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Submitted Via eRulemaking Portal

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code 28221T
Washington, D.C. 20460

Attn: Docket ID No. EPA-HQ-OAR-2019-0136

RE: Valero Comments on the Proposed Rule: Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes

Dear Administrator Wheeler:

The Valero Energy Corporation and its subsidiaries (collectively, "Valero") submit these comments on EPA's proposed rule Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes. Valero's unique position as a refiner, importer, exporter, marketer and biodiesel and ethanol producer means that Valero views the RFS program from several perspectives that can be helpful to EPA in evaluating and considering issues in the RFS program. Valero urges EPA to consider its unique frame of reference in evaluating the views and recommendations presented in these comments.

As the world's largest independent refiner, Valero employs approximately 10,000 employees and operates 15 petroleum refineries in the U.S., Canada and the U.K. Valero has a large RFS obligation but also provides the perspective of a merchant refiner. In addition, Valero is also a fuel importer, exporter, and a major fuel wholesaler. Important also is Valero's experience as a biofuel producer. Valero was the first traditional petroleum refiner to enter the large-scale ethanol production market and has 14 state-of-the-art plants, making Valero one of the two largest ethanol producers in the U.S. Finally, Valero's investment in Diamond Green Diesel also makes Valero the largest renewable diesel producer in the U.S.

In accordance with Valero's diverse business interests described above, Valero is a member of several different trade associations that represent different aspects of the fuels sector. Any comments these associations submit on this proposal do not necessarily reflect Valero's views, particularly to the extent that such comments conflict with Valero's specific comments. However,

Valero agrees with and incorporates as its own the comments submitted by American Fuel & Petrochemical Manufacturers.

Valero is concerned that EPA has yet again proposed standards that are not reasonably attainable and EPA has declined to make use of available authorities to reduce harms caused by the program and the RIN market. After EPA issued its proposal, news reports surfaced that the agency intends to reverse course and finalize a rule that may include an additional 500 million gallons of total renewable fuel and 250 million gallons of biomass-based diesel ("BBD") for 2021.[1] Finalizing such increased mandates would be harmful, arbitrary and capricious, and contrary to law, and brings instability to this proposal and the entire RFS program.

In addition to concerns about the volumes, expressed in these comments, Valero reminds EPA of corrections to the RFS that will substantially improve the program and ensure that it continues to meet the statutory goals set by Congress: to support growth in renewable fuels in the U.S. and to enhance U.S. energy security and independence. As noted in these comments, Valero has provided information and recommendations to EPA in previous comments. Valero asks EPA to consider information provided in previous comments as well as these comments in considering how to reduce the unintended and unnecessary harms caused by the RFS program.

I. Introduction and Summary

Since 2013, the RFS program has been fraught with challenges, yet EPA has set annual mandates every year at aspirational levels. In that time, EPA has made decisions based on interpretations of the statute that conflict with the goals and the structure of the statute. EPA has acknowledged that the RFS has resulted in renewable fuel entering the market in volumes that increasingly exceed the blendwall and that the statutory goals for biofuel volumes are not achievable.

Valero asks that EPA reduce the proposed mandates for advanced biofuel and biomass-based diesel so that they are reasonably attainable, and—if EPA does so—it should also reduce the total renewable fuel volume. EPA must not increase the RVO in any way simply to increase ethanol volumes; doing so not only exceeds the blendwall, increases costs, harm and disparity under the program but also exceeds Congress' intent to cap ethanol mandates under the RFS program.

EPA should not rely on the production of biogas to increase mandates under the RFS. Awarding RINs to biogas producers will not serve the purposes of the RFS program as it will not increase renewable fuel in the transportation fuel supply. In addition, as noted in these comments,

[1] *See, e.g.,* Jennifer A. Dlouhy & Mario Parker, *Trump Orders Biofuel Boost in Bid to Temper Farm State Anger (1)*, BLOOMBERG (Aug. 23, 2019, 2:50 PM), https://news.bloombergenvironment.com/environment-and-energy/trump-orders-biofuel-boost-in-bid-to-temper-farm-state-anger/?utm_source=Email_Share; Stephanie Kelly, Humeyra Pamuk, & Jarrett Renshaw, *Trump Administration Considers Boost to Biofuel Mandates to Ease Farmer Anger: Sources*, REUTERS (Aug. 23, 2019, 11:09 AM), https://www.reuters.com/article/us-usa-biofuels-trump/trump-administration-not-seen-rescinding-granted-biofuel-waivers-sources-idUSKCN1VD1QK.

underregulated promotion of biogas could contribute to increased greenhouse gas emissions, undermining one of the purposes of the RFS program.

Valero supports EPA's intention to preserve the RIN carry-over bank and urges EPA to consider that the proposed RVO might result in drawing down the RIN bank because the mandates are not reasonably attainable. Any additional increase in the RVO is likely to completely draw down the available carry-over RINs, which will likely eliminate compliance flexibility.

EPA has yet again failed to adequately consider exercising to the full extent all the authority available under the statute to minimize harm that arises from well-documented market constraints. One of EPA's fundamental obligations under the statute is to set volumes at levels that do not cause unnecessary harm. EPA fails to meet these obligations with the proposal, and—worse yet—the news media have reported that contrary to EPA's proposal, EPA intends to substantially increase the mandates in the final rule. Such action would be arbitrary and capricious and violate the statute. Valero urges EPA to reconsider the proposed volumes and to reconsider any prior interpretations of the Clean Air Act that EPA relies upon in this proposal. Despite having numerous tools at its disposal, EPA continues to fail to address the harm to merchant refiners that became apparent before 2015.

Although EPA has granted waivers to small refineries, the small refinery exemption is not EPA's only tool to address harm in the market nor is it sufficient to remedy harm to all merchant refiners, since many refineries that are harmed do not qualify for such exemptions due to their size. Valero urges EPA to rely not on stale theoretical assessments that repeatedly have been disproven, but instead on a serious and robust evaluation of market-based evidence, which compels EPA's use of statutory tools to reduce distortions in the RIN market and the fuel market. Further, the statute mandates that EPA undertake periodic review of the program impacts and compliance feasibility. In response to litigation over its obligation, EPA asserted that it completes such periodic reviews in the course of the annual rulemaking.[2] The obligation includes reviewing the impacts of the RFS program on obligated parties. As no such review is apparent in the preamble to the proposed rule, EPA must undertake the statutorily-mandated impacts review before finalizing the proposal. This review should be a robust evaluation of the impacts on each individual refinery, not just small refineries.

Additional tools available to EPA to provide relief in the RIN market include changing the point of obligation, implementing trading reforms such as position limits, and changing the status of exported renewable fuel. EPA can eliminate the RIN market distortion and disparate impacts on some obligated parties by shifting the point of obligation to the point of compliance. EPA can reduce RIN market manipulation by promulgating RIN holding limits (or position limits). EPA can increase the supply of RINs in the market and provide additional RIN liquidity and RIN price stability if EPA changes the RFS to ensure that all renewable transportation fuel produced in the United States is available for compliance credits. EPA should amend its regulations accordingly.

[2] *Another Day in Bureaucratic Hell*, THE WALL ST. J. (Aug. 8, 2019, 6:45 PM), https://www.wsj.com/articles/another-day-in-bureaucratic-hell-11565304309.

II. The Proposed Volumes Are Not Reasonably Attainable

A. EPA Must Set the Conventional Biofuel Mandate No Higher than the Blendwall

EPA proposes to require 15.0 billion gallons of conventional ethanol—a mandate that exceeds the blendwall by hundreds of millions of gallons.[3] Finalizing this proposed volume would increase compliance costs, trigger price spikes in the RIN market, and ultimately lead to economic harm without any benefit to the environment.

Congress never intended for the conventional ethanol mandate implied in the RFS statutory volumes to exceed the blendwall. In fact, the issue was a focus of legislative debate as Congress considered the bill that would ultimately become the Energy Independence and Security Act ("EISA") and expanded the original RFS1 program both as to the kinds of biofuels subject to the mandate and the volumes.[4] Over the years, EPA has repeatedly acknowledged that the blendwall is a constraint on the ability to achieve ever-increasing volumes of biofuel use.[5] Forcing ethanol use beyond the blendwall leads to economic harm.

EPA has also acknowledged that setting the volumes above the blendwall can increase compliance costs for obligated parties. The reason for this is that "the price of D6 RINs is expected to vary greatly with very low prices for D6 RINs when the implied RFS requirement for conventional biofuel is below the blendwall to the high prices seen in previous years when the implied RFS requirement for conventional biofuel is above the blendwall."[6] In addition, when the conventional biofuel mandated exceeds the blendwall, obligated parties can only comply by acquiring RINs beyond those that were available from blending ethanol as E10. These additional RINs have to come from either blending ethanol into higher-level ethanol blends (*e.g.,* E85) or blending non-ethanol biofuels (such as biodiesel or renewable diesel beyond what was needed to satisfy the BBD and advanced biofuel volume standards).[7] As discussed below, this increases the compliance burden on obligated parties because EPA has already set these volumes at levels that are not reasonably attainable.

[3] The E10 blendwall occurred when the implied conventional biofuel volume of ethanol established by the RFS program exceeded the volume of ethanol that could be blended into gasoline at a rate of up to 10 percent. 84 Fed. Reg. 26,980, 27,013 n. 216 (June 10, 2019).
[4] "Additionally, we have to keep in mind the limitations placed on ethanol demand due to blend restrictions. Right now, only E10, 10 percent ethanol and 90 percent gasoline, is approved for use in nonflex-fuel vehicles. There is a point at which we are going to hit the E10 wall. Domestic production, as you can see if you look at this chart of ethanol production in this country, is more than adequate to meet the full market potential for E10. Some industry analysts predict we will very soon have excess ethanol production capacity when we hit the E10 wall." CONG REC. at S8007, June 20, 2007 (statement of Sen. Thune).
[5] *See, e.g.*, 84 Fed. Reg. 36,762, 36,794 (July 29, 2019) (acknowledging that the E10 blendwall "had the potential to increase the challenges associated with supplying increasing volumes of ethanol to the U.S.").
[6] 84 Fed. Reg. 26,980, 27,016 (June 10, 2019).
[7] 84 Fed. Reg. 10,584, 10,607 (Mar. 21, 2019).

Finally, there is no environmental benefit to setting the implied conventional mandate above the blendwall. This is because exceeding the ethanol blendwall encourages imported biodiesel that is produced from palm oil. EPA's own analysis finds that biodiesel produced from palm oil fails to meet GHG emission reduction requirements of the RFS, except when it meets statutory grandfathering requirements.[8]

The U.S. Energy Information Administration ("EIA") currently projects gasoline demand to be 143.03 billion gallons in 2020.[9] Given this projection, and the concerns explained above, EPA should not promulgate a 2020 RFS standard that is based on the use of corn, sugarcane, and cellulosic ethanol in excess of 14.30 billion gallons.

B. EPA Must Set Advanced Biofuel at a Level that Is Reasonably Attainable

EPA should not finalize its proposed advanced renewable fuel volume because (i) EPA fails to consider the costs and uncertainty associated with importing renewable fuel; (ii) EPA does not account for reduced volumes of renewable fuel imports due to increased costs; and (iii) even the volumes of advanced ethanol, other advanced biofuels, and advanced biodiesel and renewable diesel EPA estimates will be reasonably attainable are insufficient to meet its proposed requirement.[10]

EPA has proposed to find that "60 million gallons of advanced ethanol, 60 million gallons of other advanced biofuels, and 2.78 billion gallons of advanced biodiesel and renewable diesel are reasonably attainable."[11] However, the Agency concludes that, combined with its estimate of 540 million gallons of reasonably attainable cellulosic biofuel, "the sum of these volumes falls short of 4.94 billion gallons, which is lowest advanced biofuel requirement that EPA can determine under the cellulosic waiver authority."[12] To make up the difference, EPA suggests there may be as much as 2.83 billion gallons of advanced biofuel available in 2020, but admits that this is a risky bet because of "likely feedstock/fuel diversions."[13] If this bet fails, EPA suggests that carryover RINs can serve as a backstop, but acknowledges that compliance using carry-over RINs may be complicated by the uncertainty surrounding the ultimate size of the carryover RIN bank.[14]

In addition, EPA must consider the costs and uncertainty associated with reliance on imported BBD to meet the RVO. EPA's projection of 4.38 billion advanced biodiesel and renewable diesel RINs in 2020 is overly optimistic.[15] Given tariffs on imported biodiesel from

[8] API, Comments on Proposed 2017 RVO at 23 (Aug. 10, 2016) (EPA-HQ-OAR-2016-0004-3512) (internal citations omitted).
[9] EIA, Short-Term Energy Outlook (Aug. 2019), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.
[10] *See* Brief of Petitioners, *Am. Fuel & Petrochem. Mfrs. v. EPA* (Doc. No. 1767965, July 27, 2018) (D.C. Cir. No. 17-1258); Brief of Petitioners, *Coffeyville Res. Ref. v. EPA* (Doc. No. 1714168, Jan. 22, 2018) (D.C. Cir. No. 17-1044).
[11] 84 Fed. Reg. at 36,778.
[12] *Id.*
[13] *Id.*
[14] *Id.*, at 36,786, 36,788.
[15] *Id.* at 36,781 n.81.

Argentina and Indonesia, EPA's proposed RVO assumes unreasonably high growth in domestic production and imports from other countries. Current domestic BBD capacity is 2.539 billion gallons and utilization is ~68% through May 2019.[16] At this rate, biodiesel production in 2019 will be approximately 1.73 billion gallons. This is not high enough to ensure that 4.38 billion RINs are reasonably attainable. And, as EPA has explained, reliance on BBD imports to make up the shortfall is not rational because "[t]here is a far higher degree of uncertainty related to the availability and production of advanced biodiesel and renewable diesel in foreign countries, as this supply can be impacted by a number of unpredictable factors such as the imposition of tariffs and increased incentives for the use of these fuels in other countries (such as tax incentives or blend mandates)."[17]

EPA also assumes unrealistically that higher domestic production is reasonably achievable. The registered domestic capacity totaling 4.1 billion gallons of total biodiesel and renewable diesel is irrelevant in this discussion as this volume is not reflective of actual domestic production.[18] EPA should be relying on the EIA production capacity of 2.539 billion gallons.[19]

In short, EPA cannot finalize the proposed 4.94 billion gallons when that is premised on the uncertainty of attaining 2.83 billion gallons of BBD to achieve the advanced fuel mandate, "notwithstanding likely feedstock/fuel diversions."[20] If there is substantial doubt as to whether a quantity of renewable fuel is reasonably attainable, it is unreasonable for EPA to set the volume at that level. Valero agrees that EPA should not "propose to set the 2020 volume requirements at levels that would envision an intentional drawdown in the bank of carryover RINs."[21] 2.83 billion gallons of advanced biodiesel and renewable diesel for 2020 for the calculation of advanced biofuels is an unattainable volume and, therefore, is an intentional drawdown of the RIN bank balance. EPA should avoid this by using the general waivers to ensure that all RVOs are reasonably attainable without drawing down the RIN bank.

C. EPA Must Set Biomass-Based Diesel Volumes That Are Reasonably Attainable and Based on Domestic Supply

In previous comments, Valero and others requested that EPA define "domestic supply" to include only renewable fuel produced in the United States.[22] Even after the D.C. Circuit's decision

[16] EIA, Monthly Biodiesel Production Report, Table 1: U.S. Biodiesel production capacity and production, https://www.eia.gov/biofuels/biodiesel/production/table1.pdf.
[17] 84 Fed. Reg. at 36,785.
[18] *See id.* at 36,783.
[19] Monthly Biodiesel Production Report, *supra* note 16.
[20] 84 Fed. Reg. at 36,778.
[21] *Id.* at 36,768.
[22] *See, e.g.,* Valero Comments on Proposed 2018 RVO (Aug. 31, 2017) (EPA-HQ-OAR-2017-0091-3988), Attachment A. "Domestic" is defined as originating in, pertaining to, or relating to a country's internal affairs. A "domestic" orange is one grown in the United States, not one grown in Brazil and transported here for sale. Likewise, the "domestic supply" of renewable fuel does not encompass fuel imported from abroad. "Domestic" must be given meaning. The statutory context of the phrase "inadequate domestic supply" reflects a focus on events within the United

in *Americans for Clean Energy v. EPA* ("*ACE*"),[23] EPA retains substantial discretion to use the general waiver authority for inadequate domestic supply. EPA should appropriately define "domestic supply" as the supply of renewable fuel produced in the United States. and evaluate whether that supply, in terms of both its existence and its cost, is adequate to support annual requirements.[24] Consequently, when it determines what volume of BBD is reasonably attainable, EPA should consider domestic supply and not set the standard based on uncertain and costly imports. The promotion of imports is not consistent with the statutory purpose of protecting national security and promoting domestic resource development.

The domestic production capacity of BBD at 100% utilization would be 2.539 billion gallons/year, but annualized BBD domestic production in 2019 is on track for ~1.73 billion gallons. Thus, although utilization is up year over year from 2017, it has not come close to averaging 2.539 billion gallons. Excluding imports from "domestic supply" (as EPA should to give meaning to the statute's plain language and intended purpose with respect to energy security), the proposed BBD RVO for 2021 is not reasonably attainable.

EPA proposed to set the BBD volume mandate for 2021 at the same level as 2020. Thus, EPA did not increase the BBD mandate from 2020. Yet, with less than ten days remaining in the comment period for this proposal, news reports surfaced that the agency intends to increase the BBD mandate for 2021 in the final rule by 250 million gallons. It is reported that this decision is the Administration's response to reaction from U.S. farm states over the small refinery hardship waivers EPA granted in early August. Some see support from U.S. farm states as essential to President Donald Trump's reelection. Finalizing such a rushed and unsupportable change on this issue would be divorced from the record and from statutory factors and thus, would be arbitrary and capricious.

EPA estimates that there are approximately 390 million advanced biofuel carry-over RINs, a reduction of 210 million from 2018. With an increase in the advanced RVO mandate as proposed, it is reasonable to presume that the remaining carry-over RINs would be used for compliance in 2020. This means that there will likely be no available carry-over RINs for 2021 compliance, contravening EPA's long-standing views regarding the importance of setting the RVO at levels that maintain the supply of carry-over RINs. Increasing the BBD mandate when EPA can expect the RIN carry-over bank to already be drawn down is arbitrary and capricious.

D. EPA Must Reevaluate Biogas as a Renewable Fuel and as Cellulosic Biofuel

Almost all RFS cellulosic biofuel is biogas.[25] Biogas is produced from various biomass sources, including landfills, livestock operations, and wastewater treatment. To qualify for RINs

States. The waiver is paired in the same subsection with a waiver focused on harm to "a State, a region, or the United States." 42 U.S.C. § 7545(o)(7)(A).

[23] 864 F.3d 691 (D.C. Cir. 2017) ("*ACE*").

[24] *See* Valero Comments on Proposed 2019 RVO at 14 (Aug. 17, 2018) (EPQ-HQ-OAR-2018-0167-1041), Attachment B.

[25] 84 Fed. Reg. at 36,775.

under the RFS, biogas must meet the definition of renewable fuel. Cellulosic biofuel is defined under the statute as "renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60% less than the baseline lifecycle greenhouse gas emissions."[26] Currently, most biogas comes from municipal waste landfills. EPA determined that biogas from municipal waste landfills qualifies for RINs because only the "biogenic components" form biogas:

> We note that the process of biogas formation in a landfill provides some element of separation, in that it is formed only from the biogenic components of landfill material, including but not strictly limited to food and yard waste. Thus, plastics, metal and glass are effectively "separated" out through the process of biogas formation. As a result of the intermixing of wastes, the fact that biogas is formed only from the biogenic portion of landfill material, and the fact that landfill material is as a practical matter inaccessible for further separation, EPA believes that no further practical separation is possible for landfill material and biogas should be considered as produced from separated yard and food waste for purposes of EISA. Therefore, all biogas from landfills is eligible for RIN generation.[27]

However, biogas from landfills does not meet the statutory requirement that the gas have lifecycle greenhouse gas emissions at least 60% lower than the baseline lifecycle greenhouse gas emissions of the fuel that it is replacing. In addition (and as described further below), biogas from municipal landfills is inconsistent with the purposes of the RFS program in several ways. EPA should reevaluate the status of municipal waste landfill biogas and should not promote biogas under the RFS program until EPA completes the proper analysis. Nor should EPA count biofuels that don't meet the statutory test toward the volume of projected cellulosic biofuel that is reasonably attainable.

First, waste companies would likely capture biogas even if the fuel were not associated with the generation of RINs, which means the program is not furthering any additional environmental benefits. Indeed, EPA acknowledges this fact in their proposal when they state that "EPA expects that landfills that produce high BTU gas in 2020 are likely to already have this infrastructure in place."[28] Since this activity would occur without a mandate, basing increases of cellulosic biofuel on biogas is nothing more than a transfer of wealth from the refining industry, its employees, and American consumers to waste companies that would be capturing biogas in any event. Congress did not intend this outcome. EPA admits that cellulosic biofuel RIN value is 9 times the value of the fuel in 2018.[29] Consequently, EPA must be conservative in estimates of supply actually associated with the incentives of the RFS to avoid undermining the RFS's purpose of increasing renewable fuels.

[26] 42 U.S.C. § 7545(o)(1)(E).
[27] 75 Fed. Reg. 14,370, 14,704-07 (Mar. 26, 2010).
[28] 84 Fed. Reg. at 36,790.
[29] *Id.* at 36,771.

Second, to the extent municipal waste landfill biogas replaces use of natural gas, EPA must compare the greenhouse gas emissions from natural gas to determine whether landfill biogas meets the required greenhouse gas emissions reductions to qualify as cellulosic or advanced biofuel.

Third, the quality of biogas from municipal waste landfills is not equivalent to natural gas. Municipal waste landfill biogas and municipal wastewater biogas have been found to contain significant levels of siloxanes. Siloxanes are silicon compounds that come from non-biogenic material such as shampoo, deodorant, toothpaste, and cosmetics that are routinely disposed of in these landfills. When biogas containing siloxanes is combusted in gas turbines, boilers or combustion engines, deposits of solid silica or silicates can adhere to cylinder heads, pistons, turbine blades, and heat exchanger surfaces, causing wear, imbalance, fouling, and other serious problems.[30] The presence of siloxanes also poses a risk of catalyst poisoning. The damage that such biogas might cause to engines could increase greenhouse gas emissions and other air pollution and thus, fail to meet the statutory requirement for less lifecycle greenhouse gas emissions.

The presence of siloxanes in municipal waste landfill gas should disqualify the biogas as renewable fuel since the gas does not come solely from biomass and use of such gas could lead to higher lifecycle greenhouse gas emissions. EPA should reevaluate the status of landfill biogas as a renewable fuel in light of the presence of siloxanes in the gas.

III. EPA Should Preserve the RIN Carry-Over Bank

Valero agrees with EPA that EPA should not set the RVO at a level that would result in a reduction of the RIN bank. The RIN bank should be maintained at 14% or higher. In the proposal for the 2019 RVO, EPA noted that the RIN bank was at 15% of the proposed total renewable fuel standards and 14% of the proposed advanced biofuel standard.[31] Now EPA estimates the RIN bank to be at 11% of the proposed total renewable fuel standard and 8% of the proposed advanced biofuel standard.[32] These levels are below the 20% "rollover" limit specified in EPA regulations. EPA previously determined that such a limit is consistent with the structure of the RFS while recognizing that credits must be available in the year generated and the year thereafter. When EPA set the 20% limitation, EPA stated that "the 20% cap provides the appropriate balance between, on the one hand, allowing legitimate RIN carryovers and protecting against potential supply shortfalls that could limit the availability of RINs, and on the other hand ensuring an annual demand for renewable fuels as envisioned by the Act."[33] Valero recommends that EPA consider that the stability of the RIN market depends on a RIN carry-over bank that is sufficient to serve the purposes for which it was intended.

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[30] *See* Arlene Karidis, *The Challenges Siloxanes Pose to Landfill Gas-to-Energy Operations*, WASTE 360 (Nov. 21, 2017), https://www.waste360.com/landfill-operations/challenges-siloxanes-pose-landfill-gas-energy-operations; https://www.foresternetwork.com/msw-management/waste-sorting/article/13017344/siloxanes-and-landfill-gas-utilization; https://www.epa.gov/sites/production/files/2016-06/documents/pierce.pdf.

[31] 83 Fed. Reg. at 32,030.

[32] 84 Fed. Reg. at 36,768.

[33] 72 Fed. Reg. 23,000, 23,934-35 (May 1, 2007).

EPA acknowledged that there were a number of uncertainties regarding how the RIN bank would be impacted in 2019. Despite EPA's concerns about setting the RVOs at levels that would draw down the RIN bank, EPA nonetheless proposed to set the advanced biofuel standard at a level that EPA suggested a large number of carry-over RINs might be necessary. As a result, the carry-over RIN bank for advanced biofuel is now estimated to be down to 8% of the proposed 2020 RVO. As EPA recognizes, "a bank of carryover RINs is extremely important in providing obligated parties compliance flexibility in the face of substantial uncertainties in the transportation fuel marketplace, and in providing a liquid and well-functioning RIN market…."[34] Preserving the RIN bank ensures compliance flexibility and depleting it can disrupt the functioning of the RFS program.[35] EPA must not set the 2020 RVO at a level that is likely to result in further reductions in the RIN carry-over bank. The proposed RVO for advanced biofuel is not reasonably attainable and thus, can be expected to reduce the RIN carry-over bank to a level that risks disrupting the RFS program.

As noted above regarding EPA's proposal for the 2021 BBD RVO, EPA estimates that there are approximately 390 million advanced biofuel carry-over RINs, a reduction of 210 million from 2018. With an increase in the advanced RVO mandate as proposed, it is reasonable to presume that the remaining carry-over RINs would be used for compliance in 2020. This means that there will likely be no available carry-over RINs for 2021 compliance contravening EPA's long-standing views regarding the importance of setting the RVO at levels that maintains the supply of carry-over RINs. Increasing the BBD mandate when EPA can expect the RIN carry-over bank to already be drawn down is arbitrary and capricious. The statute does not mandate any further increases in the BBD RVO.

EPA can avoid the potentially significant negative consequences of depleting the RIN bank by considering whether the use of the agency's general waiver authority is appropriate. This is one "circumstance[ ]…that would justify further reductions in volumes through the exercise of the general waiver authority."[36] EPA has already determined that the volumes that will be reasonably attainable will fall short of the proposed advanced biofuel RVO. Using general waiver authority can correct this.

Nonetheless, a sufficient volume in the RIN bank does not necessarily reduce economic harm. The RIN bank accounts for RINs that RIN-long parties and unobligated parties might still hold. As long as RIN-long parties and unobligated parties hoard RINs, the amount in the RIN bank does not reduce economic harm of the RFS. To improve the functioning of the RIN bank to relieve economic harm under the RFS, EPA must address the RIN market problems that are due to the inequitable distribution of RINs among obligated parties. EPA could right the RFS program and eliminate the inequitable distribution of RINs by adjusting the point of obligation. Short of this correction to the program, EPA must consider additional measures recommended below to reduce

[34] 84 Fed. Reg. at 36,767.
[35] *Id.* ("An adequate carryover RIN bank serves to make the RIN market liquid…[W]e believe the RFS program functions best when sufficient carryover RINs are held in reserve….").
[36] *Id.*

the harm that comes from RIN hoarding and other market manipulation, such as RIN position limits.

IV. EPA Must Conduct a Comprehensive Analysis of Whether to Use the Severe Economic Harm Waiver

In the proposal, EPA summarily dismisses any use of the general waiver for severe economic harm.[37] However, EPA's own recent actions indicate that the RFS is causing severe harm: on August 9, EPA announced 31 small refinery exemptions for 2018.[38] EPA must conduct a full-fledged waiver analysis of whether to reduce the volumes in light of severe harm to the economy.

To use the severe economic harm waiver authority, EPA must find that such harm exists on a national, regional, or state level with respect to imposition of the statutory volumes for any of the four required renewable fuels.[39] EPA need only find that such harm "would" occur through imposition of the statutory renewable fuel volumes in order to avail itself of its authority to waive volumetric requirements "in whole or in part."[40] However, to date, EPA has adopted an unreasonably narrow interpretation of its severe economic harm waiver authority to require proof that a single market factor—RFS volume requirements—is the sole cause of the harm.[41]

EPA's restrictive interpretation is inconsistent with the statute.[42] In *ACE*, the D.C. Circuit invalidated EPA's overly broad interpretation of "supply" in the general waiver provisions, concluding that the breadth was unnecessary because the severe economic harm waiver protected against harmful volume requirements.[43] Interpreting that protection too narrowly, as EPA did in prior actions, equally offends the statutory language and purpose. Such a stringent reading of the waiver authority is inconsistent with the waiver's purpose and renders it toothless. EPA's requirement that the RFS be the "sole" cause of economic harm is so stringent that it is hard to imagine how EPA's test might ever be met, given that the RFS requirements interact with many factors contributing to the economy of the nation, a state, or a region. EPA cannot, through interpretation, nullify the effect or purpose of the statute. Furthermore, in responding to prior petitions requesting EPA issue a waiver based on economic harm, EPA has suggested that harm to specific economic sectors may be sufficient to justify use of the waiver.[44]

[37] 84 Fed. Reg. at 36,767, 36,787.
[38] EPA Announces Biofuel and Small Refinery Exemption Priorities (Aug. 8, 2019), https://www.epa.gov/newsreleases/epa-announces-biofuel-and-small-refinery-exemption-priorities.
[39] 42 U.S.C. § 7545(o)(9)(A)(i).
[40] *Id.*
[41] *See e.g.*, 73 Fed. Reg. 47,168, 47,172 (Aug. 13, 2008).
[42] *See* Brief of Petitioners, *Am. Fuel & Petrochem. Mfrs. v. EPA* (Doc. No. 1767965, July 27, 2018) (D.C. Cir. No. 17-1258).
[43] *ACE*, 864 F.3d 691, 714 (D.C. Cir. 2017).
[44] *See e.g.*, 77 Fed. Reg. 70,752, 70,774-75 (Nov. 27, 2012).

Numerous parties have provided evidence in recent years to EPA that the RVOs—which have continued to increase year-over-year—cause economic harm.[45] Various factors make states and regions uniquely vulnerable to harm from implementing RFS requirements and cause those areas to experience such harm more acutely. For example, economic analysis identified East Coast and Mid-continent refiners as facing the "most risk" from the RFS Program due to "their higher operating costs, significant logistical challenges in sourcing crude oil, and direct competition from large foreign based refiners…."[46] EPA's interpretation of the severe economic harm waiver unreasonably precludes a finding of severe harm based on these serious issues. EPA should reconsider this interpretation and consider the evidence already available of economic harm caused by the RFS.

This is not a theoretical problem. EPA recently granted waivers from the 2018 standard for 31 refineries—nearly 1 in 4 of the refineries in the United States.[47] These waivers result from findings of "disproportionate economic hardship" under 42 U.S.C. § 7545(o)(9)(B). The repeated need to exercise this waiver authority is strong evidence supporting exercise of the general waiver to relieve severe harm to "the economy. . .of a state, a region, or the United States" under 42 U.S.C. § 7545(o)(7)(A)(i).

It is simply irrational for EPA to deny that there is economic harm arising from the RFS while simultaneously granting hardship exemptions based on disproportionate economic harm to nearly one-quarter of all U.S. refineries. EPA cannot offhandedly dismiss obvious severe economic harm without any analysis.

V. EPA's Proposed Response to the 2016 Remand

EPA proposes to respond to the D.C. Circuit's 2017 remand in *ACE* by finding that the applicable 2016 volume requirement for total renewable fuel and the associated percentage standard should not be changed because a retroactive standard "would impose a significant burden on obligated parties without any corresponding benefit."[48] EPA should finalize its proposal, which is well-supported by law and a reasonable response to the D.C. Circuit's remand.

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[45] *See, e.g.*, waiver requests from the states of Texas, New Mexico, Delaware and Pennsylvania. EPA, Learn More about Letters Seeking Additional Information Related to Petitions for a Partial Waiver of the 2017 and 2018 RFS Standards, https://www.epa.gov/renewable-fuel-standard-program/learn-more-about-letters-seeking-additional-information-related; AFPM Comments on 2018 Supplemental Notice at 18 (Oct. 19, 2017) (EPA-HQ-OAR-2017-0091-4703) (requesting a 3.3-billion-gallon reduction of total renewable fuel and advanced biofuel volumes due to past reliance on now uncertain supply of imported renewable fuel); Valero Comments on 2018 Supplemental Notice at 14 (Aug. 31, 2017) (EPA-HQ-OAR-2017-0091-4885) (requesting reduction in requirements for advanced and total renewable fuel), Attachment C; HollyFrontier Comments on Proposed 2018 RVO at 9-10 (Aug. 31, 2017) (EPA-HQ-OAR-2017-0091-2547); PES Comments on Proposed 2018 RVO at 3 (Aug. 31, 2017) (EPA-HQ-OAR-2017-0091-3887); Small Retailers Coalition Comments on Proposed 2018 RVO at 1-8 (Oct. 19, 2017) (EPA-HQ-OAR-2017-0091-4687).

[46] Alex Holcomb, *Market Analysis of the Proposed Change to the RFS Point of Obligation* 15 (Feb. 22, 2017) (EPA-HQ-OAR-2017-0091-3988).

[47] As of January 1, 2019, there are 135 operating refineries in the United States. *See* EIA, When was the Last Refinery Built in the United States?, https://www.eia.gov/tools/faqs/faq.php?id=29&t=6.

[48] 84 Fed. Reg. at 36,788.

In 2017, the D.C. Circuit vacated EPA's use of the general waiver authority to reduce the 2016 total renewable fuel standard under a finding of inadequate domestic supply. The Court did so because it determined that the "inadequate domestic supply" waiver provision "refers to the supply of renewable fuel available to refiners, blenders, and importers to meet the statutory volume requirements."[49] The Court also concluded that "for purposes of examining whether the supply of renewable fuel is adequate, the 'inadequate domestic supply' provision authorizes EPA to consider only supply-side factors—such as production and import capacity—affecting the available supply of renewable fuel. The 'inadequate domestic supply' provision does not authorize EPA to consider demand-side factors affecting the demand for renewable fuel."[50] The D.C. Circuit remanded the 2016 total renewable fuel standard EPA for further consideration in light of the court's ruling.

Aside from the court's direction regarding the interpretation of "inadequate domestic supply," the *ACE* decision is important to EPA's analysis on remand because it (and two other RFS decisions from the D.C. Circuit) instructs EPA in determining whether it can apply a standard retroactively. In *ACE*, the D.C. Circuit reviewed EPA's decision to set the 2014 and 2015 volume requirements based on the volume of renewable fuel actually supplied in those years because the agency missed the statutory deadlines for promulgating those standards.[51] Biofuels producers argued that it was an error for EPA to rely on its own delay, but the court rejected their challenge. The D.C. Circuit explained its precedent:

> In *National Petrochemical & Refiners Association v. EPA*, 630 F.3d 145 (D.C. Cir. 2010), this Court held that EPA has statutory authority to issue late renewable fuel requirements, even when they have retroactive effects. *See id.* at 154-58. EPA's authority to issue late renewable fuel requirements is not unlimited, however. Rather, we specified in *National Petrochemical* that EPA must exercise its authority reasonably by considering the "benefits and the burdens attendant to its approach" of issuing late renewable fuel requirements. *Id.* at 166. Applying that standard, we concluded that EPA's issuance of a late volume requirement with retroactive effects was reasonable. That was so because EPA considered, among other things, whether obligated parties had adequate lead time and access to a sufficient number of RINs to comply with the delayed requirement. *Id.* at 165.
>
> We followed the same approach a few years later in *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014). In that case, we concluded that EPA's decision to issue late renewable fuel standards was reasonable because EPA "considered various ways to minimize the hardship caused to obligated parties" by its delay and chose to extend the compliance deadline. *Id.* at 920.[52]

[49] *ACE*, 864 F.3d 691, 710 (D.C. Cir. 2017).
[50] *Id.*
[51] *Id.* at 716.
[52] *Id.* at 718.

As the court further explained, "*National Petrochemical* and *Monroe Energy* together establish that EPA may promulgate late renewable fuel requirements—and even apply those standards retroactively—so long as EPA reasonably considers and mitigates any hardship caused to obligated parties by reason of the lateness."[53] Thus, in imposing a retroactive standard, EPA must balance the burden on obligated parties with the RFS Program's broader goal of increasing renewable fuel production.[54]

In considering the remand from *ACE*, EPA's mandate is "to reevaluate the 2016 total renewable fuel volume requirement in accordance with the court's decision."[55] That is precisely what EPA's proposal does. The agency assessed the burden on obligated parties of a retroactive standard and found that "any approach that requires additional volumes of renewable fuel use would impose a significant burden on obligated parties."[56] EPA examined three possible solutions:

> (1) reopening compliance with the 2016 standard so that obligated parties could comply with a new, higher standard that includes an adjustment to the requirement total renewable fuel volume to address the *ACE* decision;
>
> (2) reopening compliance with the 2017 standard in a similar way; and
>
> (3) expanding the proposed 2020 standard to require the 500 million gallons remanded by *ACE*.[57]

In all three cases, EPA determined that the impact on obligated parties would be great. The steps needed to reopen compliance with the 2016 standard—namely rescinding the standards, returning the RINs used for compliance to their original owners, and allowing trading of 2015 and 2016 RINs to resume—would create a heavy burden on obligated parties. This is because there are nowhere near enough valid 2015 and 2016 RINs available to comply with an additional requirement of 500 million gallons, and the small number of RINs may be held by a small number of obligated parties—a scenario that could lead to price-gouging and dysfunction in the RIN market.[58] For similar reasons, reopening compliance with the 2017 standards in order to unretire 2016 RINs used for compliance in that year would be similarly burdensome (and, EPA noted, doing so could cause a domino effect of necessitating reopening 2018 compliance too).

EPA also considered whether it could satisfy the D.C. Circuit's remand by adding the 500 million gallons of total renewable fuel onto the 2020 total renewable fuel standard. However, EPA rightly explained that this is no solution at all because doing so would add stringency to the total renewable fuel standard for 2020 that EPA has already justifiably determined the market cannot

[53] *Id.*
[54] 84 Fed. Reg. at 36,788.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 36,788-89.
[58] *Id.* at 36,788.

bear. For example, EPA concluded that "there are real constraints on the ability of the market to significantly exceed an average nationwide ethanol content of 10% in 2020."[59] EPA also concluded that production of non-cellulosic advanced biofuels in 2020 will be insufficient to allow any backfilling for missing volumes of cellulosic biofuel, and consequently proposes to reduce the advanced biofuels standard by the full amount permitted by the statute under the cellulosic waiver authority.[60]

Despite the real possibility of substantially burdening obligated parties, EPA followed the standard articulated in *ACE* and its predecessors and also evaluated the potential of these three burdensome options to create a benefit in terms of additional renewable fuels production. The agency correctly concluded that "*any* approach that requires additional volumes of renewable fuel use" would be "without any…benefit as any additional standard cannot result in any additional renewable fuel use in 2016."[61] Valero agrees. Reopening compliance for prior years would result in "high [RIN] prices [that] would create a burden on obligated parties, without providing any incentive for additional renewable fuel use." And, rather than incenting further renewable fuel, adding 500 million gallons to the 2020 total renewable fuel standard would only exacerbate drawdown of the RIN bank to deleterious effect.[62]

Valero agrees with EPA's analysis. Reopening any of the prior compliance years would be needlessly expensive for obligated parties, disrupt the RIN market, draw down the RIN bank (an undesirable effect to be avoided, as EPA explains elsewhere in the proposal), and create uncertainty that EPA has long guarded against in setting the annual standard.[63] Likewise, EPA's analysis is correct that requiring obligated parties to retire RINs to make up for the 500 million gallons this year would not be reasonably attainable. In short, EPA balanced the potential burdens on obligated parties with the potential to increase renewable fuel as required by *ACE* and determined that the 2016 volume requirement for total renewable fuel and the associated percentage standard should not be changed. The burdens on obligated parties would be tremendous, but, moreover, "any" option that requires additional volumes of renewable fuel use would have no benefit in terms of increased renewable fuel use. Congress did not pursue ever-increasing renewable fuel use "at all costs."[64] EPA's proposal is appropriate and should be finalized.

Alternatively, Valero notes that EPA may—as the D.C. Circuit suggested in *ACE*—justify its decision to waive 500 million gallons of total renewable fuel in 2016 in another way: by applying the severe economic harm waiver. As discussed above, the *ACE* court rejected EPA's

[59] David Kortoney, *Market Impacts of Biofuels in 2020* at 2 (July 3, 2019) (EPA-HQ-OAR-2019-0136) (listing constraints limiting consumption of ethanol, including overall gasoline use and the E10 blendwall; the number of retail stations that offer E15 or E85; the number of vehicles that can both legally and practically consume E15 or E85; pricing concerns; and the use of E0).
[60] *See* 84 Fed. Reg. at 36,776-77; 42 U.S.C. § 7545(o)(7)(D)(i).
[61] 84 Fed. Reg. at 36,788 (emphasis added).
[62] *Id.* at 36,789.
[63] *See, e.g.*, 75 Fed. Reg. 76,790, 76,805 (Dec. 9, 2010).
[64] *ACE*, 864 F.3d 691, 714 (D.C. Cir. 2017).

overly-broad interpretation of "supply." The court noted that any "negative economic effects" of the statutory volume requirements "could be addressed through other provisions of the statute."[65] The court did not require EPA to recover any volumes, going as far as to remind the Agency of flexibility within the statute: "In particular, Congress authorized EPA to reduce the statutory renewable fuel volume requirements upon a determination that implementation of those requirements 'would severely harm the economy or environment of a State, a region, or the United States.' 42 U.S.C. § 7545(o)(7)(A)(i)." EPA may justify its decision not to mandate an additional 500 million gallons of total renewable fuel in 2020 on the basis that such a mandate could cause severe economic harm to the refining sector and to portions of the U.S. economy.

As noted above, after EPA issued its proposal, news reports surfaced that the agency intends to reverse course on this issue and finalize a rule that includes an additional 500 million gallons of total renewable fuel in response to the D.C. Circuit's remand.[66] As such reports explain, EPA's reported reversal stems not from an honest reassessment of the legality or reasonableness of its proposal, but from political fallout from U.S. farm states that some see as essential to President Donald Trump's reelection.[67] Finalizing such a rushed and unsupportable change on this issue would be arbitrary and capricious (at the very least). Further, such political considerations do not come within the meaning of any appropriate statutory basis for standard-setting under the program.

If the Administration wishes to create market opportunities for biofuels beyond what the RFS can or should allow as a matter of its legal authority or operational constraints, Valero respectfully reminds the Administration that it has other policy options at its disposal. As an example, the U.S. Department of Agriculture ("USDA") has a program to work with the biofuels industry on expansion of marketing infrastructure for higher blends of ethanol fuels. This approach allows the Administration to address biofuel concerns without undue disruption of the RIN market (an ineffective basis for stimulating ethanol demand) and without the presumption that the USDA has interfered with the RFS at variance with the assignment of responsibilities governed by the Act and related administrative law.

VI. RFS Program Improvements and Corrections to Flaws

A. Clarification of Diesel RVO Calculations

EPA proposes to clarify the requirement for refiners and importers to include distillate fuel in their RVO compliance calculations by providing exceptions for the following three additional categories of fuel:

- Distillate fuel, such as heating oil ("HO") or Emissions Control Area ("ECA") marine fuel, with a sulfur content greater than 15 ppm that is clearly designated for a use other than transportation fuel.

[65] *Id.*
[66] *See supra* note 1.
[67] *Id.*

- Distillate fuel that meets the 15 ppm sulfur standard, is designated for non-transportation use, and that remains completely segregated from MVNRLM diesel fuel from the point of production through to the point of use for a non-transportation purpose.
- Distillate fuel that that meets the 15 ppm diesel sulfur standard, is ultimately used for non-transportation purposes, and does not remain completely segregated from MVNRLM diesel fuel.[68]

Valero appreciates EPA's proposal to clarify distillate RVO calculations in light of the convergence of distillate sulfur specifications. EPA's preamble discussion makes clear how distillate regrades to MVNRLM will "produce" a fuel, just as importing or refining produces fuel.[69] Consequently, parties that regrade fuels in this manner incur an RVO in the same fashion as importers or refiners. This approach comports with current industry practice. However, to the extent that "clarity" is needed to address stakeholder confusion over who should account for redesignated fuel in their RVO, EPA provided sufficient explanation through its preamble discussion. To the extent that EPA is concerned that this confusion is causing some redesignated MVNRLM diesel fuel to be omitted from RVO calculations altogether,[70] EPA has not provided any data specific to rates of non-compliance or enforcement that might indicate a systemic problem in need of a broadly-applicable regulatory change. The preamble provides the clarity that some stakeholders might need; EPA provides a common-sense interpretation of the existing regulatory language. Therefore, further regulatory burdens that would impact the entire industry, are not warranted. Valero opposes any additional regulations that will complicate compliance as described further below.

As EPA's first option, EPA proposes to clarify that distillate fuel that meets a 15 ppm sulfur spec and is commingled with other diesel fuel may only be excluded from the refiner's/importer's RVO if it meets the requirements for a new designation of "Certified non-transportation 15 ppm distillate fuel," or "NTDF."[71] A new category of fuel is not needed. Although it is reasonable and consistent with the existing regulations to require that downstream purchasers register as refiners and keep appropriate records to be able to redesignate volumes, EPA's proposal for additional regulations to implement this definition complicates compliance.

First, EPA's proposed notation for product transfer documents to state that the fuel "meets all MVNRLM diesel fuel standards" is potentially confusing or misleading to downstream purchasers.[72] Valero recommends that such notation state "Intended only for non-transportation use except as designated by EPA-registered refiner."

[68] 84 Fed. Reg. at 36,799.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 36,800.
[72] *Id.*

More importantly, EPA proposes a requirement that refiners/importers demonstrate a "reasonable expectation" that the fuel will not be used for transportation in order to justify exclusion from the obligated volume.[73] EPA specifies three criteria relevant to demonstrating the "reasonable expectation." It is unclear from the proposal whether refiners/importers would have to meet all three criteria or whether one would be sufficient. It is also unclear how this would be documented. The only objective criteria identified is the contractual arrangement prohibiting the buyer from selling fuel as MVNRLM; the remaining criteria are subjective.[74] As a practical matter, imposing a new series of criteria that must be met in order to now exclude certain materials (termed "NTDF") from the RVO calculation imposes a heavy burden on refiners and importers that cannot always be met. EPA recognizes "that the complexity of the fuel distribution system makes it difficult for refiners and importers to ensure in all situations that the fuel they produce and exclude from their RVO calculations will be used for non-transportation purposes…."[75] The complexity of market forces will further compound this problem to such an extent that the risk of enforcement may be too significant, particularly given the vague nature of the suggested criteria.

The first of the criteria EPA proposes is that the refiner or importer supplies areas that use HO, ECA marine fuel, or 15 ppm distillate fuel for non-transportation purposes in the quantities being supplied by the refiner or importer.[76] The market forces of supply and demand, seasonal changes, and force majeure events will create a continually changing landscape where supply and demand are not equal. Further, EPA would need detailed information on all suppliers into a given area to understand the fuel demand vs. the amount supplied and be able to make the subjective determination of who is supplying "more than they should."

The second of the proposed criteria is that the refiner or importer has entered into a contractual arrangement that prohibits the buyer from selling the fuel as MVNRLM diesel fuel.[77] This criteria directly conflicts with the proposed methodology for downstream facilities to regrade NTDF into MVNRLM fuel. Market flexibility could be significantly limited, particularly if shortages occur.

The third of the proposed criteria is that the volume of fuel designated as HO, ECA marine fuel, or other non-transportation purposes is consistent with the refiner's or importer's past practices or reflect changed market conditions.[78] This is a highly subjective criterion that not only restricts flexibility but would require justification of business strategies as part of a party's compliance obligation.

EPA does not address the timing of the criteria; the application of these (or similar) criteria would likely require annual analysis, or perhaps more frequent if market conditions change quickly, creating a significant administrative burden.

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

The regulated community has, and continues, to operate in accordance with the law regarding the treatment of fuels and any associated RVO. Product transfer documents make clear what products are being sold and distributed. There is no established compliance concern at the upstream refiner or importer level of inappropriately excluding fuels from the RVO and consequently there is no need for this process when regrades at the downstream facilities are the relevant activity. If EPA must add a new provision to address the concern, Valero recommends that EPA finalize only option 1 without the upstream refiner/importer "reasonable expectation" criteria for excluding select fuels from the RVO.

EPA's second option is the presumptive inclusion of 15 ppm sulfur diesel fuel in refiners'/importers' RVOs unless a downstream party informs the refiner/importer that certain volumes of their fuel were not used as transportation fuel.[79] This is an impractical option. Valero has no confidence that downstream purchasers who purchase from more than one entity would have the ability to attribute volumes sold back to any particular individual seller. It is not clear that downstream purchasers would be under any obligation or have any incentive to engage in the recordkeeping and notification that would be involved in this option. It is therefore highly likely that this scenario would result in overinclusion of non-transportation distillate volumes in refiners'/importers' RVOs. If a seller attempted to create a contractual incentive for purchasers to notify the seller of the eventual uses of the material, *e.g*. by adjusting purchase prices based on the downstream purchaser's notification, that may create an incentive for double-counting of redesignated volumes by attributing them to several different sellers.

EPA requests comment on whether terminals or other downstream parties could feasibly trace a volume of fuel that was sold for a non-transportation use to the original refiner.[80] Valero does not see how this is possible except at terminals that serve only one customer, which is the exception rather than the rule.

EPA's option 3 is the presumptive exclusion of 15 ppm sulfur diesel fuel from a refiner's/importer's RVO unless a downstream party notifies the refiner/importer that the certified NTDF was redesignated as transportation fuel, in which case the refiner/importer would be required to include that volume in its RVO.[81] As with option 2, it is impractical to expect that volumes could be traced back to the original refiner/importer. While EPA speculates that direct contracts between refiners and direct users of heating oil may be relatively easier to track, this type of contractual arrangement is not common in Valero's experience.[82] Valero usually deals with wholesalers and distributors who buy from multiple sources.

This option would create timing uncertainty for refiners/importers and would create a risk of noncompliance or put them at a disadvantage in having to purchase RINs at the close of a compliance period if they are notified of redesignations late in the compliance year.

[79] *Id.* at 36,799.
[80] *Id.* at 36,800.
[81] *Id.* at 36,799.
[82] *Id.* at 36,801.

Refiners/importers would have no control over the ultimate use of their product and this would compromise their ability to plan to meet their obligation.

EPA requested comment on what type of documentation could serve as the notification of redesignation to the original refiner/importer.[83] Any type of notification is subject to the potential for untimely communication or miscommunication and would subject the refiner/importer to a risk of double-counting or not properly including a volume that was redesignated. Furthermore, refiners/importers would have no realistic ability to verify the redesignation information that their customers provide or fail to provide.

EPA notes that while they are currently focused on how to account for distillates, similar approaches could be used to justify exclusion of exported gasoline from RVOs.[84] Valero agrees that the options discussed for inclusion/exclusion of diesel fuel in obligated parties' RVOs could be applied to address gasoline exports. However, the current regulations are clear that RFS obligations apply only to domestic volumes. Valero supports expanding the scope of this action to provide a volume balancing approach to address gasoline exports. To the extent "reasonable expectation" criteria are applied to exports, these could include destination as indicated on the bill of lading, whether the product is loaded on a Jones Act vessel, contractual arrangements indicating that the fuel is to be exported, and other criteria.

B. EPA Must Take Action to Improve the Transparency and Functioning of the RIN Market

Valero requests that EPA consider additional reforms that can improve the RIN market. Valero urges EPA to consider means to keep RIN costs low since the original intent of the program was keeping RFS compliance costs low. In several rulemakings, EPA acknowledged that a well-functioning RFS market should mean low RIN prices.[85] As Valero has previously demonstrated, low RIN costs are likely the best solution for controlling market manipulation/hoarding behavior by removing incentives for that behavior.[86]

Valero urges EPA to promulgate enforceable position or holding limits for RINs. As noted in comments submitted in 2018 and 2019, particularly absent structural changes to the RFS

[83] *Id.*
[84] *Id.*
[85] For example, when EPA in 2007 defined obligated parties as refiners and importers, but not blenders, it did so "based on an expectation that there would be an excess of RINs at low cost, and they would be freely traded between parties needing them such that obligated parties would have ample opportunity to acquire them." Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA, Office of Transportation & Air Quality, EPA-420-R-17-008, at 12-13; *see also* 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010) ("We will continue to evaluate the functionality of the RIN market. Should we determine that the RIN market is not operating as intended, driving up prices for obligated parties and fuel prices for consumers, we will consider revisiting this provision in future regulatory efforts."); Stock, The Renewable Fuel Standard - A Path Forward (Apr. 2015) (Advocates for changing the point of obligation to improve pass-through and avoid net RIN deficits that cause merchant refiners to go to the market).
[86] *See, e.g.,* Valero Comments on the Proposed 2018 RVO at 14-18 (Aug. 31, 2017) (EPA-HQ-OAR-2017-0091-3988).

program (discussed in previous comments and further below), enforceable position limits on RINs are necessary to limit the ability of large RIN holders to manipulate the RIN market. Also, in 2018 and 2019 comments, Valero recommended a central RIN repository for excess carryover RINs.[87] NERA Economic Consulting recommends that a central repository for RINs that are periodically auctioned, which could help improve liquidity, mitigate market fragmentation, and provide a centralized forum for periodic price discovery.[88] A central repository for periodic auctions for all RINs or for excess RINs held by obligated parties are options to keep RINs available for purchase and to keep RIN prices low.

Another option that would help meet the RFS's policy goals while keeping RIN prices low is a well-designed price containment mechanism, such as a D6 waiver credit. Price containment mechanisms have proven effective in a variety of other compliance credit markets, such as the Renewable Portfolio Standards and carbon emissions policies in many states and regions. As Charles River Associates has explained, "[a] price containment mechanism in the RFS could lead to greater ethanol consumption in the long term if it includes redirecting the new government revenue stream to expanding higher ethanol blend fuel consumption."[89] Waiver credits could be offered for sale by the EPA as an alternative compliance mechanism for obligated parties. Like the cellulosic waiver credit, this would be effective at providing RIN-short parties cost certainty and it would help to contain hoarding behavior.

Valero must remind EPA that two significant structural flaws in the RFS program contribute to RIN market distortions as well as unnecessary constraints on the supply of RINs for compliance purposes. The first structural flaw is the separation of the point of obligation from the point of compliance. As Valero and others have argued in several rulemakings and again in these comments, EPA can reduce the opportunities for abuse of excessive market power in the RIN market and provide relief to independent refiners, small retailers, consumers, and others routinely harmed by the RFS by redefining "obligated party" in 40 C.F.R. § 80.1401 to mean "rack seller" or "position holder"—those parties that own gasoline or diesel immediately prior to the sale or removal from an IRS-registered terminal or refinery rack.[90]

The second structural flaw is the unavailability of compliance credit for exported renewable fuel. As explained in previously submitted comments[91] and again in these comments below, the regulations conflict with the statutory mandate to credit for compliance all renewable fuel produced in the United States. The statutory mandate is for increasing volumes of renewable fuel in transportation fuel that enters into commerce in the United States. Since renewable fuel produced for sale as transportation fuel in the United States, even if exported, enters into commerce, EPA's implementation of the RFS conflicts with the statute by denying compliance

[87] Valero Comments on the Proposed 2019 RVO at 33 (Aug. 17, 2018) (EPQ-HQ-OAR-2018-0167-1041).
[88] NERA Economic Consulting, *Ethanol RIN Market Analysis and Potential Reforms* 35-36 (Oct. 18, 2018), Attachment D.
[89] Charles River Associates, *Ethanol RIN Waiver Credits: Improving Outcomes of the Renewable Fuels Standard through a Price Containment Mechanism* 1 (Mar. 2018), Attachment E [copyrighted].
[90] *See* Brief of Petitioners, *Alon Ref. Krotz Springs, Inc., et al. v. EPA* (Doc. No. 1746232, Apr. 27, 2016) (D.C. Cir. No. 16-1052); Brief of Petitioners, *Coffeyville Res. Ref. v. EPA* (Doc. No. 1714168, Jan 22, 2018) (D.C. Cir. No. 17-1044).
[91] *See, e.g.*, Valero Comments on Proposed 2018 RVO at 18-28; Valero Comments on Proposed 2019 RVO at 19-27.

credit for renewable fuel exports. By changing the RFS regulation to ensure that all renewable fuel produced in the United States for transportation fuel is available for compliance, EPA would also increase the supply of RINs in the market and provide additional RIN liquidity and RIN price stability. These changes would have a positive impact on the RIN market because they would address structural problems with the RFS program.

C. EPA Must Not Change Its Approach to Small Refinery Exemptions

EPA proposes to "maintain[]" its "approach that any exemptions for 2020 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2020."[92] Valero agrees: EPA must not reallocate volumes attributable to exempt small refineries among the other obligated parties; to do so would exceed statutory authority, violate due process of obligated parties and further jeopardize merchant refiners who do not qualify for small refinery waivers by imposing disproportionate harm on those refiners and the economies of the geographic regions they serve.

EPA's regulations establish a formula in 40 C.F.R. § 80.1405(c) by which the agency calculates annual percentage standards through which each obligated party determines its RVO. This formula is essentially a fraction, created by dividing the applicable volume for each type of renewable fuel by the estimated national volume of gasoline and diesel for the upcoming year (with certain specified adjustments).[93] One of these adjustments is to reduce the national volume of gasoline and diesel by "[t]he amount of [gasoline and diesel] projected to be produced by exempt small refineries and small refiners…in any year they are exempt.[94] This formula does not account for small refinery exemptions that are granted after November 30 when the annual rulemaking is filed—nor can it. As EPA has long explained, altering the standards after they have been set on November 30 to account for small refinery exemptions granted after that time is inconsistent with Congress's clear instruction that the standards be set "not later than November 30."

In designing the RFS, Congress made it clear that EPA was to set annual standards by November 30 prior to the year for which the standards would apply.[95] Congress also provided EPA authority to exempt small refineries from the standards if meeting the standards would cause disproportionate economic harm to a small refinery.[96] The statute does not allow EPA to set the annual standard, then re-set that standard based on later-issued exemptions granted after November 30 and in reliance on the annual standard previously established. To proceed in such a fashion would be absurd, unfeasible for industry, and entirely contrary to statutory provisions. In addition, that whiplash would constitute prohibited retroactive regulation and violate due process standards owed to obligated parties who would be penalized retroactively based on circumstances wholly beyond their control. As EPA has explained,

[92] 84 Fed. Reg. at 36,798.
[93] 40 C.F.R. § 80.1405(c).
[94] *Id.* (definitions GE_i and DE_i).
[95] 42 U.S.C. § 7545(o)(3)(B)(i).
[96] *Id*. § 7545(o)(9).

> EPA believes the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements. Periodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties.[97]

The CAA establishes statutory targets for four nested types of renewable fuel.[98] EPA's responsibility is to annually publish "the renewable fuel obligation" in percentage form that "ensures" these requirements are met.[99] In doing so, EPA considers whether to use one or more waiver authorities to reduce the applicable volumes established by Congress.[100] EPA must consider different criteria in deciding whether to use its waiver authorities, but none of them allows EPA to increase an annual standard to account for volumes not met in prior years either because of waiver or because of volumes attributable to exempt small refineries. In fact, nothing in the statute permits EPA to increase volumes in any year to account for the waiver or exemptions granted for previous year RVOs. To do so would be contrary to the statute as well as run afoul of the due process owed to obligated parties who might bear a greater burden of the annual standard.

Reallocating volumes attributable to small refinery exemptions would also potentially violate the statute because Congress also designed the RFS to mandate no more than 15 billion gallons of conventional ethanol in any year and no more than 4.5 billion gallons of non-cellulosic advanced biofuel in 2020.[101] Increasing the annual mandates for these fuels in response to the prior year's small refinery exemptions would put EPA in danger of exceeding these limitations in a given year.

Moreover, Congress also recognized that the RFS might cause broader economic harm that may not be remedied with small refinery exemptions.[102] Reallocation of RVO volumes to non-exempt obligated parties will cause broader economic harm and amount to unreasonable compliance burdens for non-exempt refineries. As discussed above, EPA has noted that the RIN carry-over bank is important for compliance flexibility. The RIN bank has decreased by 400 million RINs from the previous estimate in the 2019 final rule.[103] Without the small refinery exemptions, the RIN carry-over bank would be *further* decreased and would not currently hold

[97] 76 Fed. Reg. 38,844, 38,859 (July 1, 2011).
[98] 42 U.S.C. § 7545(o)(2)(B)(i).
[99] *Id.* § 7545(o)(3)(B)(ii)(II). EPA must also obligate the "appropriate parties" as a "required element" of its annual rulemaking. *Id.* § 7545(o)(3)(B)(ii)(I).
[100] *Id.* § 7545(o)(7).
[101] The annual cap on conventional biofuels—*i.e.*, ethanol—is implied. It is the difference between the total renewable fuel and advanced biofuel volumes. The cap on non-cellulosic advanced biofuels is 4.5 billion gallons in 2019. It is the difference between the advanced biofuel and the cellulosic biofuel volumes. *See* 84 Fed. Reg. at 36,763 n.6.
[102] EPA's authority to reduce the applicable volumes when the Agency determines they would "severely harm the economy or environment of a State, a region, or the United States," 42 U.S.C. § 7545(o)(7)(A)(i); or when there is an "inadequate domestic supply," *id.* § 7545(o)(7)(A)(ii); or when there is a "significant renewable feedstock disruption or other market circumstances" that would increase the price of BBD, *id.* § 7545(o)(7)(E)(ii).
[103] 84 Fed. Reg. at 36,767.

2.19 billion RINs. It would no longer serve the critical role that EPA claims it must serve. Reallocation of the RVO obligation to non-exempt refineries would also mean drawing down the RIN bank, an action that EPA has repeatedly said is not what EPA intends to do when setting the RVO, bringing the system to the brink of illiquidity (further complicating the placement of the obligation in the wrong location in the system).

Finally, to the extent EPA is considering—either in the course of finalizing this rule or through a future annual RFS rulemaking—a change in its approach to small refinery exemptions to incorporate expected exemptions into the regulatory formula, such a change would be unreasonable and therefore legally indefensible.[104] Congress provided EPA only one instruction with regard to small refinery exemptions when setting the annual standards: EPA is to make adjustments to the applicable percentage "to account for the use of renewable fuel" by small refineries that were exempt in the prior year.[105] In other words, when exempt refineries still use renewable fuel, those volumes should count toward compliance with the mandate and EPA can reduce the annual percentage applicable to obligated parties in setting the next year's RVO to account for "the use of renewable fuel during the previous calendar year by small refineries that are exempt."[106]

The formula in 40 C.F.R. § 80.1405(c) conforms to the statute.[107] As described above, the formula accounts for small refinery exemptions for the coming year that have been granted before November 30, *i.e.*, before EPA sets the obligations for the year ahead. EPA correctly determined that it need not and cannot, when setting annual obligations, predict volumes potentially attributable to *future* small refinery exemptions. Doing so would require EPA to speculate on numerous fronts, including:

- which refineries might seek exemptions in the coming year;
- how much gasoline and diesel each refinery might be expected to produce;
- how much renewable fuel a small refinery will blend into its gasoline and diesel;
- whether each small refinery might demonstrate "disproportionate economic hardship" in the coming year—itself a multi-faceted analysis that would require further speculation regarding the numerous criteria used by the Department of Energy to score each exemption petition;[108] and

[104] *See supra* note 1.
[105] 42 U.S.C. § 7545(o)(3)(C)(ii).
[106] *Id.*
[107] *See George E. Warren Corp. v. EPA*, 159 F.3d 616, 624-26 (D.C. Cir. 1998) (explaining that an agency has discretion to choose an appropriate solution where Congress has not specified a particular approach for the agency to follow).
[108] 42 U.S.C. § 7545(o)(9)(B)(i). For example, small refineries must report their refining margins for the year, and scoring depends on how the refinery compares to a 3-year industry average. EPA thus would have to guess not only how each refinery might perform in the coming year but also how that speculative performance will compare to a guess about the entire industry. Small refineries also must report whether their compliance costs eliminate efficiency gains—a metric dependent in part on the cost of RINs and therefore entirely a matter of speculation if scored before the compliance year. Lastly, small refineries are also required to report whether their compliance costs might be so

- whether there might be "other economic factors" that indicate that a small refinery warrants an exemption in a given year.[109]

EPA could not, without acting arbitrarily, prejudge hypothetical exemption petitions without any of the detailed application and other materials small refineries seeking such exemptions are required to submit. Attempting such blind predictions would inevitably produce compliance standards that are arbitrarily too low or too high. Any attempt to course-correct at the end of the compliance year would lead to the kind of market disruptions that EPA identified in this proposal when it (correctly) determined that it should not increase the 2020 standards in response to the D.C. Circuit's 2016 remand in *ACE*.[110] As EPA has already concluded, "the Act is best interpreted to require issuance of a single annual standard in November….Periodic revisions to the standards…would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties."[111] EPA is tasked with "ensur[ing]" that the statutory volumes are met, but Congress simply did not "pursue its purposes of increased renewable fuel generation at all costs."[112]

One additional troubling aspect of reallocation of small refinery exemption volumes or inclusion of their estimated amounts in future formulae for calculation of RVOs is the profound impact such a development would have on the procedural and administrative due process expected by the regulated community and arguably commanded by the U.S. Constitution. In essence, the small refinery exemption amounts to be recovered would act as a penalty applied without due process to non-qualifying refineries who are otherwise in compliance with the RFS program. Aside from fundamental unfairness, such an imposition of penalty—with real and consequential economic and operational costs—without due process would create a legal infirmity, potentially for the entire program.

VII. EPA Must Complete Periodic Reviews Consistent with the Statute

In its November 2017 Periodic Review Determination,[113] EPA asserts that satisfies its statutory duty to complete "periodic" reviews of the RFS in the context of each annual rulemaking. The statute requires EPA to conduct "periodic reviews" of three aspects of the program: (1) existing technologies; (2) feasibility of achieving compliance with the applicable volumes; and (3)

high as to lead to shut-down or whether they have experienced any "individual special events," which the Department of Energy has defined to mean "refinery specific events (such as a shutdown due to an accident, and subsequent loss of revenue) in the recent past that have a temporary negative impact on the ability of the refinery to comply with the RFS." It is impossible for EPA to predict with any certainty how a refinery might score on these metrics. And, a positive score on any of these metrics can have a big effect on the refinery's overall score and demonstration of "disproportionate economic hardship."

[109] *Id.* § 7545(o)(9)(B)(ii).

[110] *See* 84 Fed. Reg. at 36,788 and *supra* Section V.

[111] 76 Fed. Reg. at 38,859.

[112] *ACE*, 864 F.3d 691, 714 (D.C. Cir. 2017) (quotation and alternations marks omitted).

[113] EPA, Periodic Reviews for the Renewable Fuel Standard Program (Nov. 2017), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TDK5.pdf.

the impacts of the applicable volumes on certain individuals and entities.[114] The purpose of such "periodic reviews" is to "allow for the appropriate adjustment" to the statutory applicable volumes and the RFS Program regulations over time.[115] To comply with the mandate, EPA must review the impacts of its RFS regulations on "each entity and individual" that is obligated to comply, and use that information in making adjustments to the regulations.[116] Thus, EPA has not conducted the required periodic review if it has not evaluated the impact of the regulations on individual refineries. EPA's periodic review obligation is not met merely by reviewing impacts on those refineries that seek small refinery waivers. EPA must evaluate the impacts of the regulations on merchant refineries that may not seek or qualify for small refinery waivers but suffer severely and disproportionately from the RFS obligations imposed by the rule.

EPA must evaluate the feasibility and impact of any final action in this rulemaking on individual refineries. If, as suggested by news reports, EPA intends to increase the ethanol mandate by 500 million gallons and the BBD mandate by 250 million gallons, small refinery hardship waivers cannot alone mitigate the severe harm imposed by such increased burdens. EPA must also evaluate the impact of increased mandates on individual refineries that do not seek or qualify for small refinery hardship waivers and particularly the disparate impact of increased mandates on merchant refineries who lack control over the physical means to separate RINs necessary to comply.

VIII. EPA Must Consider the Point Of Obligation Each Time It Establishes the Annual Percentage Standards

EPA has not met its statutory duty to make annual obligations applicable to appropriate parties. By obligating refiners and importers, but not blenders, EPA imposed the RFS obligation inappropriately and in a manner that contributes to a failure to ensure statutory volumes are met. This issue is within the scope of this rulemaking because it is a mandatory statutory consideration for each annual rulemaking. Valero's comments on the point of obligation are not outside the scope of this rulemaking and must be given full consideration by EPA. EPA has no discretion to disregard this issue on the basis that the Agency has not reopened it.

The D.C. Circuit's opinion in *ACE*[117] confirms that EPA cannot disregard comments indicating that the point of obligation is misplaced. The court did not agree with EPA that the issue was beyond the scope of the annual rulemaking, but to the contrary instructed EPA to consider the issue following remand of the 2014-2016 RVO rule to EPA on other grounds.[118] EPA's refusal to adjust the definition of obligated parties in response to administrative petitions (a decision pending appellate review) does not relieve EPA of its obligation to consider the issue in connection with the 2020 RVOs.

[114] 42 U.S.C. § 7545(o)(11).
[115] *Id.*
[116] *Id.* § 7545(o)(11)(C).
[117] *ACE*, 864 F.3d at 737.
[118] *Id*. at 785.

As presented in the various administrative petitions submitted to the agency and in briefs to the D.C. Circuit, the statute requires that EPA (1) regulate refiners, importers and blenders "as appropriate" to ensure transportation fuels contain renewable fuels and (2) consider the appropriateness of the entities regulated under the RFS every time it sets the RVO.[119] The primary statutory goals of the RFS are "greater energy independence and security and increasing production of clean renewable fuels."[120] To meet these goals, the statute assigns EPA certain duties. First, it requires EPA to promulgate regulations that regulate the appropriate parties to ensure that transportation fuel introduced into commerce contains renewable fuel.[121] Second, it assigns EPA an annual, mandatory duty to evaluate whether the appropriate parties are regulated:

- Not later than November 30 of each calendar year, EPA "shall determine and publish…the renewable fuel obligation that ensures the requirements of paragraph (2) are met."[122]

- The renewable fuel obligation shall "be applicable to refineries, blenders, and importers, *as appropriate*."[123]

It is clear that this is not a one-time requirement, but rather, an annual obligation, because EPA cannot fulfill its duty to ensure that the renewable volumes prescribed by the statute for a given year are met without considering whether it has regulated the appropriate parties at that point in time.[124] It is not sufficient to regulate the parties that were appropriate at one point in time or continue with the parties regulated at one time when a change would improve the performance of the program.

EPA acknowledged the need to reevaluate the appropriateness of the regulation related to "appropriate" parties when the agency committed to reevaluate the point of obligation as circumstances change.[125] It is equally clear that EPA must fulfill its annual duty to consider the

[119] 42 U.S.C. § 7545(o)(3)(B)(ii).
[120] EISA, Pub. L. No. 110-140, tit. X, § 1001-1002, 121 Stat. 1492 (2007).
[121] 42 U.S.C. § 7545(o)(2)(A)(iii).
[122] *Id.* § 7545(o)(3)(B)(i).
[123] *Id.* § 7545(o)(3)(B)(ii)(I) (emphasis added).
[124] In disclaiming this duty, EPA has in other contexts attempted to rely on *Valero Energy Corp. v. EPA*, No. 7:17-CV-00004, 2017 WL 8780888 (N.D. Tex. Nov. 28, 2017), but the district court in that case did not address EPA's annual rulemakings or whether EPA must consider comments regarding the point of obligation in that context. That court's analysis was also flawed. It conflated the general requirement in 42 U.S.C. § 7545(o)(2)(A)(iii) to promulgate "compliance provisions" with the specific requirements applicable to annual determinations in 42 U.S.C. § 7545(o)(3)(B). It failed to explain what purpose the annual requirement would serve if it were met merely by the compliance provision. And it treated the first "required element" of EPA's annual determination differently from the other two. 2017 WL 8780888, at *4-*6.
[125] 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010) ("We will continue to evaluate the functionality of the RIN market. Should we determine that the RIN market is not operating as intended, driving up prices for obligated parties and fuel prices for consumers, we will consider revisiting this provision in future regulatory efforts.").

point of obligation within sufficient time to publish a final rule every November.[126] EPA has not fulfilled its duty with regard to the annual percentage standards for 2020 in this proposal.

Considering the point of obligation each time EPA sets the annual percentage standards serves the statute's goals of "increasing production of clean renewable fuels" and "greater energy independence and security." EPA cannot ignore the positive effect that changing the point of obligation would have on consumption of all renewable fuels. Nor can EPA ignore how the current point of obligation promotes fuel exports and supports biofuel imports. Neither can EPA continue to rely on a regulation that amounts to restructuring a segment of the U.S. economy on the basis of administrative convenience or because some economic sectors are profiting from the regulatory structure in a way that does not serve the statutory purposes. When EPA "lay[s] claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute unrecognizable to the Congress that designed it," such an announcement should be greeted with skepticism.[127]

Moreover, EPA itself has recognized a "guiding principle" of the RFS is that "the program should preserve existing business practices for the production, distribution, and use of both conventional and renewable fuels."[128] In failing to consider the point of obligation, EPA has flouted this principle, preferring instead to try to force merchant refiners to change their business practices in order to add blending facilities and to risk further consolidation in the fuel industry rather than fix the underlying flaws in the structure of the RFS.

In the context of EPA's proposed denial of their administrative petitions regarding the definition of "obligated parties" and in the context of other annual rulemakings, Valero and many other parties have explained the numerous, significant benefits that would result from EPA defining "obligated party" consistent with the federal excise tax definition of "position holder." These benefits include (but are not limited to) reducing (1) administrative burden on EPA; (2) harm to obligated parties that must purchase RINs on the market to satisfy their annual RVOs; (3) market frictions that undermine the program's ability to increase renewable fuel penetration; (4) volatility in the RIN market; (5) unfair competition experienced by small retailers; and (6) opportunities for speculation and fraud in the RINs market.[129] These benefits would still be achieved today if EPA were to properly align the point of obligation with position holders.

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[126] 42 U.S.C. § 7545(o)(3)(B)(i); 40 C.F.R. § 80.1405(b).
[127] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal citations omitted).
[128] 71 Fed. Reg. 55,552, 55,557 (Sept. 22, 2006).
[129] *See, e.g.*, Valero Comments on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation (Feb. 22, 2017) (EPA-HQ-OAR-2016-0544-0274); PBF Energy Comments on Proposed Denial (Feb. 22, 2017) (EPA-HQ-OAR-2016-0544-0373); Small Retailers Coalition Comments on Proposed Denial (Feb. 22, 2017) (EPA-HQ-OAR-2016-0544-0344); Small Refiners Coalition Comments on Proposed Denial (Feb. 22, 2017) (EPA-HQ-OAR-2016-0544-0406); Monroe Energy Comments on Proposed Denial (Feb. 22, 2017) (EPA-HQ-OAR-2016-0544-0368); Valero Comments on Proposed 2017 RVO (July 11, 2016) (EPA-HQ-OAR-2016-0004-1746); Valero Comments on Proposed 2018 RVO; Valero Comments on Proposed 2019 RVO. *See* Brief of Petitioners, *Alon Ref. Krotz Springs, Inc., et al. v. EPA* (Doc. No. 1746232, Apr. 27, 2016) (D.C. Cir. No. 16-1052).

IX. EPA Should Remove the Export RVO and Treat All Domestically-Produced Renewable Fuel Equally

If EPA is genuinely evaluating options to promote growth in domestic production of renewable fuel, EPA should correct the rules to allow all domestically produced biofuel to be used for compliance under the RFS, including ethanol exported for use as transportation fuel and exported biodiesel.[130] EPA should eliminate the export RVO, eliminate the denaturant prerequisite for RINs for renewable fuel, and allow RINs for all exported biofuels. These revisions will promote the purposes of the RFS by supporting domestic renewable fuel production, correct EPA's punitive treatment of exports under the current program rules, and add much-needed liquidity to the RIN market.

Such changes more closely adhere to the text of the RFS statute and contrary to assertions by some, the changes will not destroy demand for ethanol or biodiesel or for renewable fuel feedstocks at home.

A. The Current System Is Inconsistent With the RFS Statute

The anomalous treatment of exported renewable volumes in the current rules has no basis in the statute, which focuses on the introduction into commerce of renewable fuel, not on the geography of disposition or consumption of the fuel.[131] The plain language of 42 U.S.C. § 7545(o)(2) and (o)(3) requires EPA to "ensure that transportation fuel sold or introduced into commerce in the United States . . . , on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel" provided in 42 U.S.C. § 7545(o)(2)(B).[132] Under the statute, renewable fuel is by definition transportation fuel, whether ultimately used in or outside the United States.[133] "Introduction" into commerce is not synonymous with "used" or "consumed."[134] Therefore, if the renewable fuel is produced and offered for sale to anyone while the fuel is physically in the United States, then it would be "introduced in commerce in the United States," regardless of whether it is destined for export. As a result, this plain language calls for providing that all renewable fuel introduced in the United States can generate credits toward compliance with the renewable fuel mandate in the statute.

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[130] Brief of Petitioners, *Am. Fuel & Petrochem. Mfrs. v. EPA* (Doc. No. 1767965, July 27, 2018) (D.C. Cir. No. 17-1258).

[131] In fact, there are indications in the statute to the contrary, that Congress intended to place no restriction on the geographic distribution of renewable fuel. *See* 42 U.S.C. § 7545(o)(2)(A)(iii)(II)(aa) (prohibiting any regulations that "restrict geographic areas in which renewable fuel may be used").

[132] 42 U.S.C. § 7545(o)(2)(A).

[133] *See id.* § 7545(o)(1)(J) ("The term 'renewable fuel' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.").

[134] *See, e.g.*, *United States v. Hill*, 248 U.S. 420 (1919) ("Commerce includes the transportation of persons and property no less than the purchase, sale, and exchange of commodities."); *Bell v. Porter*, 159 F.2d 117, 119 (7th Cir. 1946), *cert. denied*, 330 U.S. 813 (1947) (Goods may move in commerce though they never enter the field of commercial competition).

There is nothing in the text of the statute that forecloses this interpretation. Nor does the legislative history indicate that Congress intended to create a disparity between domestically produced renewable fuel that is exported and renewable fuel used in the United States.

The ERVO is contrary to how the RFS program is supposed to work—incentivizing increased renewable fuel production year-over-year. As the D.C. Circuit recently observed, "[T]he Renewable Fuel Program's increasing requirements are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year."[135] EPA's interpretation of 42 U.S.C. § 7545(o) to treat consumption as the measurement of compliance with the statutory volumes "flouts that statutory design" because instead of forcing greater production, the ERVO creates a disincentive for further domestic production.[136] EPA cannot continue with such a "goal-defying (much less that text-defying) statutory construction."[137] Designed correctly, the RFS can promote continued growth in domestic biofuel production. Eliminating the ERVO would remove the burden on exports and incentivize further increases in production—a conclusion supported by a recent report issued by Charles River Associates.[138]

Regardless of EPA's policy preference for encouraging the domestic consumption of renewable fuel, exported renewable fuel is part of the U.S. supply of renewable fuel. Therefore, to be true to the statutory text, RINs associated with exported renewable volumes should also be available for compliance with the annual RVO.

B. Eliminating the ERVO Makes Policy Sense and Serves the Goals of the Program

Eliminating the ERVO is not only consistent with the statute, it is good public policy because it better serves the purposes of the RFS—domestic job creation, energy independence and security, and increased domestic production of renewable fuels—than the program's current punitive treatment of exports. The suggested change will also remove a distortion that makes America less competitive in global markets without undermining the greenhouse gas-reduction benefits of the RFS. Such a change has already been suggested by the Bipartisan Policy Center in a 2014 report, which suggested that "eliminat[ing] the exporters' RVO" could allow "the export of biofuels [to] meaningfully contribute to satisfying the RFS mandates."[139]

1. Allowing RINs for exported renewable fuel corrects the distorted position of exports in comparison to domestically-consumed fuels and in global markets

The ERVO creates a disparity between volumes of domestic renewable fuel that remain in the United States and those that do not and it gives preferential treatment to imports. Because

[135] *ACE*, 864 F.3d 691, 710 (D.C. Cir. 2017).
[136] *Id.*
[137] *Id.* (quoting *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1662 (2017)).
[138] Charles River Associates, *Balancing the Treatment of Ethanol Exports, Imports, and Consumption in the Renewable Fuel Standard* at 2 (Aug. 2017), Attachment F.
[139] Bipartisan Policy Center, Options for Reforming the Renewable Fuel Standard at 30 (Dec. 2014), Attachment G.

RINs associated with exported renewable fuel must be retired against a fictional RVO, this fuel is disadvantaged in comparison with domestically-produced renewable fuel that remains in the United States. This distinction is not rational when *all* domestically-produced renewable fuel serves the purposes of the RFS statute and benefits domestic producers. Treating domestically consumed ethanol and exported ethanol equally will drive up ethanol production, increase demand for corn, generate additional value for ethanol producers, create jobs and support American energy dominance—a goal of the current administration.[140]

Similarly, EPA's current regulations have a punitive effect on exports. Imported renewable fuel does not serve the purposes of the program, but foreign-produced volumes imported into the United States receive preferential treatment in the form of a RIN that can be separated upon blending and either used for annual compliance purposes or sold. Meanwhile, and at the expense of greater energy independence and security, biofuels produced in the United States that are ultimately used in place of petroleum-based transportation fuel abroad do not generate a RIN. Eliminating the ERVO so that these volumes generate RINs that can be used for RFS compliance would remove this penalty on exports. Such a regulatory change would improve the competitive price position of U.S.-produced ethanol in global markets[141] and drive additional demand for U.S. corn. The value of the RIN would assist exporters in overcoming protective tariffs of importing countries, making increased mandates in other countries more economical.[142]

By increasing demand for American ethanol, export RINs will support the price of ethanol and allow plants to run at higher rates. This will help maintain America's position as the best ethanol manufacturer in the world. Most importantly, smaller producers and co-ops will, for the first time, be able to capture the economic upside of RINs. Historically, separating and selling a RIN by biofuel producers generally required direct control of gasoline blending infrastructure. With the change, ethanol producers who export their products would be able to capture RIN values for themselves.

2. Eliminating the ERVO supports the goals of the RFS program

Allowing RINs for exported renewable fuel would better support the statutory goals of the RFS than the current regulatory regime. Those goals are chiefly (1) job creation;[143] (2) "greater energy independence and security"; and (3) "increase[d] . . . production of clean renewable fuels."[144]

[140] The White House, President Trump Vows to Usher in Golden Era of American Energy Dominance (June 30, 2017), https://www.whitehouse.gov/articles/president-trump-vows-usher-golden-era-american-energy-dominance/.
[141] Charles River Associates, *Unobligated RINs for Renewable Fuel Exports: Impact on Ethanol Volumes* (Oct. 16, 2017), Attachment H.
[142] *Balancing the Treatment of Ethanol Exports*, *supra* note 138 at 2.
[143] Energy and Policy Act of 2005, Pub. L. 109-58, 119 Stat. at 659.
[144] *See ACE*, 864 F.3d 697 (D.C. Cir. 2017) (quoting Preamble to EISA, 121 Stat. at 1492).

The United States exported a record 112,000 bpd of renewable fuel in 2018, setting a new record for ethanol exports for the second year in a row.[145] This represents *actual* domestic production but this fuel does not generate RINs. EPA acknowledges that

> the rate of growth in the use of ethanol in the U.S. has decreased in recent years as a result of a number of factors, including that the gasoline market has to a large degree become saturated with gasoline that contains 10 volume percent ethanol (E10), favorable blending economics diminish for gasoline-ethanol blends beyond E10, gasoline demand has leveled off, and efforts to expand the use of higher ethanol blends such as E15 and E85 have not been sufficient to maintain past growth rates in total ethanol use.[146]

This means that continued growth in domestic ethanol production depends in large part on appropriately incentivizing exports of ethanol.[147] Currently, EPA discourages exports by creating a fictional RVO against export RINs that must be retired. Eliminating the ERVO would make exporting more attractive to domestic producers by giving them access to additional markets for their products without the burden of retiring the RIN just because they export. Ensuring that RINs can be generated for compliance by *all* renewable fuel produced in the United States would provide opportunities for expanded domestic production, estimated to be as much as an additional 1.2 billion gallons per year (greater than baseline export levels).[148]

In addition, exporting renewable fuels positively impacts the U.S. economy and protects jobs in the biofuels industry, which helps to satisfy the RFS program's goal of job creation. The increased demand for domestic production that would result from eliminating the ERVO would add 26,000 jobs annually, which will contribute to regional and national economic growth.[149] As many as 1,200 additional temporary jobs could be created over the next three years as a result of specific investments in capacity expansion.[150] This will undoubtedly benefit American corn farmers and rural farming communities in addition to renewable fuel producers.

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[145] EIA, Today In Energy, *The United States exported a record amount of ethanol in 2018 for second consecutive year* (Apr. 24, 2019), https://www.eia.gov/todayinenergy/detail.php?id=39212.
[146] *Market impacts of biofuels in 2020*, *supra* note 59 at 1.
[147] "[T]he 'benefit' of the RFS program going forward is effectively limited to pushing the ethanol blend percentage beyond 10% in an attempt to incentivize demand for that fuel…If ethanol can be sold to blenders at a lower price than wholesale gasoline, there is no reason blending would *not* occur up to the 10% blend wall." Energy Ventures Analysis, Comments on PES Holdings, LLC Proposed Consent Decree 4, 5 (Mar. 26, 2018), Attachment I. Consequently, allowing RINs for exports supports additional markets for domestic ethanol produced in excess of 10% of the U.S. motor gasoline pool.
[148] *See Unobligated RINs for Renewable Fuel Exports*, *supra* note 141 at 2. That number represents preventing a loss of 600 million gallons a year based on current policy, and an additional 600 million gallons of production capacity expansion.
[149] *Balancing the Treatment of Ethanol Exports*, *supra* note 138 at 3, 10. While assigning unobligated RINs to ethanol exports will contribute to the economy, it does not follow that higher RIN prices increase total economic activity. In fact, the opposite is likely true given the volume of ethanol exports compared to domestic ethanol consumption. RIN costs are mostly borne by U.S. businesses and consumers. Therefore, the suggested regulatory change adds the most value when RINs for ethanol exports do not include expanded RFS obligations. *Id.* at 3.
[150] *Id.* at 11.

The suggested change would also enhance our energy and economic security by reinforcing our growing role as an energy superpower. Given that one of the goals of the RFS is to enhance the United States' energy security, it is difficult to imagine that Congress intended the program to replace import of petroleum with imports of renewable fuel, reinforcing the nation's dependence on foreign fuel. Allowing RINs associated with exported renewable fuel to be used for compliance with the RVO would restore the proper balance between renewable fuel imports and exports in the market and support the RFS program's purpose of increased energy independence and security. This change is entirely consistent with President Trump's recommitment to national energy security and special emphasis on U.S. energy exports.[151]

C. Eliminating the ERVO Would Ensure Greater Liquidity in the RIN Market

A significant consideration in setting annual RVOs is ensuring a "liquid and well-functioning RIN market upon which success of the entire program depends."[152] In the proposal, EPA explains the gravity of its concern that the RIN bank remain healthy:

> An adequate RIN bank serves to make the RIN market liquid. Just as the economy as a whole functions best when individuals and businesses prudently plan for unforeseen events by maintaining inventories and reserve money accounts, we believe that the RFS program functions best when sufficient carryover RINs are held in reserve for potential use by the RIN holders themselves, or for possible sale to others that may not have established their own carryover RIN reserves. Were there to be no RINs in reserve, then even minor disruptions causing shortfalls in renewable fuel production or distribution, or higher than expected transportation fuel demand (requiring greater volumes of renewable fuel to comply with the percentage standards that apply to all volumes of transportation fuel, including the unexpected volumes) could lead to the need for a new waiver of the standards, undermining the market certainty so critical to the RFS program.[153]

Revising the regulatory treatment of exported renewables would help to resolve the RIN liquidity concern in both the short- and long-term. As ethanol exports continue to increase, the RINs from such exports would become part of the RINs market, increasing liquidity and ameliorating the potential for RINs price spikes that occur when renewable blending capacity is constricted.

Economic studies have demonstrated that a significant share of the burden of higher RIN prices falls on merchant and other non-integrated refiners.[154] This is due to blenders capturing margins from RINs. Relief from this burden is possible through providing unobligated RINs for ethanol exports,[155] as the change would make an estimated 1.2 billion RINs available in the market

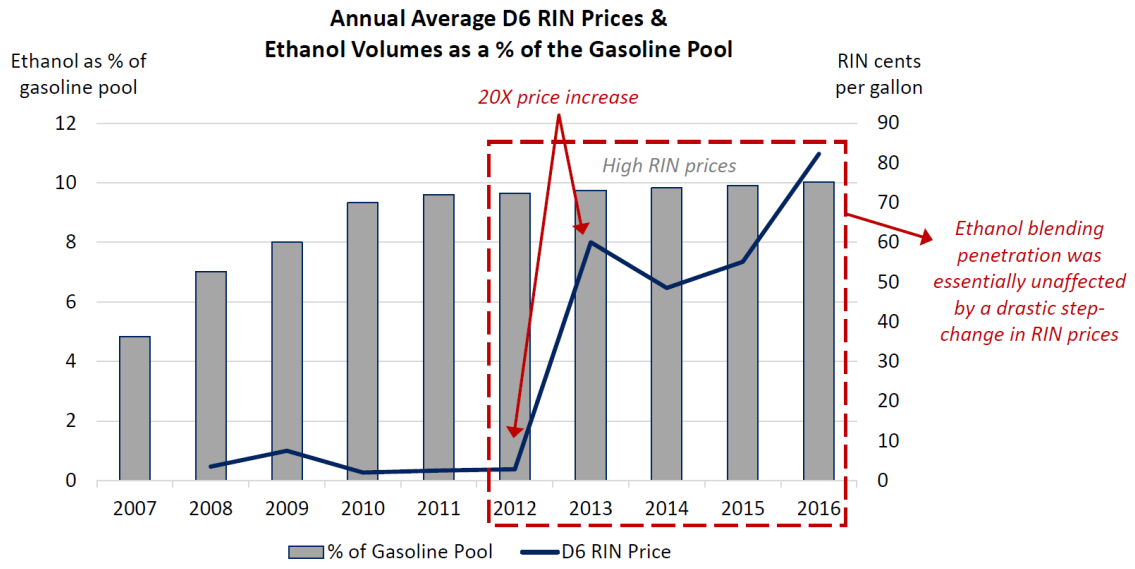
[151] President Trump Vows to Usher in Golden Era of American Energy Dominance, *supra* note 140.
[152] 83 Fed. Reg. at 32,029.
[153] *Id*.
[154] Charles River Associates, *RINs Market Frictions and the RFS Point of Obligation* (Feb. 2017), Attachment J.
[155] *Balancing the Treatment of Ethanol Exports*, *supra* note 138 at 3.

in every compliance year, and it would incentivize domestic renewable production to meet growing demand abroad.

D. Eliminating the ERVO Would Not Undermine Demand at Home for Renewable Fuels or for Corn As A Feedstock

If the export RINs change was implemented, domestic consumption of ethanol and demand for corn as a feedstock would not be harmed as ethanol volumes increased.

The addition of export RINs to the market are likely to decrease the price of RINs. However, this will not have a negative impact on the domestic consumption of renewables. The following chart (based on RVO and ethanol volumes from EIA and RIN pricing from Argus) shows that high RIN prices do not correlate with increased ethanol blending.



Between 2012 and 2013, RIN prices increased by 20 times. Yet, during the same time, the volume of ethanol in the gasoline pool was nearly unchanged.[156] In fact, EIA recently confirmed that lower RIN prices (such as would result from the increasing RINs pool if this proposal were enacted) do not impact domestic ethanol consumption.

This regulatory change would not cannibalize domestic consumption because ethanol is the most economic option for octane enhancement (a dynamic that would be expected to persist if

[156] Critics of the proposal to allow RINs for exported volumes argue that it will not cure the blendwall. This is a strawman. The proposed change to the treatment of renewable fuel exports is not intended to cure the blendwall. Rather, it is intended to add liquidity to the RIN market by allowing all biofuel produced in the U.S. to count toward compliance, resulting in reasonable RIN prices and RFS compliance costs that do not subject merchant and, small retailers, and others among the fuel value chain to harm.

the ERVO were eliminated).[157] Overall, continued domestic use of ethanol for octane and increased exports would result in a net increase in ethanol demand.[158]

E. Eliminating the ERVO is Consistent with International Trade Agreements

Critics of the suggestion to allow RINs assigned to exported volumes to be separated and used for compliance argue that the rule change may present problems with the United States' trading partners. Arguments that the change could lead to dumping in foreign markets, create a subsidy that is prohibited by international trade agreements (including those under the auspices of the World Trade Organization ("WTO")), or result in countervailing duties are speculative at best for several reasons.

First, WTO rules typically do not apply to environmental conservation measures. Article XX of General Agreement on Tariffs and Trade ("GATT") provides

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures … relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[159]

This exception has been used to except the RFS program in general from WTO restrictions. The suggested regulatory change would be implemented in order to allow the overall program to operate more efficiently and effectively—very likely making it exempt from WTO concerns. In addition, demonstrating a WTO violation would require evidence of harm to foreign biofuels producers, which would be difficult. There is no evidence that treating exported ethanol the same as domestically consumed ethanol (including imports) would result in the loss of existing ethanol production capacity in countries that would purchase U.S. ethanol.

Moreover, the current treatment of exported volumes under the RFS may be considered to be a violation of international trade agreements. The elimination of the ERVO would rectify these concerns. These issues are discussed in brief below, but Valero incorporates into its comments analysis conducted by Sidley Austin LLP.[160]

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[157] *Unobligated RINs for Renewable Fuel Exports*, *supra* note 141 at 4.
[158] *Id.* at 3.
[159] *See* GATT Art. XX(g).
[160] *See* Letter from Andrew W. Shoyer, Sidley Austin, to EPA Administrator Scott Pruitt (Oct. 19, 2017) (EPA-HQ-OAR-2017-0091-4716), Attachment K.

1. Modifying the export treatment within the RFS would not constitute a violation of GATT 1994

Modifying the treatment of exported renewable fuels would not violate the WTO's GATT 1994.[161] In fact, in modifying the RFS rules to allow exported renewable fuel volumes to enjoy the same RIN benefit as volumes consumed at home, EPA will be viewed as addressing compliance flaws posed by the current ERVO and will bring the RFS program into compliance with international trade laws.

Article XI:1 of GATT 1994 bars "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences [*sic*] or other measures" that are "instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." As Sidley Austin explained,

> Today's RFS [rule] discriminates against U.S. exports of renewable fuels by not allowing those volumes to receive the same benefits as volumes consumed (blended) domestically….Currently, the EPA requires that a person exporting renewable fuel from the United States surrender RINs. On the other hand, if the renewable fuel is sold in the domestic market, the sale does not attract an obligation to surrender RINs. In the domestic market, the obligation to surrender a RIN is at the point that it is blended with hydrocarbon-based fuels. Thus, the existing requirements create an artificial disincentive for exporting renewable fuels, and creates an incentive for selling renewable fuel in the domestic market. This is indeed a distortion of the market through government intervention, and…appears to amount to a violation of Article XI:1 of GATT 1994.[162]

For purposes of compliance with international trade agreements, the suggested rule change would remove an artificially created disincentive against exportation rather than creating an incentive for exportation.[163] By eliminating the ERVO, EPA would allow exported renewable fuel volumes to enjoy the same RIN benefit as volumes consumed at home, which would be viewed as rectifying these concerns.[164]

2. Allowing export RINs to be used for compliance should not result in "dumping"

Allowing export RINs to be used for RFS compliance purposes should not result in dumping, which is prohibited by Article VI of GATT 1994. "Dumping, by which products of one

[161] *Id.* at 1.
[162] *Id.* at 1, 3.
[163] *Id.* at 3.
[164] *Id.* at 1, 3. Although GATT 1994's general prohibition on restricting trade "is generally viewed as a prohibition to disadvantage imports, the WTO has applied this prohibition to government measures that restrict exports as well." *Id.* at 4.

country are introduced into the commerce of another country at less than the normal value of the products is to be condemned if it causes or threatens material injury to an established industry."[165]

There is no reasonable argument that allowing the RINs to attach to exports would allow for exports to occur at a price that is artificially lower than the "normal price" for the domestic sale of ethanol. The suggested change would not provide any financial benefits to exports of ethanol above and beyond domestic consumption (for which RINs already attach). In addition, the scope of the RFS program as a whole means that the price implications of the suggested change would be negligible. And, to the extent that the international ethanol market is influenced by U.S. policy, that influence is dominated by the overall RFS program, the vast majority of which is unaffected by this suggested change.

As discussed above, the change would support the functioning of the RFS program, which is exempt as an environmental conservation measure, and there is no evidence that the change would harm foreign producers of renewable fuel.

3. The suggested change does not create a prohibited subsidy or result in countervailing duties

The WTO's Subsidies and Countervailing Measures Agreement ("SCM Agreement") prohibits subsidies contingent on exports and subsidies that cause adverse effects to the interests of other WTO members.[166] Annex I of the SCM Agreement lists a variety of prohibited subsidies, and the suggested change is not similar to any of the listed subsidies. The change would result in exported ethanol being treated the same as domestically consumed ethanol. It would rectify an existing obstacle to exports, and would not create any scheme to privilege or promote exports above and beyond domestic use. Again, the change would be covered by the exception for environmental conservation measures, and there is no evidence that treating exported ethanol the same as domestically consumed exports would result in the loss of existing ethanol production capacity in countries that would purchase U.S. ethanol. And, it is likely the change would be considered part of the overall program and therefore subject to the general exception for environmental conservation measures in GATT Article XX.

Conclusion

Valero appreciates the work EPA undertakes to complete annual rulemakings under the RFS. Valero agrees with EPA on numerous positions taken in the proposal, as they are based on EPA's sound recognition of many of the burdens of the RFS program. In prior comments and these comments, Valero urges EPA to more closely and more accurately assess and address the burdens of the mandates. However, EPA risks undermining some of its own sound analysis of recognized burdens if EPA finalizes volume mandates higher than proposed. Valero urges EPA not only to stand by its sound proposal not to increase mandates of BBD, not to increase ethanol

[165] GATT Art. VI:1.

[166] SCM Agreement, Article 3.1 ("…the following subsidies, … shall be prohibited: (a) subsidies contingent … upon export performance; (b) subsidies contingent … upon the use of domestic over imported goods"), https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

mandates in response to the 2016 remand, and to limit increases in other biofuel mandates but also urges EPA to undertake more robust analysis of the impact of the RFS program, as required by the statute, and use all available authorities to mitigate the impacts of the program.

Valero is committed to working with EPA in a constructive way that will further the goals of the RFS program. I am available at your convenience to discuss the issues raised in these comments and recommendations. Please contact me at (202) 560-5858 should you have any questions.

Sincerely,

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