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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, and Response to the Remand of the 2016 Standards; Supplemental Notice of Proposed Rulemaking

Dear Administrator Wheeler:

The Valero Energy Corporation and its subsidiaries (collectively, "Valero") submit these comments on EPA's Supplemental Notice of Proposed Rulemaking for the Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, and Response to the Remand of the 2016 Standards. Valero's unique position as a refiner, importer, exporter, marketer and renewable diesel 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.

The percentage adjustment in EPA's supplemental proposal is not supported by the facts or the law. Finalizing such increased mandates would be harmful, arbitrary and capricious, contrary to law and violates due process and fundamental fairness.

I. Introduction and Summary

If finalized, the supplemental proposal to adjust the percentage obligation would be arbitrary, capricious, contrary to the statute, fundamentally unfair, unnecessarily harmful, and a violation of due process. The proposal is a classic "solution in search of a problem" intended to address a demonstrably false narrative perpetuated by the renewable fuel industry that holds small refinery exemptions ("SREs") responsible for reduced biofuel consumption. EPA itself, via public statements from spokespeople as well as sworn testimony by the Administrator, has determined that SREs have not caused biofuel demand destruction. Indeed, even the U.S. Secretary of Agriculture Sonny Perdue recently stated publicly that "[m]ost of the macroeconomic issues [the U.S.] have had with ethanol this year have been because of lower exports, not small refinery waivers."[1] This fact has also been affirmed by the Department of Energy's Energy Information Administration ("EIA") data and from leading agriculture economists regularly cited and relied upon by renewable fuels and farm industry advocates. All of these sources have reviewed the data and found no evidence of any decline in biofuel consumption related to the SREs issued by this or any previous EPA. This is no surprise as renewable fuel production and blending in the U.S. has not declined in the past two years. Thus, the SREs, have not caused a reduction in renewable fuel production or use below the statutory goals. This myth of demand destruction therefore cannot and should not be used to support EPA's proposed action.

To believe the myth of demand destruction, one must suspend all actual knowledge of how the transportation fuel sector works and believe that the RFS program alone defines the level of biofuel blended in the U.S. The RFS program does not define nor entirely describe the renewable fuel market. Specifically, the domestic ethanol industry is mature and represents the lowest cost source of octane for gasoline manufacturers. That fact, along with the national proliferation of E10, results in domestic ethanol consumption levels entirely independent of the RFS and its associated RIN obligations and prices. It is true that ethanol profits have been lower in the past two years, however, that fact is directly attributable to non-RFS factors such as the current trade issues with China and other countries, domestic overproduction and other variables. Similarly, the domestic biodiesel market, while more susceptible to RFS mandates, is far more impacted by ongoing trade disputes as well as Congress' failure to extend the biodiesel tax credit.

[1] https://brownfieldagnews.com/news/perdue-lower-ethanol-exports-hurting-farmers-more-than-rfs-waivers/

In addition to these well-understood market dynamics, EPA simply has to consider the way SREs have worked to understand why there has been no reduction in biofuel blending. Contrary to the myth, small refineries that have received SREs received them at the end of the compliance year. This occurred well after the gasoline produced at the refinery for the compliance year was already sold and shipped for blending with biofuels at fuel terminals. The only function of the SRE received then was to relieve the small refinery of its RIN obligation for that compliance year and enable it to sell the RINs it had accumulated into the RIN market. EPA's SRE therefore played no role in whether the small refinery's gasoline was ultimately blended (in the past) at a terminal. A key corollary to this is that denying the same SRE for that refinery or reallocating the obligation of an exempt refinery to other obligated parties will also play no role in increasing biofuel blending.

In the course of implementing the RFS, EPA has made decisions based on interpretations of the statute that conflict with the goals and the structure of the statute. Now, rather than correct some of those conflicts, EPA responds to the myth of demand destruction from SREs by reversing prior sound interpretations to cause further conflict with the language and goals of the statute. As recently as November 2018, EPA's interpretation of the statute allowed EPA only to make downward adjustments in the percentage to account for renewable fuel use by exempted refineries; it does not allow EPA to increase the percentage for any reason. EPA also interpreted the statute to prohibit post-hoc adjustments to the RVO for any exemptions granted after the RVO is set. In the supplemental proposal, EPA proposes to change its interpretation regarding the future exemptions based on the Agency's view that it has broad authority to "ensure" compliance with the statute. However, EPA continues to ignore its statutory duty to adjust the annual percentage.

EPA's obligation to "ensure" the statutory volumes are met does not mean that EPA is required to maximize blending mandates. If EPA were to recognize the scope of the renewable fuel market, EPA could not deny that renewable fuel produced in the U.S., except for cellulosic fuel, already exceeds the statutory levels. Instead EPA's proposal is intended to respond to protests by the renewable fuel industry by increasing mandates to promote more renewable fuel blending to make up for a perception of lost demand. The RFS program was not designed by Congress to define and entirely control renewable fuel blending; it was designed to promote renewable fuel blending. EPA need not, nor is EPA authorized to, design the RFS program to maximize renewable fuel production and blending within the U.S. The supplemental proposal represents EPA's misuse of the RFS program to do more than Congress intended.

The proposal increases costs for complying non-exempt refineries that have no due process associated with EPA's adjustment determination. EPA has acknowledged that the RFS program has resulted in renewable fuel entering the market in volumes that increasingly exceed the blendwall. EPA has recognized that the blendwall represents constraints on the fuel market such that the costs associated with renewable fuel blending increase as the mandate exceeds the blendwall. Yet EPA's proposal would mandate blending percentage obligations that further exceed the blendwall. Imposing the increased costs on obligated non-exempt refineries violates fundamental fairness and due process. Obligated non-exempt refineries have no input nor control

over the amount of the percentage increase; yet, these refineries will be required to bear a heavier burden of the RFS mandate simply for complying with the mandates.

If EPA is compelled to address concerns about SREs, EPA must consider less harmful alternatives to implement the goals and mandates of the statute. If EPA was serious about "ensuring" renewable fuel would be blended into transportation fuel consistent with the statutory mandates, EPA would move the point of obligation to the point of compliance. By obligating blenders, EPA would incentivize renewable fuel blending at the right point in the market, thereby "ensuring" that renewable fuel produced in the U.S. is blended where reasonably possible within in the U.S. Moving the point of obligation would also reduce the need for small refinery exemptions because the move would reduce the harm to small refineries and would reduce the unfair uneven distribution of the cost of renewable fuel blending.

The disconnect between the RFS program and the renewable fuel market contributes to myths and misunderstandings about how the two interact. EPA should correct the RFS program to account for all renewable fuel that is produced in the U.S. Although EPA need not design the RFS program to define and entirely control the renewable fuel market, EPA should ensure that the RFS program not disregard millions of gallons of renewable fuel in the real renewable fuel market. Since Congress intended for the program to promote renewable fuel production in the U.S., the RFS program should account for all renewable fuel produced within the U.S. that enters into commerce in the U.S. for compliance with the RFS program mandates. This correction, accounting for ethanol exports for RFS compliance, will better align RIN volumes with renewable fuel produced in the U.S. and introduced into commerce in the U.S. This better accounting of renewable fuel will demonstrate that the total renewable fuel volume goals of the statute are being met. Those volumes have not decreased as a result of SREs; as Administrator Wheeler testified, ethanol production in the U.S. has increased over the last two years; some of that increased production shows up as exports.

In this supplemental proposal, EPA is not proposing to increase the RVO for 2020. EPA already determined in the July proposal the total annual renewable fuel that is attainable. Valero and others submitted comments objecting to those volumes because EPA proposed levels that the Agency acknowledges are not reasonably attainable. We agree that EPA has no basis to increase the total RVO to re-allocate volumes connected with SREs. We know that EPA is under pressure and will receive comments on this supplemental proposal to increase the RVO. Yet EPA has no basis or authority to do so; thus, EPA must not increase the total RVO on the basis of re-allocating exempted volumes from prior years. The statute does not authorize EPA to increase the total annual volume mandates or the annual percentage to account for SREs; it only allows EPA to adjust the percentage downward to account for renewable fuel use by exempted refineries.

II. Myth of Demand Destruction

The RFS program does not define nor entirely describe the renewable fuel market. Renewable fuels are produced and blended beyond the mandates of the RFS program. Much has been written about how the SREs are allegedly responsible for reducing the renewable fuel blending mandates. Even EPA acknowledges the obvious fact: exemptions reduce volumes that

are *required* to be blended (i.e. the number of RINs an obligated party is required to submit to EPA for compliance). However, too many have misunderstood the reduction in RIN mandates to mean a reduction in renewable fuel produced or used in the U.S. market or a reduction in demand. In this supplemental proposal, EPA indicates that a reduction in RIN mandates has the *potential* to reduce the use of renewable fuel. However, EPA has not found that it has in fact caused a reduction in renewable fuel use or production. "Demand destruction" is widely referenced by those pushing EPA to take action despite EPA's own acknowledgement that SREs have not caused demand destruction.[2] The SREs only reduce the number of RINs small refineries must retire; a reduction in retired RINs does not mean a reduction in blending of renewable fuel. Renewable fuel expert Sandra Dunphy explained why in her testimony before Congress on July 25, 2018. Here is her response to the question about whether SREs reduce renewable fuel blending:

> Ms. DUNPHY: So I suggest that you all definitely talk to the small refineries in the U.S. and ask them if they have changed their blending policies because they think they're going to be exempted for the year and I think you will find that they have not changed their blending policy. They continue to blend. They continue to purchase RINs. What they do is focus on current year RINs rather than the 20 percent prior year. So if they get the exemption they still will be able to use the current year RINs in the next year. So that puts more RINs into the market. We understand that. But does it destruct the demand of the current year? I would say that if you look at the RIN data through June we are at the same production level that we were in 2017 and we are halfway toward meeting the 2018 compliance RVOs. So whether that will hold true for the entire year I don't know.
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> Mr. MCKINLEY: The EIA had come out—I saw some information yesterday on the EIA that said that actually the blending over the first part of this year—there was 6 months, 7 months—we are actually up over last year—that actually we are increasing. So despite having all of these small refinery exemptions, is this a confirmation that small refinery exemptions do not destroy the demand for renewable fuel?
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> Ms. DUNPHY: We should remember that refiners would probably blend ethanol regardless of whether there was an RFS or not because ethanol represents a very good source of octane. It helps them meet their gasoline, sulfur, and benzene requirements. So they have an incentive to blend ethanol and they're going to do that. So I would say that the data through 6 months for the EMTS data that's published that anyone can see—it's public information—shows that we are on track with last year.[3]

[2] "Ethanol demand has not been impacted by the small refinery program. In fact, we've seen an uptick in ethanol over the last two years. So far this year the industry has produced more ethanol than they did at this point last year. And we do not see any demand disruption from the small refinery program on ethanol production." Andrew Wheeler, Acting Administrator, EPA, September 19, 2019 Hearing before the House Committee on Science, Space, Technology

[3] United States. Cong. House. Subcommittee on Environment of the Committee on Energy and Commerce. Hearing on Renewable Identification Numbers under the Renewable Fuel Standard, July 25, 2018. 115th Cong. 2nd sess. Washington: GPO, 2019.pg 82-83. Attachment 1.

Economist Scott Irwin also analyzed the question and issued reports[4] in 2018 that come to the same conclusion:

> There is widespread interest in whether small refinery exemptions (SREs) under the RFS have "destroyed" demand for ethanol in the physical market. It seems obvious that this would be the case since SREs have the effect of waiving more than a billion gallons of the conventional ethanol mandate under the RFS. The updated analysis in this article shows even less evidence that the blend rate for ethanol has been reduced by SREs. If there has been any ethanol "demand destruction" to date it was very, very small, perhaps a drop in the ethanol blend rate of a half-a-tenth or so, which equates to only about 70 million gallons of ethanol consumption on an annual basis. The reason for this counter-intuitive result is that all but a tiny sliver of ethanol in the U.S. is consumed in the form of E10 and ethanol is very price competitive in the E10 gasoline blend.[5]

Because SREs have not resulted in reduced renewable fuel in the market, EPA's basis for the proposal is arbitrary and capricious; it is unfounded. The agency must be able to provide the "essential facts upon which the administrative decision was based" and explain what justifies the determination with actual evidence beyond a "conclusory statement." (*United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)); *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993)). EPA argues "should we grant SREs without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program, potentially impacting the volume of renewable fuel used in the U.S." 84 Fed. Reg. 57679-57680 EPA incorrectly assumes, contrary to actual evidence over the past two years, that SREs "potentially impact" the volume of renewable fuel used in the U.S. to levels below the statutory or regulatory goals. EPA's conclusory statement that SREs have the *potential* to reduce the use of renewable fuel is contrary to the facts: Experts and EPA have found no reduction in renewable fuel blending. Therefore, EPA cannot increase the percentage obligation to make up for a reduction that doesn't exist. There has been no demand destruction as a result of the SREs; thus, EPA cannot adjust the annual percentage as proposed. Increasing the percentage obligation will do nothing more than increase renewable fuel imports undermining the purposes of the statute.

[4] Irwin, S. "Small Refinery Exemptions and Ethanol Demand Destruction." farmdoc daily (8): 170, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, September 13, 2018. https://farmdocdaily.illinois.edu/2018/09/small-refinery-exemptions-and-ethanol-demanddestruction.html. Attachment 2.

[5] Irwin, S. "More on Small Refinery Exemptions and Ethanol Demand Destruction." farmdoc daily (8): 228, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, December 13, 2018. https://farmdocdaily.illinois.edu/2018/12/more-on-small-refinery-exemptions-and-ethanoldemand-destruction.html. Attachment 3.

III. The Proposed Action is Arbitrary and Capricious and Not Authorized by the Statute

In support of the supplemental proposal, EPA conflicts with prior interpretations of the statutory provisions for percentage adjustments as well as the implied statutory cap on ethanol.

A. The Proposal Is Inconsistent with Prior EPA Statements and Statutory Interpretation of Authority To Adjust The RFS Mandates To Account For SREs.

As EPA acknowledges, the proposal represents a change in EPA's interpretation regarding future exemptions:

> Historically, EPA has interpreted the terms referring to the amount of gasoline and diesel projected to be produced by exempt small refineries (terms GEi and DEi in the equation above) to refer to the amount of gasoline and diesel projected to be produced by small refineries that have already been granted exemptions from their obligations prior to issuing the final rule for the relevant compliance year. As a result of this interpretation, any SREs granted after we issue the annual rule containing the percentage standards for that year effectively reduces the required volume of renewable fuel for that year.

EPA finds authority to change its interpretation and the percentage formula in *Chevron* and its obligation to "ensure" the statute is met. However, EPA appears to have intentionally ignored its prior interpretation of the statute that conflicts with the new found authority and disallows EPA's discretion to adjust the annual percentage.

Under EPA's prior interpretation of the statute, EPA lacks authority to "reallocate" any waived volumes in any circumstance. This holds true whether EPA grants SREs retroactively or before setting a final RVO. The statute only allows for downward adjustments. The language is clear in expressing Congress' recognition that the targets in the statute may be overly aggressive and, as a result, included several waiver authorities expressly intended to allow EPA to reduce the RFS requirement. The relevant statutory provision is CAA section 211(o)(3)(C)(ii):

> **Adjustments** In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—
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> (i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and
>
> (ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

In the final rule issued March 26, 2010, EPA provided this interpretation of the provision:

> CAA section 211(o) requires that the small refinery adjustment also account for renewable fuels used during the prior year by small refineries that are exempt and do not participate

> in the RFS2 program. Accounting for this volume of renewable fuel would reduce the total volume of renewable fuel use required of others, and thus directionally would reduce the percentage standards. However, as we discussed in RFS1, the amount of renewable fuel that would qualify, i.e., that was used by exempt small refineries and small refiners but not used as part of the RFS program, is expected to be very small. In fact, these volumes would not significantly change the resulting percentage standards. Whatever renewable fuels small refineries and small refiners blend will be reflected as RINs available in the market; thus there is no need for a separate accounting of their renewable fuel use in the equations used to determine the standards.
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> 75 Fed. Reg. 14717 (interpretation of CAA section 211(o)(3)(C)(ii)).

In EPA's November 2018 Response to Comments on the 2019 RVO proposal, EPA referenced this interpretation as "longstanding."[6]

The various waiver authorities of the RFS are all geared towards downward adjustment; including waivers for inadequate domestic supply, severe economic or environmental harm, reduction of the cellulosic requirement, reduction of the biodiesel requirement, and even a reduction in the requirement associated with SREs. The statute directly addresses renewable fuel use by small refineries in spite of the exemptions. Specifically, the Administrator shall make adjustments, "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt." In other words, the statute recognizes that small refiners may still blend renewable fuel regardless of the exemption in a manner that equates to overcompliance with the federal statute.

The statute provides that EPA act only to reduce the overall requirement: "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt." The law does not say EPA shall make up a deficit for renewable fuel NOT used due to the SREs, nor does it require SREs to be addressed through an increase in the obligation for non-exempt refiners. Congress said that any use of renewable fuel by exempted refineries should be accounted for in reducing the percentage obligations for nonexempt refineries. With this provision, Congress had a chance to address exempted volumes in another way but did not. As a result, EPA has no authority other than to adjust the RFS requirement downward to take into account what is essentially over-compliance when small refiner produced fuel is blended with renewable fuel, which the data suggests has been occurring over the last several years.

B. EPA's Proposal Conflicts with EPA's Prior Interpretation of the Implied Statutory Cap on Ethanol

Prior to this proposal, EPA has implemented the RFS consistent with an interpretation that the statute imposes a cap on mandating conventional ethanol volumes. The implied statutory cap is 15 billion gallons. Congress designed the RFS to promote increases in renewable fuel production and use but to limit the statute's promotion of conventional ethanol to 15 billion

[6] November 2018 Response to Comments on the 2019 RVO proposal page 183-184. Attachment 4.

gallons. While conventional ethanol production in the U.S. has exceeded 15 billion gallons since 2016, domestic ethanol consumption has fallen short of 15 billion gallons due to blendwall constraints on higher ethanol gasoline blends and tepid overall gasoline demand.[7] EPA's press release for this proposal states "EPA will seek comment on actions to ensure that more than 15 billion gallons of conventional ethanol be blended into the nation's fuel supply beginning in 2020." The statute does not require nor does it even authorize EPA to ensure more than 15 billion gallons of conventional ethanol will be blended into fuel within the U.S. Moreover, nothing proposed by EPA in this proposal will address the blendwall constraints that constrain reaching such a goal that have been readily cited by EPA in previous rulemakings.

Not only does the statute cap EPA's authority to promote conventional ethanol at 15 billion gallons, it also only requires EPA to promote renewable fuel in transportation fuel introduced into commerce in the U.S. In other words, once conventional ethanol production exceeds 15 billion gallons and 15 billion gallons of ethanol are offered for sale in the U.S., the statutory goal is met. EPA's proposal is an attempt to increase separated RINs for conventional ethanol above 15 billion gallons but the statute does not require or authorize EPA to do so. The RIN system is a creation of EPA to ensure compliance with the statute; yet, EPA relies on the RIN system as a representation of the renewable fuel market even though it does not accurately represent all renewable fuel in the U.S. market. The RIN system fails to account for the real volumes of conventional ethanol because it does not account for renewable fuel exports.

The implied statutory cap for conventional ethanol does not reflect Congress' intention to promote conventional ethanol volumes up to or over 15 billion gallons a year. To the contrary, it is Congress' preference for renewable fuels other than conventional ethanol. Congress did not require EPA to promote conventional ethanol above 15 billion gallons; Congress set a limit on conventional ethanol by limiting total renewable fuel despite increasing the mandates for the advanced biofuels and biodiesel. This is a limit on EPA's authority; it is not a mandate to ensure 15 billion gallons of conventional ethanol are used. If other biofuels were available to fill the statutory goals for total renewable fuel, EPA could not revise the RFS program to ensure that 15 billion gallons of conventional ethanol was used instead of or in addition to other renewable fuel.

IV. The Proposal Violates Due Process and Fundamental Fairness.

EPA proposes to increase the percentage obligation for all non-exempt refineries to re-allocate obligations for volumes that are exempted under small refinery waivers. EPA proposes, however, to base the percentage adjustment on the 3-year average of DOE's recommendations for exemptions. Non-exempt refineries have no input in DOE's recommendations nor in EPA's exemption process. Non-exempt refineries must bear the burden of EPA's re-allocation determination but will have no due process associated with the determinations that create the burden. EPA's proposed action would punish compliant refiners; under the proposal, non-exempt refiners will essentially incur an additional financial penalty without any due process of law.

[7] The EIA and Renewable Fuels Association report that conventional ethanol introduced into commerce in the U.S. already exceeds 15 billion gallons and has done so since 2016.

The statute provides for the SREs but it does not place the burden of such exemptions on non-exempt refineries. The statute does not grant the EPA authority to re-allocate the volumetric exemptions to non-qualifying refiners. The proposed percentage adjustment violates fundamental fairness and due process by creating an unfair disadvantage for non-exempt refineries. Many small refineries that receive exemptions are competitors of non-exempt refineries; the exemptions amount to an unfair advantage over the non-exempt refineries, particularly non-exempt refineries that do not have sufficient blending assets to acquire RINs through blending. The advantage of an exemption is created by the law; however, the additional discriminatory impact of re-allocation was not created by the RFS law. Where the law does not clearly provide for such a discriminatory impact, EPA must not abuse its discretion to act in a way that unnecessarily causes such an impact.

The proposed percentage adjustment is also arbitrary and capricious because it unnecessarily increases uneven distribution of harm. The SREs are a clear indication, and acknowledgement by EPA, that RFS costs are disproportionately distributed among obligated parties. The disproportionate distribution of RFS cost is not exclusive to small refineries; independent refineries, that do not qualify for SREs, nonetheless bear higher RFS costs than refineries that have greater blending assets. EPA's proposed percentage adjustments increase the uneven and unfair distribution of harm by increasing the burden on non-exempt obligated parties.

V. EPA Must Implement Reasonable Alternatives Available Under the Statute Instead of Adopting Measures that Are Not Authorized by the Statute

A fundamental principle of administrative law is that an agency must consider reasonable alternatives available that would cause less harm in achieving the same goal. It becomes even more relevant for an agency to do so when the agency is considering a measure that is not authorized by the statute or requires extraordinary administrative measures. The percentage adjustment EPA proposes is based on an unlawful and arbitrary and capricious revised interpretation of EPA's statutory authority. However, even if that were not the case, EPA must consider other reasonable alternatives that could make such action unnecessary.

There are two alternatives to EPA's proposal: (1) move the point of obligation so that blenders are obligated parties and (2) allow all renewable fuel produced in the U.S. for transportation use to be used for compliance. The first measure, making blenders obligated parties, would improve incentives for blending renewable fuel and would reduce or eliminate the need for SREs. The second measure would adjust the RFS program to recognize volumes of renewable fuel in the U.S. market. Both measures are authorized by the statute; both would improve the RFS program.

A. Moving the Point of Obligation Will Make the Adjustment Unnecessary

EPA represents that the purpose of the supplemental proposal is to address the potential that SREs will reduce volumes of renewable fuel use such that the volumes required by the statute are no longer met. In addition to EPA's proposal to increase the annual percentage mandate, EPA proposes to change its approach to SREs and grant partial exemptions rather than full exemptions. 84 Fed. Reg. 57681. An alternative to addressing purported reduced volume use from SREs and

reducing the exemptions granted is to consider how to eliminate the need for SREs. An alternative that would eliminate the need for SREs and improve incentives for renewable fuel use is relevant to EPA's supplemental proposal. It is not outside of the scope of the rulemaking; it relates directly to the issue EPA attempts to address with the proposal.

Making blenders obligated parties under the RFS by moving the point of obligation to the point of compliance would reduce, if not eliminate, the need for SREs because any refinery that does not blend will be exempt and volume obligations will be reduced for those that blend less than they produce. The statute clearly allows EPA to obligate blenders; it does not allow for re-allocation of obligations as a result of SREs nor does it authorize increasing the percentage to account for SREs that might be granted in the future. Placing the point of obligation at the point of compliance would avoid any need to increase the uneven distribution of the cost of renewable fuel blending, but also the SREs would not be needed. EPA would not need to exempt small refineries because their burden would be reduced to only the amount of fuel that they blend.

The recent court decisions in *Alon Refining*[8] and *AFPM* [9] do not mean that EPA can refuse to consider comments on the point of obligation in this rulemaking. To the contrary, the courts said "EPA's determination as to whether it is 'appropriate' to reconsider the point of obligation in the context of an annual volumetric rulemaking is reviewable for abuse of discretion."[10] To the extent that language in the *AFPM* court decision allows EPA to exclude the issue from rulemaking, the *AFPM* court defers to the decision in *Alon Refining* as resolving the issue. *Alon Refining* concludes that EPA's refusal to reconsider the point of obligation can be reviewable for abuse of discretion.

The point of obligation is a central issue for this rulemaking because EPA's refusal to move the point of obligation to the point of compliance creates the need for SREs and, with the proposed percentage adjustment, causes higher levels of harm. Moving the point of obligation would eliminate the need for the exemptions and eliminate the uneven harm occurring under the current RFS program.

In the proposal, EPA solicits comments on "other formulations of these definitions in order to accurately describe our intent that these terms represent a projection of the volume of gasoline and diesel produced by exempt small refineries, regardless of whether EPA had already adjudicated those exemptions by the time of the final rule." 84 Fed. Reg. 57680 A formulation of the annual percentage that would apply to blenders at the point where renewable fuel is blended into transportation fuel would capture all gasoline and diesel produced by small refineries and would make it unnecessary for EPA to grant SREs. Such a formulation would capture all gasoline and diesel that enters the market no matter what size or economic status of the refinery.

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[8] *Alon Refining Krotz Springs, Inc. v. EPA*, No. 16-1052 (D.C. Cir. 2019) (Decided August 30, 2019) ("*Alon Refining"*)
[9] *American Fuel & Petrochemical Manufacturers v. EPA*, No. 17-1258 (D.C. Cir. 2019) (Decided September 6, 2019) ("*AFPM"*)
[10] *Alon Refining* pg.53.

B. Including Exported Renewable for Compliance Is A More Reasonable Measure to Ensure Compliance with the Statute

When an agency fails to consider "less restrictive, yet easily administered" regulatory alternatives (*Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995)), the agency action is arbitrary and capricious. The percentage adjustment proposal is arbitrary and capricious because it increases the burden of the rule when other less restrictive and more easily administered options are available to ensure the statute is met.

The statute clearly states that renewable fuel is to be included in transportation fuel that is introduced into commerce in the U.S. Thus, renewable fuel that is produced and offered for sale in the U.S. is renewable fuel within the scope of the statute. By contrast, the statute does not allow re-allocation of obligations from small refineries to non-exempt refineries. When EPA's purpose for the rule is to "ensure" that the statute's goal is being met, EPA must re-evaluate how the RFS rule impedes compliance with the statute or evaluate how the statute's goals are being met despite EPA's regulatory definitions.

Renewable fuel exports are relevant to EPA's proposal. The court in *AFPM* agreed that EPA could exclude the issue of renewable fuel exports from the scope of the 2018 RVO rulemaking because EPA narrowed the scope of that rulemaking to only the promulgation of the RVO and annual percentage. The court in *AFPM* said, however, that if obligated parties "explained how a change in the EPA's RIN policy for renewable fuel exports would have required the agency to change its proposed applicable volumes and percentage standards,"[11] it could be arbitrary and capricious for EPA to decline to reconsider its RIN policy for renewable fuel exports. In this case, a change to EPA's RIN policy for renewable fuel exports would require a change to EPA's proposed percentage adjustment. A change to EPA's RIN policy to account for renewable fuel exports would ensure the RFS program accounts for the production of over 16 billion gallons of ethanol in compliance with the RVO and the statute. There would be no need for the percentage increase and it could justify a percentage decrease.

It is only EPA's interpretation of the statute that results in the finding that the statutory target of 15 billion gallons of ethanol is not being met. In reality, over 16 billion gallons of ethanol is produced and introduced into commerce in the U.S. EPA's regulatory definition ignores reality that the total volume of renewable fuel in the transportation market in the U.S. includes fuel produced domestically that is later exported. Allowing RINs – as compliance credits not as a penalty - for ethanol exports is central to EPA's goal of promoting ethanol production – the purpose of the percentage adjustment proposal. EPA's stated goal for (or authority for) the percentage adjustment is to "ensure" the statutory goals of promoting renewable fuel in transportation fuel is met. Renewable fuel produced in the U.S. and then exported is renewable fuel as transportation fuel introduced into commerce in the U.S. – in alignment with the specific mandate of the statute. If EPA intends to "ensure" that 15 billion gallons of ethanol has been introduced into commerce, consistent with the statute, EPA need only account for the volumes of renewable fuel that have

[11] *AFPM* pg. 38.

been produced in the United States including renewable fuel that is exported. In 2018, the U.S. produced over 16 billion gallons of ethanol. The statutory goal for ethanol has been met. In 2017, the U.S. produced 15.9 billion gallons of ethanol. The statutory goals for ethanol have been met since 2016 and have not been adversely affected by the SREs.

Rather than distort the program further to cause harm to complying obligated refiners, EPA should adjust its accounting of renewable fuel within the RFS program to accurately reflect the reality of the renewable fuel market. Production has been increasing; Congress's goals for the RFS are being met. EPA need not twist the program further to make it more burdensome.

VI. Implementing the Percentage Adjustment

In this supplemental proposal, EPA specified that EPA is not proposing to increase the RVO for 2020 to account for SREs that might be granted in 2020 and is not soliciting comment on increasing the RVO to account for the reductions in the required renewable fuel volumes that resulted from SRE decisions issued prior to the 2020 compliance year. Valero agrees that EPA must not increase the RVO to account for SREs. EPA has already proposed an RVO for 2020 that is not reasonably attainable. We understand that EPA is under pressure to respond to the false narrative of demand destruction and that political pressure and comments submitted in response to this proposal demand that EPA increase the total RVO. Yet, EPA must not increase the total RVO on the basis of re-allocating exempted volumes from prior years and accepting the myth of demand destruction. The statute does not authorize EPA to increase the total annual volume mandates to account for SREs; it only allows EPA to adjust the percentage downward to account for renewable fuel use by exempted refineries.

For the proposed percentage adjustment, EPA projects the volumes that EPA might exempt in small refinery waivers in 2020. EPA is basing the projection on a 3-year average of DOE's recommendations for past years. In the past, EPA has disregarded DOE's recommendations and granted fewer exemptions and, at times, more exemptions. Yet, EPA does not propose how percentage adjustments would account for EPA granting fewer or more exemptions than what EPA projects from DOE recommendations. If EPA nonetheless finalizes a percentage adjustment to account for SREs, EPA's projection for exemptions should be as close to what is expected to be granted to avoid future adjustments.

Conclusion

An agency decision is arbitrary and capricious if the agency has: relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for it decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (*Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*, 463 U.S. 29, 42-44 (1983*)*) Valero believes that this supplemental proposal represents agency

action based on factors that Congress did not intend and an interpretation of the statute contrary to Congressional intent. EPA also fails to consider important aspects of the problem if EPA refuses to align the RFS program by moving the point of obligation and refuses to account for all renewable fuel production in the U.S. for compliance with the RVO and the statute. EPA's explanation for this proposal – that SREs cause demand destruction for renewable fuel – runs counter to the evidence. EPA does not have a different view about SREs; EPA admits that SREs have not caused demand destruction. Therefore, EPA cannot base its action on the myth of demand destruction. Finalizing increased mandates would be harmful, arbitrary and capricious, contrary to law and violates due process and fundamental fairness.

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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