IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NGL CRUDE LOGISTICS, LLC (f/k/a Gavilon, LLC) and WESTERN DUBUQUE BIODIESEL, LLC, Defendants.	Case No. 2:16-cv-1038-LRR Chief Judge Linda Reade *Oral Argument Requested*

UNITED STATES' RESISTANCE TO NGL CRUDE LOGISTICS, LLC'S MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

The United States, on behalf of the Environmental Protection Agency ("EPA"), filed this lawsuit on October 4, 2016, against NGL Crude Logistics, LLC ("NGL") and Western Dubuque Biodiesel, LLC ("WDB") for violations of Section 211(*o*) of the Clean Air Act, 42 U.S.C. § 7545(*o*), and the Renewable Fuel Standard ("RFS") regulations issued thereunder at 40 C.F.R. Part 80, Subpart M. The subject of this lawsuit is a series of biodiesel sale and repurchase transactions that NGL developed and implemented in 2011 to effectively double the biodiesel production credits, known as Renewable Identification Numbers or RINs, associated with the biodiesel. The nature of the transactions is undisputed: (1) NGL, then known as Gavilon, LLC, purchased biodiesel on the open market with the RINs that the original biodiesel producer had assigned to it; (2) NGL separated the RINs from the biodiesel and sold the RINs to third parties; (3) NGL then sold the biodiesel as "fatty acid methyl ester" to WDB, the owner of a biodiesel production facility in Farley, Iowa, for use as a "feedstock" in its operations (*i.e.*, as materials WDB would process to produce fuel); (4) WDB reprocessed the biodiesel and generated a new set of RINs for it, (5) WDB sold both the reprocessed biodiesel and RINs back to NGL; and finally (6) NGL sold the biodiesel and the approximately 36 million additional RINs purchased from WDB to third parties. The result was the generation of a second set of RINs for the same volume of biodiesel. *See* Appendix A (Flowchart of NGL's Sale and Repurchase Plan). The government alleges that NGL sold the second set of RINs for an estimated $47 million.

The Court should deny NGL's Motion to Dismiss the Amended Complaint (Dkt. No. 25, hereinafter "MTD") in its entirety because (1) NGL's conduct was illegal under the regulations in effect in 2011, (2) the Amended Complaint contains more than enough factual content to support the claims, and (3) the Court has the authority to order the relief sought.

BACKGROUND

The Renewable Fuel Standard Program

The Energy Policy Act of 2005 amended the Clean Air Act to add a renewable fuel program, which required EPA to promulgate regulations to increase the amount of renewable fuels used in motor vehicles. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1069 (codified at 42 U.S.C. § 7545(*o*)). The Energy Independence and Security Act of 2007 further amended the Clean Air Act to increase the renewable fuel mandate. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1521-24 (codified at 42 U.S.C. § 7545(*o*)(2)). Congress expanded the RFS Program to reduce the Nation's dependence on foreign oil, increase the production of renewable fuels, and achieve significant reductions in greenhouse gas emissions. *See id.* EPA promulgated the regulations at issue in this case (known as the RFS2 regulations) to implement the new requirements.

Congress required EPA to implement a credit trading program to facilitate compliance with the renewable fuel mandate. 42 U.S.C. § 7545(*o*)(5). To effectuate this requirement, the RFS Program created RINs, which "represent the basic framework for ensuring that the statutorily required volumes of renewable fuel are used as transportation fuel in the U.S." 75 Fed. Reg. 14670, 14684 (Mar. 26, 2010). A RIN is "a unique number generated to represent a volume of renewable fuel pursuant to §§ 80.1425 and 80.1426." *See* 40 C.F.R. § 80.1401 (definition of RIN). "Renewable fuel" is a fuel that is produced from renewable biomass to replace or reduce the fossil fuel in transportation fuel, with lifecycle greenhouse gas emissions that are at least 20 percent less than baseline lifecycle greenhouse gas emissions. *See* 40 C.F.R. § 80.1401 (definition of renewable fuel). A renewable fuel producer must comply with certain "pathways" to ensure that fuel meets the greenhouse gas reduction thresholds required to

generate RINs. The pathways require use of specific feedstocks (*i.e.*, what the renewable fuel is made from, such as soybean oil) and processes (*i.e.*, how the feedstock is converted to a renewable fuel). *See* 40 C.F.R. § 80.1426(f), Table 1 (2011) (listing pathways).

RINs are designated as either "assigned" or "separated." *See* 40 C.F.R. § 80.1428. An assigned RIN "cannot be transferred to another person without simultaneously transferring a volume of renewable fuel to that same person." 40 C.F.R. § 80.1428(a)(3). A RIN may be separated from the volume of renewable fuel it represents under certain conditions. *See* 40 C.F.R. § 80.1429. A separated RIN can be transferred any number of times. 40 C.F.R. § 80.1428(b)(1) and (3). RINs are generated and tracked through the EPA Moderated Transaction System, known as EMTS. 40 C.F.R. § 80.1401 (definition of EMTS).

The RFS2 regulations require gasoline and diesel refiners and importers (known as "obligated parties") to blend renewable fuels into transportation fuel or obtain RINs to meet their Renewable Volume Obligations ("RVOs"), which are based upon the volume of the gasoline and diesel fuel that the obligated party produces or imports into the United States. *See* 40 C.F.R. §§ 80.1406(b), 80.1407. The RFS2 regulations allow obligated parties to comply with their RVOs by producing renewable fuel and generating RINs themselves or acquiring RINs from other parties. Obligated parties must demonstrate that they have retired a sufficient number of RINs to meet their RVOs. *See* 40 C.F.R. § 80.1427(a)(1). *See generally Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

Procedural Background

On December 19, 2016, NGL filed a motion to dismiss the Complaint. (Dkt. No. 17.) On January 9, 2017, in lieu of filing a substantive opposition to NGL's motion to dismiss, the government filed an Amended Complaint as a matter of course pursuant to Federal Rule of Civil

Procedure 15(a)(1). (Dkt. No. 21.) Although the original Complaint properly stated claims for relief to the degree required by Rule 8(a), the government filed its Amended Complaint to, among other things, clarify its allegations concerning NGL and WDB's violations of the Clean Air Act and the relief requested in this matter in an effort to avoid litigation of tangential issues raised in NGL's motion to dismiss. NGL subsequently filed the current Motion to Dismiss (Dkt. No. 25) and withdrew the original (Dkt. No. 39).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In order to satisfy Rule 8, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is sufficient if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ulrich v. Pope Cnty.*, 715 F.3d 1054, 1058 (8th Cir. 2013) (quotation omitted).

ARGUMENT

The basic structure of the transactions between NGL and WDB is undisputed, as is the fact that WDB generated a second set of RINs for biodiesel produced from fatty acid methyl ester feedstock, which was itself biodiesel NGL purchased on the open market. NGL asks the Court to agree, as a matter of law, and without the presentation of any evidence, that the RFS Program allowed the generation of two sets of RINs under the law and facts of this case, and that RIN retirement is unavailable as injunctive relief. NGL's motion should be denied.

I. The Second, Third, and Fourth Causes of Action Meet Rule 8(a)'s Pleading Standard Because the Amended Complaint Alleges that WDB "Produced" Fuel.

The Second Cause of Action (use of an unpermitted feedstock) and Third Cause of Action (use of an unpermitted process) allege that WDB produced "a renewable fuel without complying with the requirements of § 80.1426 regarding the generation and assignment of RINs." 40 C.F.R. § 80.1460(a). Section 80.1426 prohibited a party "from generating RINs for a volume of fuel that it *produces*" without meeting certain criteria. 40 C.F.R. § 80.1426(c)(6) (2011)[1] (emphasis added). Both the Second Cause of Action and Third Cause of Action implicitly rely on WDB's "production" of fuel. NGL argues that the claims are deficient because the Amended Complaint does not allege that WDB "produced" fuel. (MTD at 16-17.) NGL also argues this same point in a slightly different way with regard to the Fourth Cause of Action (use of a feedstock/process not identified in WDB's EPA registration). The Fourth Cause of Action asserts that WDB violated 40 C.F.R. § 80.1460(b)(5), which provides that no person shall "[i]ntroduce into commerce any renewable fuel *produced* from a feedstock or through a process that is not described in the person's registration information." (emphasis added).

A common sense reading of the Amended Complaint confirms that the government has pled more than enough factual content to allege that WDB "produced" fuel under the plain meaning of that word. The Second, Third, and Fourth Causes of Action state that WDB "contends" it produced the biodiesel for which it generated RINs. (Amended Complaint, hereinafter "AC" ¶¶ 60, 61, 80, 86, 95.) The government alleges that WDB "contends" it produced the biodiesel based on WDB's representation to EPA that it produced fuel when it

[1] All references to 40 C.F.R. § 80.1426(c)(6) refer to the 2011 regulation. EPA amended Section 80.1426(c)(6)(ii) in 2014. The violations alleged in this case arose under the language in the 2011 regulation.

generated the RINs. The allegations are consistent with the government's position that the fuel WDB produced—the output of its production facility—was not biodiesel for which RINs could legally be generated under the RFS regulations. The government also alleges that the underlying "feedstock" was biodiesel that had been previously produced by other entities at other locations. (AC ¶¶ 43-44, 70-71, 103.) These are not "contradictory" allegations as NGL contends. (MTD at 16.) Both are reasonably based on the facts of NGL's sale and repurchase transactions with WDB: WDB reprocessed, or "produced," a fuel that had been previously produced by other entities.[2] NGL does not seriously dispute that WDB produced fuel given that it asserts WDB "used the biodiesel as a feedstock to create new biodiesel." (MTD at 1, 6.) NGL's semantic argument regarding the meaning of the word "produce" attempts to create confusion where none exists. The Second, Third, and Fourth Causes of Action each state a claim under Rule 8(a).

II. WDB Generated RINs Using a Non-Qualifying Feedstock (Second Cause of Action) and Non-Qualifying Process (Third Cause of Action).

The Second Cause of Action states a claim that WDB used a non-qualifying feedstock and the Third Cause of Action states a claim that WDB used a non-qualifying process in violation of Sections 80.1426(c)(6)(i) and 80.1460(a). Section 80.1460(a) provides that "no person shall produce or import a renewable fuel without complying with the requirements of § 80.1426 regarding the generation and assignment of RINs." At all times relevant to this lawsuit, Section 80.1426(c) provided in relevant part:

> (6) A party is prohibited from generating RINs for a volume of fuel that it produces if:
> (i) The fuel does not meet the requirements of paragraph (a)(1) of this section; or
> (ii) The fuel has been produced from a chemical conversion

[2] The government strongly disagrees with the assertion that NGL and WDB engaged in these transactions "with the intention of improving the original biodiesel." (MTD at 1.) NGL's intent in engaging in the transactions was to generate additional RINs. There is also a significant factual dispute regarding whether the defendants' transactions materially improved the biodiesel that was reprocessed.

process that uses another renewable fuel as a feedstock, the renewable fuel used as a feedstock was produced by another party, and RINs were received with the renewable fuel.

(A) Parties who produce renewable fuel made from a feedstock which itself was a renewable fuel received with RINs, shall assign the original RINs to the new renewable fuel.

Subparts (A) and (B) below explain that WDB violated Section 80.1426(c)(6)(i) because it generated RINs for fuel that used a non-qualifying feedstock and process. Section III below explains that generation of RINs was also illegal under Section 80.1426(c)(6)(ii) because WDB generated RINs for fuel that used another renewable fuel as feedstock and RINs were received with the renewable fuel feedstock, yet WDB did not assign the original RINs to its end product.

A. WDB Was Prohibited from Generating RINs under Section 80.1426(c)(6)(i).

The Second and Third Causes of Action allege that WDB failed to comply with the feedstock and process requirements in the RFS regulations. Section 80.1426(c)(6)(i) provided that "[a] party is prohibited from generating RINs for a volume of fuel that it produces if: (i) The fuel does not meet the requirements of paragraph (a)(1) of this section." Paragraph (a)(1) of 40 C.F.R. § 80.1426 provides in relevant part that "producers and importers of renewable fuel must generate RINs to represent that fuel if the fuel: (i) Qualifies for a D code pursuant to § 80.1426(f), or EPA has approved a petition for use of a D code pursuant to § 80.1416." Section 80.1426(f), in turn, sets forth the pathways (feedstock and process requirements) for renewable fuel production that qualifies the fuel for RIN generation. These pathway requirements are designed to ensure that RINs can only be generated for fuel that meets the Clean Air Act's greenhouse gas emissions reduction requirements.

The biodiesel that WDB produced did not qualify for a D code, *i.e.*, meet the pathway requirements in Section 80.1426(f), Table 1, because neither biodiesel nor "methyl ester feedstock" are identified as qualifying feedstocks and because WDB did not use an EPA-

approved process (such as transesterification) to create the biodiesel. Nor did WDB petition for use of an alternative feedstock or process pursuant to Section 80.1416. (AC ¶¶ 79-92.) Accordingly, by generating RINs for fuel that did not comply with the requirements of Section 80.1426, WDB violated the prohibitions in Section 80.1426(c)(6)(i) and Section 80.1460(a).

B. Section 80.1426(c)(6)(ii) Does Not Authorize the Use of Renewable Fuel as a Feedstock for Purposes of Section 80.1426(c)(6)(i).

As described above, WDB violated Sections 80.1426(c)(6)(i) and 80.1460(a) by failing to comply with the feedstock and process requirements referenced in Section 80.1426(a)(1). Section 80.1426(c)(6)(i) and (ii) are separated by the word "or," meaning that "[a] party is prohibited from generating RINs" if either of the independent prohibitions in (i) or (ii) is met. *See, e.g., U.S. v. Smith*, 35 F.3d 344, 346 (8th Cir. 1994) ("[t]he ordinary usage of the word 'or' is disjunctive, indicating an alternative"). Accordingly, the prohibition in Section 80.1426(c)(6)(ii) does not dictate whether the prohibition in 80.1426(c)(6)(i) applies to a party, and vice versa.

While principles of construction clearly establish the two subparagraphs as distinct prohibitions, NGL nevertheless argues that the pathway requirements do not apply under Section 80.1426(c)(6)(i) where biodiesel is the feedstock because Section 80.1426(c)(6)(ii) "expressly contemplates using a 'renewable fuel' as a 'feedstock.'" (MTD at 16.) This is contrary to the plain language of Section 80.1426(c)(6)(ii). This provision — which specified instances in which the generation of RINs was *prohibited* — did not *authorize* the use of renewable fuel as feedstock. It did not *authorize* anything.

NGL argues that if Section 80.1426(c)(6)(ii) was not intended to authorize the use of renewable fuel as feedstock under Section 80.1426(c)(6)(i), it would be "superfluous." (MTD at 16-17.) This ignores the fact that the RFS regulations did contain a mechanism for potentially

using renewable fuel as a feedstock. Section 80.1426(a)(1)(i), which is referenced in Section 80.1426(c)(6)(i), provides that a renewable fuel producer can generate RINs for renewable fuel if the renewable fuel "[q]ualifies for a D code pursuant to § 80.1426(f), *or EPA has approved a petition for use of a D code pursuant to § 80.1416*." (emphasis added). Section 80.1416 sets forth the EPA petition process for evaluation of new renewable fuels pathways, *i.e.*, feedstocks and processes not already listed as approved pathways in Section 80.1426(f)(1) and Table 1. Section 80.1426(f)(1) is consistent with these provisions; it provides that "D codes shall be used in RINs generated by producers or importers of renewable fuel according to the pathways listed in Table 1 to this section . . . *or as approved by the Administrator*." (emphasis added). Sections 80.1426(a)(1)(i), 80.1416, and 80.1426(f)(1), taken together, thus provide a process whereby a party can *petition* EPA to use renewable fuel as a feedstock.[3] Section 80.1426(c)(6)(ii) was not, then, "superfluous."

The plain language of Section 80.1426(c)(6)(ii) is unambiguous — it does not authorize the use of renewable fuel as a feedstock, but would apply where a petition permitting use of a renewable fuel as a feedstock is granted.[4] However, even if Section 80.1426(c)(6)(ii) was

[3] EPA confirmed this interpretation of the RFS regulations when it finalized the current version of 40 C.F.R. § 80.1426(c)(6)(ii). EPA explained that "[t]he existing regulations do not provide a pathway for the generation of RINs for a fuel produced using another renewable fuel as a feedstock. Parties seeking to do so, however, may submit a petition requesting approval pursuant to § 80.1416." 79 Fed. Reg. 42078, 42107 (July 18, 2014).

[4] Other companies have availed themselves of Section 80.1416's petition process to use a renewable fuel as a feedstock without generating two sets of RINs for the same volume of fuel. For example, on April 6, 2011, EPA approved a petition for the use of a pathway not listed in Section 80.1426(f). The petition proposed production of renewable fuel and generation of RINs using, in part, a renewable fuel feedstock (denatured ethanol). The renewable fuel feedstock had RINs that were attached, and also RINs that were separated. In granting the petition, EPA explicitly stated that the petitioning party was not authorized to generate RINs for the renewable fuel feedstock portion of the produced fuel. *See* Appendix B, Global Energy Resources Request for Fuel Pathway Determination under the RFS2 (Apr. 6, 2011), at 1, available at https://www.epa.gov/sites/production/files/2015-08/documents/global-energy-determination.pdf. The Court may consider certain matters of public record on a Rule 12(b)(6) motion, including letter decisions

ambiguous, EPA's interpretation is reasonable, consistent with the plain language of the regulation, and entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation and citation omitted)); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). In sum, the Second and Third Causes of Action state claims for relief under Rule 8(a).

III. The Generation of RINs in this Case Was Unlawful Because Section 80.1426(c)(6)(ii) Prohibited the Generation of a Second Set of RINs.

WDB's generation of a second set of RINs for the biodiesel produced from biodiesel or methyl ester "feedstock" was illegal in 2011. NGL focuses on the prohibition against RIN generation in Section 80.1426(c)(6)(ii) to support its argument that the conduct at issue was legal. (MTD at 12-13.) This argument is fundamentally flawed for two reasons. First, as described in Section II, WDB was *independently* prohibited from generating RINs using non-qualifying feedstocks and processes under Section 80.1426(c)(6)(i). This should be the end of NGL's argument that the conduct at issue was legal. Second, even assuming that Section 80.1426(c)(6)(i) did not bar WDB from generating the RINs, the conduct at issue was illegal under the RIN generation prohibition in Section 80.1426(c)(6)(ii) as it existed in 2011.

Section 80.1426(c)(6)(ii) prohibited a party from generating RINs when the produced fuel "use[d] another renewable fuel as a feedstock, the renewable fuel used as a feedstock was produced by another party, *and RINs were received with the renewable fuel*." (emphasis added). NGL contends that the third prong of Section 80.1426(c)(6)(ii)'s prohibition is not met because

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of government agencies. *See Moore U.S.A. Inc. v. Standard Register Co.*, 139 F. Supp. 2d 348, 363 (W.D.N.Y. 2001).

WDB did not receive RINs with the renewable fuel — NGL separated and transferred the RINs associated with the original fuel before selling it to WDB.

The Court should reject NGL's self-serving interpretation of this language. The more appropriate interpretation is that it prohibited the generation of RINs when "RINs were received with the renewable fuel" by either WDB *or NGL*. This interpretation is consistent with the plain language of the regulation, its regulatory history, and Congress's goals for the RFS Program, and would prohibit parties from generating a second set of RINs for the same fuel by simply stripping the RINs from the fuel before selling it to another party for "reprocessing." EPA's interpretation of the regulation is controlling because it is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quotation omitted).

The regulatory history of Section 80.1426(c)(6)(ii) supports EPA's interpretation. The regulations at issue in this case were originally issued on March 26, 2010. 75 Fed. Reg. 14670 (Mar. 26, 2010). At that time Section 80.1426(c)(6)(ii) prohibited a party from generating RINs when the produced fuel "use[d] another renewable fuel as a feedstock, the renewable fuel used as a feedstock was produced by another party, *and RINs with a K code of 1 were received with the renewable fuel.*" 75 Fed. Reg. at 14871 (emphasis added). The K code is a number identifying the status of the RIN as either assigned to a volume of renewable fuel (K code of 1) or separated from a volume of renewable fuel (K code of 2). 40 C.F.R. § 80.1425(a)(1), (2). On May 10, 2010, EPA issued technical amendments to the March 2010 RFS2 regulations. 75 Fed. Reg. 26026 (May 10, 2010). One technical amendment deleted Section 80.1426(c)(6)(ii)'s final clause "*and RINs with a K code of 1 were received with the renewable fuel*," and replaced it with the language presently at issue, *i.e.*, "and RINs were received with the renewable fuel." Stated differently, EPA deleted the reference in Section 80.1426(c)(6)(ii) to assigned RINs (K code of

1), and replaced it with a blanket prohibition on generation of RINs when "*RINs were received with the renewable fue*l," *i.e.*, RINs that were assigned (with a K code of 1) or separated (with a K code of 2). The preamble to the May 10, 2010 technical amendment confirmed that the basis for the change was "to prohibit the generation of RINs for a volume of renewable fuel produced from other renewable fuel *that was accompanied by RINs, either assigned or separated*." 75 Fed. Reg. at 26029 (emphasis added). The latter is the very situation in this case: NGL received RINs with the biodiesel that it re-designated as a "feedstock." The fact that NGL separated and sold the first set of RINs just before it re-designated it as a feedstock does not negate the fact that "RINs were received with the renewable fuel."

Moreover, NGL's interpretation cannot be correct when Section 80.1426(c)(6)(ii) and its Subpart A are read together. Section 80.1426(c)(6)(ii)(A) provided that "[p]arties who produce renewable fuel made from a feedstock which itself was a renewable fuel received with RINs, shall assign the original RINs to the new renewable fuel." Subpart A's reference to "the original RINs" does not differentiate between RINs received by the feedstock seller (here, NGL) or the fuel producer (here, WDB). So even if Section 80.1426(c)(6)(ii) did authorize the conduct at issue here (as NGL contends), its Subpart A would have required WDB to assign "the original RINs," to the produced fuel regardless of who received them. It did not do so.

EPA's interpretation of Section 80.1426(c)(6)(ii) is consistent with Congress's goals for the RFS Program. Congress expanded the renewable fuel program to reduce the United States' dependence on foreign oil, increase the production of renewable fuels, and achieve significant greenhouse gas emissions reductions. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492. With exceptions not relevant here, each volume of renewable fuel represented by a RIN must reflect at least a 20 percent reduction from baseline lifecycle

greenhouse gas emissions. An interpretation of the RFS regulations that allows the generation of multiple sets of RINs for the very same volume of renewable fuel cannot be reconciled with the RFS Program's goals. Extending NGL's logic, it would have been possible to endlessly reprocess the same volume of renewable fuel for the sole purpose of generating RINs.

NGL argues that its conduct was legal until EPA amended the RFS2 regulations in 2012 to include a blanket prohibition against generating two sets of RINs for the same volume of fuel. NGL also argues that even if its conduct was illegal, it did not have fair warning that it was engaged in illegal activity. (MTD at 7, 13.) Both of these arguments are incorrect. In support of these arguments, NGL relies on statements relating to technical amendments that have nothing to do with amendments relevant to this case. For instance, NGL argues that "[w]hen it promulgated the new paragraph, EPA explained that several aspects of the existing regulations 'were causing confusion,' in some cases due to a "lack of specificity in terms." (MTD at 7.) The reference to a "lack of specificity" relates to engineering reviews, not the paragraph that added a blanket prohibition against generating two sets of RINs for the same volume of fuel.[5]

It is true that, on January 9, 2012, EPA issued technical amendments that added a new paragraph, Section 80.1460(b)(6), to the regulations. 77 Fed. Reg. 1320, 1341, 1348 (Jan. 9, 2012). This paragraph prohibits any party from generating RINs "for fuel for which RINs have been previously generated." *Id.* at 1357. But, the 2012 amendments did not alter existing requirements that, to generate RINs, renewable fuel must be produced via approved pathways. EPA stated that the new paragraph "[a]dds the existing prohibition against generating a RIN for fuel for which RINs have previously been generated," and that "[w]hile generating RINs for a

[5] EPA explained that it was amending the regulations relating to engineering reviews to provide "more specificity on when updates, addenda, or resubmittals are required for engineering reviews." *See* 77 Fed. Reg. 1320, 1341, 1346-48 (Jan. 9, 2012).

particular volume of fuel for which RINs have already been generated is already prohibited, we are amending the regulations to include this prohibition in § 80.1460 for clarity." *Id.* at 1341, 1348.

Regardless of EPA's subsequent addition of Paragraph 80.1460(b)(6), NGL and WDB had fair warning that this conduct was illegal in 2011 for several other reasons. First, Section 80.1426(c)(6)(i) unambiguously and independently prohibited the generation of a second set of RINs under the circumstances of this case. Second, NGL cannot dispute that the definition of RIN in the 2011 regulations and 2012 regulations is *identical*. As such, in 2011, it was unreasonable for a party to conclude that two unique numbers could be generated to represent a single volume of renewable fuel — the resulting RINs would no longer meet the definition of RIN, and would therefore be invalid. Third, EPA revised Section 80.1426(c)(6)(ii) *in 2010* "to prohibit the generation of RINs for a volume of renewable fuel produced from other renewable fuel *that was accompanied by RINs, either assigned or separated*." 75 Fed. Reg. at 26029 (emphasis added). In short, notice is not grounds to dismiss the Amended Complaint.

IV. WDB and NGL Transferred Invalid RINs (Sixth and Eighth Causes of Action).

Both NGL and WDB violated Section 80.1460(b) by transferring the invalid RINs WDB generated. The prohibition against transferring invalid RINs is designed to maintain the integrity of the RIN market by discouraging parties from selling invalid RINs. In this case, NGL did not just inadvertently transfer invalid RINs that it acquired in the normal course of business. Rather, NGL developed and implemented the sale and repurchase plan that caused the generation of the invalid RINs. (*See* AC ¶¶ 114-117.)

Section 80.1460(b)(2) provides that no person shall "[c]reate or transfer to any person a RIN that is invalid under § 80.1431." Section 80.1431 specifies nine reasons that a RIN would

be deemed invalid, including that a RIN "[w]as otherwise improperly generated." 40 C.F.R. § 80.1431(a)(1)(ix). The government has stated plausible claims that the RINs WDB transferred to NGL, and that NGL subsequently transferred to third parties, were "otherwise improperly generated" within the meaning of 40 C.F.R. § 80.1431(a)(1)(ix). The government alleges four independent bases for the RINs to be deemed invalid: (1) WDB used an unpermitted feedstock (Second Cause of Action), (2) WDB used an unpermitted process (Third Cause of Action), (3) WDB generated RINs for fuel introduced into commerce using processes and feedstocks not listed on its EPA registration (Fourth Cause of Action), and (4) WDB identified the RINs in EMTS as being generated for biodiesel produced at its facility when the biodiesel was previously produced by other entities at other facilities (Fifth Cause of Action).

A. The RINs Were Invalid Because WDB Used an Unpermitted Feedstock (Second Cause of Action) and Unpermitted Process (Third Cause of Action).

The RINs WDB generated were improperly generated under Section 80.1431(a)(1)(ix) because WDB did not comply with the feedstock and process requirements in Section 80.1426(f). NGL argues that the Second Cause of Action (unpermitted feedstock) and Third Cause of Action (unpermitted process) do not establish that the RINs were invalid because the government did not verbatim recite that WDB "produce[d]" fuel as stated in Section 80.1426(c)(6), and because the 2011 version of Section 80.1426(c)(6)(ii) permitted WDB to generate RINs for fuel produced using a renewable fuel as a feedstock. These arguments are without merit for the reasons set forth in Sections I, II, and III of this brief.

B. The RINs Were Invalid Because WDB Used a Feedstock and Process Not Identified in its EPA Registration (Fourth Cause of Action).

The RINs WDB generated were invalid because it improperly generated the RINs for fuel introduced into commerce using processes and feedstocks not listed in its registration

information. NGL argues that the Fourth Cause of Action does not establish that the RINs were invalid for two reasons. First, NGL asserts the government did not allege that WDB "produced" fuel for purposes of Section 80.1460(b)(5). For the reasons described in Section I, the government has alleged that WDB "produced" fuel. Second, NGL argues that Section 80.1460(b)(5) "is about fuel production," and is not grounds for RINs to be invalid. (MTD at 19.) NGL's argument misses the point. In order to prevail on the Sixth and Eighth Causes of Action (that WDB and NGL, respectively, transferred invalid RINs), the government need not establish that Section 80.1460(b)(5) prohibited WDB from generating RINs. Instead, the government must show that NGL transferred invalid RINs, *i.e.*, WDB and NGL transferred RINs that were "improperly generated" under Section 80.1431. The Fourth Cause of Action alleges that by using a feedstock and process that was not identified in its registration information, WDB "improperly generated RINs *and* violated Section 80.1460(b)(5). (AC ¶ 99 (emphasis added).) Stated differently, the Fourth Cause of Action states a claim that WDB violated Section 80.1460(b)(5), and it also sets forth allegations necessary to establish that the RINs were "otherwise improperly generated" under Section 80.1431(a)(1)(ix) because they were generated using incorrect information. The latter establishes that the RINs were invalid for the Sixth and Eighth Causes of Action.

The RINs WDB generated were improperly generated under Section 80.1431(a)(1)(ix) because WDB reported to EPA that it produced renewable fuel using the feedstocks (*e.g.*, soybean oil) and process listed in its EPA registration. (*See* AC ¶¶ 61, 68-69; *see also* 40 C.F.R. § 80.1450(b).) WDB could not have generated the RINs if it had reported to EMTS that it used biodiesel or methyl ester as a feedstock or a process other than transesterification because this information conflicted with the information in its registration. In the preamble to the 2010 RFS

regulations, EPA explained that the expanded producer registration process "is essential to generating and assigning a certain category of RIN to a volume of fuel," 75 Fed. Reg. at 14707, and is designed to make sure that proper feedstocks are used and that the fuel meets the greenhouse gas emissions threshold required to generate RINs. *Id.* Information in the renewable fuel producer's registration is then used to "screen" the generation of RINs to assure that RINs are generated only for fuel produced from qualifying pathways. *Id.* at 14707, 14732-33. The registration process is therefore integral to RIN generation. The EMTS system only allowed WDB to generate RINs because it stated in its registration application that it was using a qualifying feedstock and process. The RINs were improperly generated because the information WDB entered into EMTS was incorrect — WDB did not generate RINs for fuel using the process and/or feedstocks listed in its EPA registration.

C. The RINs Were Invalid Because WDB Improperly Identified RINs in EMTS (Fifth Cause of Action).

The Fifth Cause of Action states a plausible claim that WDB improperly identified RINs in EMTS in violation of 40 C.F.R. §§ 80.1452(b)(2) and (4) (2011) and 80.1460(f), and that the RINs WDB generated were therefore improperly generated. Section 80.1460(f) provides that "[n]o person shall fail to meet any requirement that applies to that person under this subpart." Section 80.1452(b) provided in relevant part that each time a renewable fuel producer assigned RINs to a batch of renewable fuel "all the following information must be submitted to EPA" via EMTS: "(1) The name of the renewable fuel producer or importer," "(2) the EPA company registration number of the renewable fuel or foreign ethanol producer," and "(4) the EPA facility registration number of the renewable fuel or foreign ethanol producer."

Accurate information reporting in EMTS is important for two reasons. First, EMTS enables EPA to track RIN transactions. 40 C.F.R. § 80.1401 (definition of EMTS). Second, the

information that producers submit determines whether the producer can generate valid RINs, *i.e.*, it includes the data elements that generate a "unique number" to "represent a volume of renewable fuel." 40 C.F.R. § 80.1401 (definition of RIN). Generally, EMTS inputs and RIN generation are connected as follows: Section 80.1452(b) specifies the information a producer of renewable fuel must submit to EPA via EMTS each time it "assigns RINs to a batch of renewable fuel pursuant to § 80.1426(e)." Section 80.1425 explains that RINs generated after July 1, 2010, "shall be identified by the information specified in paragraphs (a) through (i) of this section and introduced into EMTS as data elements during the generation of RINs pursuant to Section § 80.1452(b)." Among the data elements described in Section 80.1452(b) are the registration number assigned to the producer of a batch of renewable fuel, 40 C.F.R. § 80.1452(b)(2), and the registration number assigned to the facility where the batch of renewable fuel was produced, 40 C.F.R. § 80.1452(b)(4). *See also* 40 C.F.R. § 80.1425(c), (d).

NGL argues that the Fifth Cause of Action does not establish that the RINs WDB produced were invalid for two reasons. First, NGL asserts that the Fifth Cause of Action itself fails to state a claim because the government has alleged that WDB complied with the requirements in Section 80.1452(b) insofar as WDB reported its information when it assigned RINs to the fuel. (MTD at 17-18.) This argument should be rejected because the government has alleged that the biodiesel for which WDB generated RINs in 2011 was biodiesel that had been previously produced by other entities at other facilities, *i.e.*, it was already a "renewable fuel" within the meaning of 40 C.F.R. § 80.1401 at the time NGL sold it to WDB as a feedstock. Accepting this allegation as true, the government has stated a plausible claim that WDB violated Sections 80.1452(b) and 80.1460(f) by incorrectly identifying itself and its facility as being that of "the renewable fuel producer." For the reasons described in Section I, while WDB contends it

"produced" fuel, it was not the entity that produced renewable fuel in compliance with the RFS regulations, particularly the pathway requirements of 40 C.F.R. § 80.1426(f). Accordingly, the government has stated a plausible claim that WDB improperly identified the RINs in EMTS.

Second, NGL argues that the Fifth Cause of Action is not a basis for determining that the RINs WDB generated were invalid because Section 80.1452(b) is a reporting provision, not a prohibition on RIN generation. (MTD at 18.) This argument underestimates the importance of EMTS in the RIN generation process. To establish that WDB and NGL transferred invalid RINs, the government is required to plead that the RINs were "otherwise improperly generated" under 40 C.F.R. § 80.1431(a)(1)(ix). Here, the unique registration number for WDB as a producer and for WDB's facility were part of the data elements that generated the RINs. These inputs into EMTS were invalid, because other entities used the qualifying feedstocks and processes necessary to produce RFS compliant "renewable fuel" (and accompanying RINs). The resulting RINs were invalid because they were generated using incorrect information.

V. The Government Has Pled that NGL "Caused" WDB to Violate the RFS Regulations (Seventh Cause of Action).

The Seventh Cause of Action states a viable claim that NGL violated 40 C.F.R. § 80.1460(e) by causing WDB to act in violation of the RFS regulations. Section 80.1460(e) provides that "[n]o person shall cause another person to commit an act in violation of any prohibited act under this section." 40 C.F.R. § 80.1460(e). Section 80.1460(e) does not define what it means to "cause" "another person to commit an act in violation of any prohibited act." The plain meaning of the word "cause" is "[t]o bring about or effect." Black's Law Dictionary (10th ed. 2014) (definition of cause, *vb*.). "The Clean Air Act imposes a strict liability standard for assessing compliance violations." *U.S. v. JBA Motorcars, Inc.*, 839 F. Supp. 1572, 1577 (S.D. Fla. 1993) (mobile source enforcement case for violations of Section 203 of the Clean Air

Act, 42 U.S.C. § 7522). Thus, to state a claim, the Amended Complaint need only allege that NGL's actions brought about or effected WDB's alleged illegal generation of RINs.

Here, the government alleges that NGL caused WDB to commit acts in violation of the RFS regulations through the implementation of its 2011 sale and repurchase plan, the purpose of which was to generate a second set of RINs for the same volume of renewable fuel. By alleging that NGL created the sale and repurchase plan, drafted the pertinent documents, provided WDB with a legal opinion, sold WDB the biodiesel, and repurchased the biodiesel and RINs, NGL's actions brought about or effected WDB's violations, particularly given the Clean Air Act's strict liability standard. (*See* AC ¶¶ 113-118.)

NGL claims that in order for the government to show causation it must plead a number of scienter requirements, including that NGL intentionally caused WDB to violate the RFS regulations, and that NGL could not "cause" WDB to violate the regulations if WDB acted knowingly or intentionally. (MTD at 14-15.) This argument fails because scienter is not a required element of proof under the plain language of Section 80.1460(e). Indeed, the Clean Air Act "and regulations themselves do not indicate that scienter is required for establishing violations of the Act." *U. S. v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1020 (D.N.J. 1988); *see also U. S. v. J & D Enters. of Duluth*, 955 F. Supp. 1153, 1158-59 (D. Minn. 1997).[6]

The fraud cases NGL cites in support of its argument, *McAdams v. McCord*, 584 F.3d 1111 (8th Cir. 2009) and *Hardin Cnty. Sav. Bank v. City of Brainerd*, 602 F. Supp. 2d 1012 (N.D. Iowa 2008), are not relevant to the government's claim, which is a strict liability claim that

[6] This interpretation of the regulation is in keeping with the "buyer beware" structure of the RFS Program. An obligated party cannot use invalid RINs to satisfy its RVO regardless of its good faith belief that the RINs were valid at the time they were acquired. *See* 40 C.F.R. §§ 80.1431(b) and 80.1460(c)(1). By including an enforcement provision against parties who cause another to commit a prohibited act, the RFS regulations discourage the sale of invalid RINs to obligated parties.

does not allege fraud. While it may be true that NGL intentionally or fraudulently caused WDB to violate the RFS regulations, and that too would be a violation, it is not the allegation the government makes, nor is intent a required element of proof.

VI. NGL Was Required to Retire RINs when it Re-designated Biodiesel as "Feedstock."

The First Cause of Action states a plausible claim for relief that NGL failed to retire RINs as required by 40 C.F.R. § 80.1429(f) (2011) when it re-designated the renewable fuel it sold to WDB as "feedstock." Section 80.1429(f) provided:

> Any party that uses a renewable fuel in any application that is not transportation fuel, heating oil, or jet fuel, or designates a renewable fuel for use as something other than transportation fuel, heating oil, or jet fuel, must retire any RINs received with that renewable fuel and report the retired RINs in the applicable reports under § 80.1451.

In this case, the government has stated a claim by asserting that NGL designated the "renewable fuel for use as something other than transportation fuel, heating oil, or jet fuel," when it sold biodiesel to WDB as a fatty acid methyl ester "feedstock." (AC ¶¶ 74-75.)

NGL argues that Section 80.1429(f) required RIN retirements only for final uses and designations of renewable fuels, not interim uses and designations. (MTD at 20.) NGL's interpretation of Section 80.1429(f) is incorrect under a plain reading of the regulation, which does not distinguish between "interim" and "final" or "end use" designations.[7]

NGL's argument also fails in the context of the facts alleged. The government alleges that the biodiesel NGL sold to WDB as "feedstock" already met the definition of renewable fuel

[7] NGL incorrectly implies that EPA removed Section 80.1429(f) because it did not believe this requirement was necessary. (MTD at 8, 21.) Notably, EPA stated that it inadvertently removed Section 80.1429(f) and has proposed an alternative regulatory method designed to require parties to retire RINs for fuel that is used for a non-qualifying purpose. *See* 81 Fed. Reg. 80828, 80911-12 (Nov. 16, 2016). In any event, these amendments do not change the fact that in 2011 Section 80.1429(f) required NGL to retire RINs when it re-designated biodiesel as a feedstock.

when NGL sold it to WDB. (AC ¶¶ 42-44.) Since the biodiesel NGL re-designated as "feedstock" was not an approved feedstock under Section 80.1426(f) or approved via a Section 80.1416 petition, NGL's designation of the biodiesel as "feedstock" and the generation of RINs for fuel produced from this feedstock was not permitted under Section 80.1426(c)(6)(i) and (ii). (*See supra* Sections II and III.) Thus, the "interim use" NGL claims was an illegal use.

In addition, the government has alleged facts that show NGL did not re-designate the biodiesel for an "interim" use, but re-designated the biodiesel as a feedstock in order for WDB to generate a second set of RINs. The government alleges that (1) NGL re-designated the renewable fuel as "feedstock" in the sale and repurchase transactions (AC ¶¶ 50-52); (2) NGL did not provide WDB with product transfer documents identifying the biodiesel it sold to WDB as a renewable fuel when it transferred the product to WDB (*Id.* ¶ 55); (3) WDB generated RINs in EMTS by claiming that it produced the batches of biodiesel from soybean oil, waste oils/fats/greases and oil from annual cover crops feedstocks using the transesterification process (*Id.* ¶¶ 61, 81); and (4) WDB did not transesterify the biodiesel feedstock (*Id.* ¶¶ 70-71). If NGL intended the "feedstock" designation to be an "interim" designation, it would have provided WDB with product transfer documents identifying the biodiesel as renewable fuel as required by 40 C.F.R. § 80.1453 instead of labeling the biodiesel as a feedstock. The re-designation was necessary for the generation of a second set of RINs via EMTS because EMTS would not have allowed WDB to generate RINs if it reported that it produced fuel using biodiesel as a feedstock. Thus the government has alleged facts that dispute NGL's theory that it was not required to retire RINs because it re-designated the biodiesel sold to WDB as "feedstock" for an "interim use."

NGL also argues that the government's interpretation of Section 80.1429(f) conflicts with Section 80.1426(c)(6)(ii)(A). As discussed in Section III, Section 80.1426(c)(6)(ii)(A) provided

that "[p]arties who produce renewable fuel made from a feedstock which itself was a renewable fuel received with RINs, shall assign the original RINs to the new renewable fuel." NGL questions how Section 80.1429(f) could require the retirement of RINs if Section 80.1426(c)(6)(ii)(A) required the original RINs to be assigned to a fuel that uses renewable fuel as feedstock.[8] The answer is that Section 80.1426(c)(6)(ii)(A) worked — as all of Section 80.1426(c)(6) does — as a safeguard against the double generation of RINs for the same volume of renewable fuel.[9] Under Section 80.1429(f), a party that transferred RINs to a renewable fuel producer was required to retire the RINs if it re-designated the fuel for any use or application other than transportation fuel, heating oil, or jet fuel. But if a renewable fuel producer used a renewable fuel as a feedstock, it would be required to assign the original RINs to the new renewable fuel in order to prevent double generation of RINs. To the extent that there is a theoretical tension between these two sections of the regulations, it would have been resolved had WDB petitioned EPA pursuant to Section 80.1416 to use biodiesel as feedstock. In no event did the regulations allow a renewable fuel producer to generate a second set of RINs for fuel produced from a renewable fuel feedstock.[10]

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[8] NGL raises this purported inconsistency in a purely hypothetical way. It is undisputed that NGL did not retire the RINs associated with the biodiesel it sold to WDB as required by Section 80.1429(f). Instead, NGL separated and sold these RINs. Nor did WDB comply with the prohibitions against RIN generation in Section 80.1426(c)(6)(i) or (ii), including the requirement to assign the original RINs to the new renewable fuel per Section 80.1426(c)(6)(ii)(A). In short, NGL and WDB had to disregard multiple layers of regulatory requirements to generate a second set of RINs.

[9] NGL had fair warning that Section 80.1429(f) required RIN retirement. NGL's reading of Section 80.1429(f) as not requiring RIN retirement under the plain language of the regulation and the circumstances of this case was not reasonable given the prohibitions in Section 80.1426(c)(6) against the double generation of RINs for fuel made from renewable fuel feedstock.

[10] For example, in 2014 EPA approved a petition from a company that used ethanol (a renewable fuel) as a feedstock to produce a fuel known as G2 Diesel. Some of the ethanol used to produce this fuel ended up in a by-product and some ended up in the G2 Diesel. In order to prevent double-RIN generation, EPA required the renewable fuel producer to retire RINs for the portion of the ethanol in the by-product and assign the original RINs to the ethanol in in the final product, G2 Diesel. *See* Appendix C, 11 Good

VII. RIN Retirement Is Available as Injunctive Relief in this Case.

NGL asks the Court to rule, as a matter of law and without the presentation of evidence, that its alleged violations caused no harm to the environment and the RFS Program, and that the Court is without authority to order the relief requested in the Amended Complaint. NGL is incorrect. The Court has broad equitable authority to order RIN retirement as relief in this case.

The Clean Air Act provides that the Court has jurisdiction to, *inter alia*, "restrain violations" of the RFS regulations and "to award other appropriate relief." 42 U.S.C. § 7545(d)(2). Unless specifically curtailed by Congress, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The Court's equitable authority is curtailed only by a "clear and valid legislative command" from Congress, *see id.*, and Congress imposed no such restraint here. *See U.S. v. Holtzman*, 762 F.2d 720, 724-25 (9th Cir. 1985) (authority under Clean Air Act Section 204(a) to "restrain violations" did not narrow the district court's equitable authority); *U.S. v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1063, 1066 (S.D. Ind. 2008) (authority under Clean Air Act Section 113 to award "any other appropriate relief" authorizes a full range of equitable relief). The Court's equitable authority to order injunctive relief under the Clean Air Act includes the authority to order relief to mitigate the harmful effect of violations. *See Cinergy Corp.*, 582 F. Supp. 2d at 1066. When, as here, the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398.

The relief the government seeks falls squarely within the Court's equitable authority. An

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Energy Request for Fuel Pathway Determination under the RFS Program (Jan. 10, 2014), at 2, available at https://www.epa.gov/sites/production/files/2015-08/documents/11-good-determination-letter-01-10-14.pdf.

order requiring NGL "to take actions that remedy, mitigate, and offset harms caused to the public and the environment" by its past violations would give effect to the Clean Air Act's goals. *Cinergy Corp.*, 582 F. Supp. 2d at 1061. The generation of RINs without the production of new renewable fuel causes harm by undermining the renewable fuel production mandate. When less renewable fuel is blended into the domestic fuel supply, more fossil fuel will be used, resulting in greater greenhouse gas emissions. This subverts Congress's effort to reduce the Nation's dependence on foreign oil, promote domestic renewable energy sources, and protect the environment. Requiring an entity that generates invalid RINs, or causes them to be generated, to retire the equivalent number and type of RINs is the most effective way to mitigate the harm of the violations. As such, RIN retirement is "appropriate relief" under 42 U.S.C. § 7545(d)(2).

NGL cites to three cases in support of its argument that the relief sought here constitutes a penalty. (*See* MTD at 23, citing *U.S. v. EME Homer City Generation, L.P.*, 727 F.3d 274 (3d Cir. 2013); *U.S. v. Midwest Generation*, 781 F. Supp. 2d 677 (N.D. Ill. 2011); *New Jersey v. Reliant Energy Mid-Atlantic Power Holdings, LLC*, No. CIV A 07-CV-5298, 2009 WL 3234438 (E.D. Pa. Sept. 30, 2009)). But these cases are not compelling. First, they are distinguishable. The courts rejected the government's demand for the surrender of emissions allowances as mitigation (or installation of pollution-control measures at formerly-owned facilities) for claims alleging the construction or modification of a polluting facility without installation of required pollution controls. There were no allegations that the emissions allowances themselves were illegally generated. The three cases thus provide no insight regarding whether RIN retirement is appropriate injunctive relief in a case alleging illegally generated RINs. Second, even if the cited cases were relevant, NGL fails to note that there is a split of authority as to whether the surrender of emissions allowances is appropriate injunctive relief. *See, e.g., U.S. v. Ameren Missouri*, No.

4:11-CV-77-RWS, 2016 WL 468557, slip op. at *3 (E.D. Mo. Feb. 8, 2016) (surrendering emissions allowances could mitigate harm caused by permit violation); *U.S. v. Westvaco Corp.*, No. MJG-00-2602, 2015 WL 10323214, slip op. at *12 (D. Md. Feb. 26, 2015) (court may "issue an injunction that provides a reasonable degree of remediation through the purchase and retirement of emissions credits").

NGL also asserts that any alleged harm from the invalid RINs cannot be offset by retiring different RINs in a different RVO compliance period. In NGL's view, it is simply too late to remedy any alleged harm the alleged violations caused. (MTD at 23 n.14.) This is not the case. Retiring an equivalent number of current year RINs will effectively increase the amount of renewable fuel that must be produced to meet the production mandate. This will reduce the amount of fossil fuel consumed in the current RIN compliance period — with the attendant benefits to the domestic renewable fuel industry and reduction in greenhouse gas emissions.

Finally, NGL incorrectly relies on the *administrative process* for RIN retirement in 40 C.F.R. § 80.1474 to support its argument that requiring NGL to retire RINs would be contrary to the RFS regulations. Section 80.1474 explicitly states that "[t]he administrative process for replacement of invalid RINs does not, in any way, limit the ability of the United States to exercise any other authority to bring an enforcement action under section 211 of the Clean Air Act, the fuels regulations at 40 CFR part 80, or any other applicable law."[11] In sum, this provision does not limit the Court's equitable authority to order NGL to retire RINs.

CONCLUSION

The United States respectfully requests that the Court deny NGL's Motion to Dismiss the Amended Complaint in its entirety.

[11] Similarly, nothing in 40 C.F.R. § 80.1431 limits the Court's exercise of its statutory and equitable powers to order RIN retirements as injunctive relief in this case.

Respectfully submitted,

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