we do not believe that the advanced biofuel applicable volume of 1.35 bill gallons or the total renewable fuel applicable volume of 13.95 billion gallons should be reduced.[41]

Petitioners raised these issues again in their Petition for Reconsideration. In our proposed denial, we pointed out that EPA had already addressed these comments and stated: "petitioners did not reference any new data on imports of sugarcane ethanol or the production potential of biodiesel to demonstrate that the statutory applicable volume of 1.35 bill gallons of advanced biodiesel cannot be met in 2011."[42] API responds that EPA may, at its own discretion, decide to reconsider rules even if not required by CAA section 307(d).[43] NPRA responds that: "there is a possible shortfall that must be accounted for with excess biomass-based diesel, imports of sugarcane ethanol, or another qualified biofuel."[44] NPRA points to additional information, some of which is new information from that available at the time of the Final Rule, supporting its conclusion that there may be insufficient volumes of advanced biofuels in 2011. NPRA believes that "EPA must grant the petition unless it believes today that there will be sufficient volumes of advanced biofuels in 2011."[45]

b. Most of Petitioners Claims Were Made During the Comment Period

With the exception of the new information submitted by NPRA that is discussed in the next section, all of Petitioners' arguments with respect to the advanced biofuel requirement were raised during the comment period. EPA considered these comments, and nevertheless decided not to reduce the advance biofuel requirement. As discussed below, we have considered these comments anew, as supplemented by the petition, and are not persuaded that we should grant Petitioners' request for reconsideration.

c. Petitioners Claims Are Not of Central Relevance

An objection is of central relevance if it provides substantial support for the argument that the underlying decision should be revised. NPRA provides additional information, some of which is new, to support its argument that there may be insufficient volumes of advanced biofuel. EPA identified a range of possible sources of advanced biofuel that may be used to meet the required volume, and NPRA's new information supplements its previous arguments to the effect that possible uncertainties and inadequacies may be associated with various sources. NPRA, however, does not suggest that the statutory level cannot be met; it merely suggests that

[41] 75 FR 76799.
[42] 76 FR 38880.
[43] API Comments on 2012 NPRM, EPA-HQ-OAR-2010-0133-0152, at 13.
[44] NPRA Comments on 2012 NPRM at 19.
[45] NPRA Comments on 2012 NPRM at 20.

the level *might* not be met. [.[46]] In response, EPA notes that until final compliance determinations are made, some uncertainty is expected; however, information currently available to EPA does not suggest that obligated parties have had difficulty in complying with the 2011 advanced biofuel standard. In 2011 a total of 1.895 billion RINs that could be used to satisfy the advanced biofuel standard were generated (1.675 billion biomass based diesel RINs and 0.220 advanced biofuel RINs).[47] The number of available RINs significantly exceeds the required total of 1.35 billion advanced RINs for 2011. Therefore, Petitioners' claims regarding the advanced biofuel requirement are not of central relevance.

d. Petitioners Do Not Meet the Standard for Reconsideration

As discussed above, petitioners must demonstrate either that it was impracticable to raise the objections during the public comment period or that the grounds for raising such objections arose after the close of the comment period (but within the time specified for judicial review), and that their objections are of central relevance to the outcome of the underlying decision. The above analysis shows that Petitioners' claims with respect to the advanced biofuel requirement were either raised during the comment period or are not of central relevance to the rule. Thus, reconsideration of this aspect of the challenged RFS rule is properly denied. Furthermore, in response to API's suggestion that EPA reconsider the advanced biofuel requirement as a discretionary matter, we choose not to exercise such discretion, and stand by our prior decision to not reduce Congress' 2011 advanced biofuel requirement based on our prior analysis of feedstock availability and production capacity, and our general understanding of levels of advanced biofuel production in 2011 .

3. The Regulatory Provision Allowing the Generation of Delayed RINs in Certain Situations

a. Petitioners' Claim the Final Rule's Treatment of Delayed RINs Introduces Uncertainty Into the Regulatory Environment

In the Final Rule, EPA made delayed RINs available in certain circumstances.[48] Petitioners raised concerns with delayed RINs first in their comments on the 2011 standard proposal, and again in their Petition for Reconsideration. In our proposed denial, we pointed out: "petitioners did not cite new circumstances or new information in their assertion that this provision will inject uncertainty into the regulatory system and RIN market."[49] API urges EPA to grant its petition, without new information, at its discretion. NPRA also offers no information, but again argues against delayed RINs because they inject uncertainty into RFS compliance.

b. All of Petitioners Claims Were Made During the Comment Period

[46] EPA has initiated enforcement actions against some entities for fraudulent generation of RINs during 2011. It is likely that the total number of properly-generated advanced biofuel RINs for 2011 is less than is currently reflected in EMTS. However, EPA does not believe that the extent of fraudulent RIN generation was sufficient to undermine the ability of obligated parties to comply with the 2011 advanced biofuel standard with valid RINs.
[47] Information from EPA's EMTS website: http://www.epa.gov/otaq/fuels/rfsdata/2011emts.htm
[48] 75 FR 76818.
[49] 76 FR 38880.

As noted above, all of Petitioners' claims with respect to delayed RINs were raised during the comment period. EPA considered these comments, and nevertheless decided to allow delayed RINs in certain circumstances. Because Petitioners could have, and in fact did, raise all of their objections during the comment period, the petition is appropriately denied on this basis alone.

c. Petitioners Claims Are Not of Central Relevance

An objection is of central relevance if it provides substantial support for the argument that the underlying decision should be revised. Petitioners' argue that the RFS delayed RINs provision inserts uncertainty into the RFS program, but petitioners do not support that argument with any actual evidence that delayed RINs will undermine the RFS program in any concrete or measurable way. EPA considered and rejected these arguments in the context of the rulemaking. For the reasons already articulated, Petitioners' claims regarding the advanced biofuel requirement are not of central relevance.

d. Petitioners Do Not Meet the Standard for Reconsideration

As discussed above, petitioners must demonstrate either that it was impracticable to raise the objections during the public comment period or that the grounds for raising such objections arose after the close of the comment period (but within the time specified for judicial review), and that their objections are of central relevance to the outcome of the underlying decision. The above analysis shows that Petitioners' claims do not satisfy these criteria. Thus, reconsideration of the challenged RFS rule is denied. Furthermore, in response to API's suggestion that EPA reconsider the delayed RINs provision as a discretionary matter, we choose not to exercise such discretion for the reasons noted above.

D. Conclusion

For all of the reasons discussed above, the petition for reconsideration of portions of the December 9, 2010 rule amending the RFS program regulations is denied.

II. Response to Petitions for Waiver of the 2011 Cellulosic Biofuel Standard by API, NPRA WSPA and Coffeyville

A. Introduction

As required by CAA Section 211(o)(7)(D)(i), in setting annual cellulosic biofuel standards, EPA begins by projecting production levels for the upcoming year and, if such levels are lower than the applicable volumes set forth in the statute, EPA establishes the annual standard based on the lower projected production volume. For 2011, EPA projected that 6.6 million gallons of cellulosic biofuel would be produced (representing 6.0 million gallons of ethanol-equivalent fuel), and based the annual percentage standard on that

significantly lower projected production level rather than the applicable volume of 250 million gallons set forth in the statute.

By letter dated January 20, 2012, API, NPRA and WSPA (the "refiner trade associations") petitioned EPA to exercise its authority under Clean Air Act section 211(o)(7)(A)(ii) to waive all volumes of cellulosic biofuel required under the RFS program for the 2011 compliance year. These Petitioners cited as justification an inadequate domestic supply of qualifying fuel. Shortly thereafter, Coffeyville filed a petition seeking identical relief, for the same reason. To support their claims regarding inadequate supply of cellulosic biofuel, all Petitioners referenced data available through the EPA Moderated Transaction System ("EMTS") that indicates that zero volumes of cellulosic biofuel RINs had been generated in the period between July 1, 2010 and October 1, 2011.[50]

The refiner trade associations requested an EPA response in less than the 90-days allowed under CAA 211(o)(7)(B). They noted that obligated parties are required to demonstrate compliance with the 2011 renewable fuel standards by February 28, 2012, which is roughly just five weeks from the date the petition was submitted. All petitioners requested that their requirement to demonstrate compliance with the 2011 cellulosic biofuel standard be deferred until after EPA response to the petitions.

B. Statutory Background

CAA Section 211(o)(7)(A), provides that:

> The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph [211(o)(2)] in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph [211(o)(2)] --
>
> (i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or
>
> (ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

C. EPA's Response to Request for Delay of Compliance Deadline

EPA is today issuing a response to the petitions for a waiver of the cellulosic biofuel standard, as requested by Petitioners. To facilitate a prompt reply, EPA decided not to seek public comment on the petitions. As EPA noted in its August 13, 2008 response to the waiver request of the State of Texas, the statute requires an opportunity for public comment before EPA may grant a petition, but does not impose the same requirement in the case of an

[50] Updated information in EMTS as of the date of this EPA response indicates that zero cellulosic biofuel RINs were generated in November and December, 2011. Although not referenced in the petitions, EPA has taken this updated information into accounting responding to the petitions.

EPA petition denial. Since the Petitioners note that their members "produce virtually all the refined petroleum products and petrochemicals manufactured in the United States," EPA presumes that Petitioners have already asserted through their petition all likely arguments that would come from obligated parties charged with complying with the 2011 cellulosic biofuel standard, and that additional public comment would not likely result in the identification of additional rationale for granting the petition. On the other hand, as described below, EPA believes that the petitions should be denied. Allowing an opportunity for comment could lead to additional support for a petition denial from those parties, such as biofuel producers, that were not parties to the petition, however, such additional comment is not necessary for EPA to conclude that denial is appropriate. Although a formal opportunity for public comment has not been provided, EPA did receive comments from Biotechnology Industry Organization, the Advanced Biofuels Association and the Advanced Ethanol Council[51] opposing the API/NPRA/WSPA petition. EPA has taken these comments into consideration in this response.

As discussed below, EPA is not granting the API/NPRA/WSPA and Coffeeville petitions. Therefore, it was not necessary for EPA to extend the compliance deadline in order to allow obligated parties time to adjust to a modified requirement. The compliance obligations as set forth by regulation apply. In addition, the parties' late request for a waiver should not justify an extension of the compliance period. As Petitioners noted, the statute specifies a 90-day time period for EPA responses to petitions under Section 211(o)(7)(A), and parties seeking a waiver should take that time allowance into account when deciding when to submit a waiver petition. . Obligated parties awaiting EPA action on their petitions had the option of either demonstrating compliance by the required deadline (through the purchase of cellulosic waiver credits and 2010 cellulosic RINs) or carrying a compliance deficit forward to 2012.

D. EPA's Response to Requests for a Waiver of 2011 Cellulosic Biofuel Requirements

EPA recognizes that, contrary to EPA expectations at the time the 2011 cellulosic biofuel standard was established, there have been no cellulosic biofuel RINs generated in calendar year 2011. Although cellulosic biofuel RINs generated in 2010 may be used to satisfy up to 20% of the cellulosic biofuel obligations in 2011, this still leaves a shortfall of 80% or more of the cellulosic biofuel obligation. However, this shortfall does not prevent compliance. Obligated parties may either purchase cellulosic biofuel waiver credits to fully satisfy any renewable volume obligation that is not satisfied with use of 2010 cellulosic biofuel RINs, or they may, in appropriate cases, carry a compliance deficit into the next calendar year.

EPA notes that notwithstanding the shortfall in cellulosic biofuel production in 2011, it is not clear that Petitioners have established that there is an "inadequate domestic supply" within the meaning of CAA section 211(o)(7)(A)(ii). For most biofuels EPA believes that a demonstration by a petitioner that there were insufficient RINs available from the previous year (subject to the 20% carry-over limitation) and the current year's production to allow for

[51] February 24, 2012 letter from the Advanced Biofuels Association to Lisa P. Jackson; February 16, 2012 letter from the Advance Ethanol Council to Lisa P. Jackson; February 16, 2012 letter from the Biotechnology Industry Organization

compliance with the standard could be a basis for finding that there was an "inadequate domestic supply."[52] However, this is not necessarily the case with cellulosic biofuel. The statute does not clarify what "supply" is referenced in the term "inadequate domestic supply." The "supply" in question could be fuel, as Petitioners assume. However, for cellulosic biofuel the "supply" in question could reasonably be interpreted to include both actual cellulosic biofuel that generates RINs and cellulosic biofuel waiver credits, since either may be used for compliance.

If the term "supply" is interpreted to include cellulosic biofuel waiver credits, EPA would deny the petitions before it on grounds that inadequate domestic supply has not been demonstrated. There are sufficient cellulosic biofuel waiver credits available to allow all obligated parties to comply with the 2011 standards. However, EPA is not deciding the matter today, since even if the term "supply" in the context of a petition for waiver of a cellulosic biofuel standard were interpreted to refer solely to actual cellulosic biofuel that generates RINs, and not cellulosic biofuel waiver credits, EPA would deny the petitions filed by API, NPRA, WSPA and Coffeyville.

As noted above, the statute indicates that EPA has discretion and is not required to grant a petition claiming inadequate supply. The statute provides that EPA "may" grant a petition if inadequate domestic supply is found; EPA is not required to do so. There are several reasons why EPA believes the instant petitions should be denied, even if the lack of generation of 2011 cellulosic biofuel RINs, and limited availability of 2010 cellulosic RINs for 2011 compliance, amounts to inadequate domestic supply. First, the required volume is very small. In establishing the standard in its December 9, 2010 rulemaking, EPA already lowered the applicable volume used to establish the standard from the 250 million gallons specified in the Act to 6.6 million gallons. This obligation, spread among all obligated parties on the basis of their production and export, is extremely small in the context of a refining and import industry providing approximately 139 billion gallons of gasoline fuel in 2011.[53] When you add in covered diesel the fraction of the pool is even less. This sets the context for evaluating petitioners' concerns. Second, API, NPRA and WSPA clearly err in stating that the lack of cellulosic biofuel production in 2011 "preclude(s) their ability to comply with the RFS." As noted above, obligated parties may satisfy up to 20% of their cellulosic biofuel obligation through the use of use 2010 cellulosic biofuel RINs, and may purchase cellulosic biofuel waiver credits to satisfy the rest of their obligation. In addition, they may choose in appropriate circumstances to carry a compliance deficit forward to 2012. Thus, there is no "need" for a waiver to allow obligated parties to come into compliance. Third, EPA believes that issuance of a waiver could have a chilling effect on the future growth of the cellulosic biofuel industry. As noted in comments by the Biotechnology

[52] Even where inadequate domestic supply for non-cellulosic fuels is found, however, the statue gives EPA discretion to consider other circumstances and does not require that EPA grant a petition. EPA will consider such circumstances on a case by case basis. EPA notes that there may be circumstances where inadequate domestic supply is a result of short term natural disaster or infrastructure disruption that would reasonably be expected to be corrected in sufficient time to allow obligated parties to comply with their obligations through use of the deficit carry-forward provision. This is an example of a situation where EPA could exercise its discretion to deny a waiver petition notwithstanding the inadequacy of the domestic supply.

[53] 75 FR 76804 (December 9, 2010)

Industry Organization, denying the petition will maintain ”a stable market signal driving investment in commercialization of cellulosic biofuels, as intended under the RFS.” The cellulosic mandate in the RFS program is intended to promote growth in the cellulosic biofuel industry. The mandate does this by providing a level of certainty for investments that could be compromised through EPA issuance of a waiver. This is especially the case where relatively small volumes are involved, and obligated parties are able to comply through various flexibilities in the program. This course of action would conflict with the Congressional goal of providing reasonable mechanisms to facilitate the growth of the cellulosic industry. Thus, EPA believes that considerably greater supply problems than has currently been demonstrated would be needed to justify a waiver, especially where cellulosic waiver credits are available (together with excess 2010 cellulosic RINs) to allow full compliance.

E. Conclusion

For the reasons discussed above, EPA denies the petitions of API, NPRA WSPA and Coffeyville for a waiver of the 2011 cellulosic biofuel standard under CAA section 211(o)(7)(A)(ii).