BRACEWELL

Texas
New York
Washington, DC
Connecticut
Seattle
Dubai
London

Lisa M. Jaeger
Senior Counsel

+1.202.828.5844 Office
+1.202.857.2107 Fax

Lisa.Jaeger@bracewelllaw.com

Bracewell LLP
2000 K Street NW
Suite 500
Washington, DC
20006-1809

February 12, 2016

Mr. Mark J. Langer, Clerk
United States Court of Appeals for the D.C. Circuit
333 Constitution Ave, NW
Room 5205
Washington, DC 20001

16-1055

Re: Valero Energy Corporation's Petition for Review of the CAA 211(o) rule, 80 Fed. Reg. 77,420 (Dec. 14, 2015)

Dear Mr. Langer:

Enclosed please find an original and four copies of Valero Energy Corporation's Petition for Review of the CAA Section 211(o) rule, 75 Fed. Reg. 14,670 (Mar. 26, 2010); 72 Fed. Reg. 23,900 (May 1, 2007), as amended in 73 Fed. Reg. 57248 (Oct. 2, 2008), 73 Fed. Reg. 71560 (Nov. 25, 2008), and 73 Fed. Reg. 71,940 (Nov. 26, 2008); and 70 Fed. Reg. 77,325 (Dec. 30, 2005).

Also enclosed is a receipt copy to be stamped and returned.

Thank you very much for your assistance with this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Bracewell LLP

Lisa M. Jaeger /ajp

Lisa M. Jaeger
Senior Counsel

Enclosures

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VALERO ENERGY CORPORATION	)	
	)	
Petitioner,	)	**Case No.** 16-1055
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, Rule 15(a) of the Federal Rule of Appellate Procedure, and the U.S. Constitution, Valero Energy Corporation hereby petitions this Court to review the final action of the Administrator of the United States Environmental Protection Agency in ("EPA" or "Agency") promulgating the final rules entitled "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program," published in the Federal Register at 75 Fed. Reg. 14,670 (Mar. 26, 2010); "Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program," published in the Federal Register at 72 Fed. Reg. 23,900 (May 1, 2007), as amended in 73 Fed. Reg. 57248 (Oct. 2, 2008), 73 Fed. Reg. 71560 (Nov. 25, 2008), and 73 Fed. Reg. 71,940 (Nov. 26, 2008); and

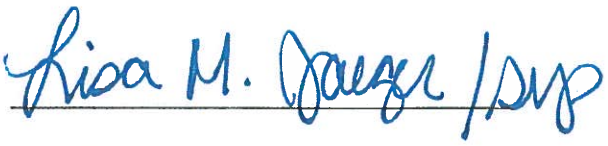
"Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Requirements for 2006," published in the Federal Register at 70 Fed. Reg. 77,325 (Dec. 30, 2005).

This Court has jurisdiction to hear this petition for review because this petition is based on grounds arising after the sixtieth day of the final rules appearing in the Federal Register and is filed within 60 days after such grounds arose. 42 U.S.C. § 7607(b)(1). This petition is filed within 60 days of new grounds for petitioning for review, which arose no earlier than December 14, 2015. *See* "Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017," 80 Fed. Reg. 77,420 (Dec. 14, 2015).

Valero has filed a petition for reconsideration with EPA on these rules. *See* Exhibit A, attached. That petition is currently pending before the Agency.

Respectfully submitted,

Date: February 12, 2015



Lisa M. Jaeger
Richard Alonso
Sandra Y. Snyder
Bracewell LLP
2000 K Street, NW
Suite 500
Washington, DC 20006-1872
202.828.5800 telephone
202.857.4812 facsimile
Lisa.jaeger@bracewelllaw.com
Richard.Alonso@bracewelllaw.com
Sandra.snyder@bracewelllaw.com

Clara Poffenberger
Clara Poffenberger Environmental Law and Policy LLC
2933 Fairhill Road
Fairfax, VA 22031
703.231.5251 telephone
Clara@airandclimatelaw.com

Counsel for Petitioner
Valero Energy Corporation

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that I have this day caused the foregoing "Petition for Review" and "Corporate Disclosure Statement" to be served, by first-class mail, postage prepaid, upon the following:

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Room 3000, William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

John Cruden, Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
RFK DOJ Building, Room 2143
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Date: February 12, 2015

Lisa M. Jaeger

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VALERO ENERGY CORPORATION,	)	
	)	
Petitioner,	)	**Case No. 16-1055**
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

CORPORATE DISCLOSURE STATEMENT

1. Valero Energy Corporation ("Valero") submits the following corporate disclosure statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

2. Valero is a Texas-based energy company incorporated under the laws of Delaware. Valero refines transportation fuels, owns multiple ethanol plants, and markets these fuels throughout the U.S. Valero has no parent corporation and no publicly held company owns a 10 percent or greater interest of its stock.

Respectfully submitted,

Date: February 12, 2015

Lisa M. Jaeger /sps

Lisa M. Jaeger
Richard Alonso
Sandra Y. Snyder
Bracewell LLP
2000 K Street, NW
Suite 500
Washington, DC 20006-1872
202.828.5800 telephone
202.857.4812 facsimile
Lisa.jaeger@bracewelllaw.com
Richard.Alonso@bracewelllaw.com
Sandra.snyder@bracewelllaw.com

Clara Poffenberger
Clara Poffenberger Environmental Law and Policy LLC
2933 Fairhill Road
Fairfax, VA 22031
703.231.5251 telephone
Clara@airandclimatelaw.com

Counsel for Petitioner
Valero Energy Corporation

EXHIBIT A

Richard J. Walsh
Senior Vice President
and Deputy General Counsel
Litigation and Regulatory Law

February 12, 2016

RECEIPT COPY

The Honorable Gina McCarthy
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20160

RE: Petition to Reconsider and Revise the Point of Obligation in the RFS Program

Dear Administrator McCarthy:

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), 5 U.S.C. § 553(e), and *Oljato Chapter of the Navajo Tribe v. Train,* 515 F.2d 654, 666 (D.C. Cir. 1975), Valero Energy Corporation and its subsidiaries ("Valero") hereby submit the attached petition for the U.S. Environmental Protection Agency ("EPA" or "Agency") to reconsider and revise the point of obligation in the Renewable Fuel Standard ("RFS") program. In other words, Valero requests reconsideration of who is an "obligated party" under the RFS program. *See* 75 Fed. Reg. 14,670 (Mar. 26, 2010); 72 Fed. Reg. 23,900 (May 1, 2007), *as amended* in 73 Fed. Reg. 57,248 (Oct. 2, 2008), 73 Fed. Reg. 71,560 (Nov. 25, 2008), and 73 Fed. Reg. 71,940 (Nov. 26, 2008); 70 Fed. Reg. 77,325 (Dec. 30, 2005). Valero petitions EPA to reconsider defining "obligated party" as the entity that holds title to the gasoline or diesel fuel, immediately prior to transfer from the truck loading terminal or bulk terminal to a retail outlet, wholesale purchaser-consumer or ultimate consumer, as reflected in the records maintained for federal excise tax purposes. Making this change will address supply constraints on renewable fuel in the transportation fuel market that impede the market's ability to respond to renewable fuel volume mandates.

Please contact me with any questions regarding this petition.

Sincerely,

Richard J. Walsh
Senior Vice President and
Deputy General Counsel

One Valero Way • San Antonio, Texas 78249-1616
Post Office Box 696000 • San Antonio, Texas 78269-6000 • Telephone (210) 345-2604 • Facsimile (210) 370-4685
richard.walsh@valero.com

EPA
2/12/16

Valero's Petition to Reconsider and Revise the Point of Obligation in the RFS Program

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), 5 U.S.C. § 553(e), and *Oljato Chapter of the Navajo Tribe v. Train,* 515 F.2d 654, 666 (D.C. Cir. 1975), Valero Energy Corporation and its subsidiaries ("Valero") hereby petition the U.S. Environmental Protection Agency ("EPA" or the "Agency") to reconsider and revise the point of obligation in the Renewable Fuel Standard ("RFS") program. Specifically, Valero requests reconsideration of 40 C.F.R. § 80.1406, which defines who is an "obligated party" under the RFS program.[1] In doing so, EPA should move the point of obligation by defining "obligated party" as the entity that holds title to the gasoline or diesel fuel, immediately prior to transfer from the truck loading terminal or bulk terminal to a retail outlet, wholesale purchaser-consumer or ultimate consumer, as reflected in the records maintained for federal excise tax purposes. Making this change will address supply constraints on renewable fuel in the transportation fuel market that impede the market's ability to respond to renewable fuel volume mandates.

Valero is uniquely situated to raise issues associated with the point of obligation in the RFS program, due to its direct experience with the rules from several commercial perspectives. As a refiner, Valero is an obligated party under the RFS rules and must comply with the RFS volume mandates. Valero owns and operates 13 petroleum refineries located in the United States. With a combined throughput capacity of approximately 2.9 million barrels per day, Valero is the world's largest independent refiner. Valero is a major fuel wholesaler and a renewable fuels producer. However, only one-third of its fuel goes into Valero branded or contract wholesale markets. Valero was the first traditional petroleum refiner to enter large-scale ethanol production and now has 11 state-of-the-art plants located throughout the Midwest, including Iowa, Nebraska, South Dakota, Ohio, Indiana, Wisconsin, and Minnesota. This makes Valero the third largest ethanol producer in the United States. Valero has further diversified its renewable investments into Diamond Green Diesel, a 12,000 barrel-per-day renewable diesel plant next to the Valero St. Charles Refinery, making Valero the largest renewable diesel producer in the U.S.

Valero's interests are unique from other refiners, ethanol producers and biofuels producers. Because of its uniquely diversified position, Valero engages with and must balance the interests and concerns of different stakeholders involved in the RFS program. Valero's business interests thus reflect concerns of a broad spectrum of market participants that EPA must consider to ensure that the RFS program functions as Congress intended and to properly implement the terms of the Clean Air Act ("CAA") RFS provisions.

I. Background and Summary of Grounds for Reconsideration

A central feature of the RFS program is to determine the appropriate entity to be obligated to meet the renewable fuel volume requirements. In the first RFS rule, EPA placed the obligation on refiners, blenders and importers of gasoline.[2] Then in the 2007 and 2010

[1] The rules that Valero seeks reconsideration of are: 75 Fed. Reg. 14,670 (Mar. 26, 2010); 72 Fed. Reg. 23,900 (May 1, 2007), *as amended in* 73 Fed. Reg. 57,248 (Oct. 2, 2008), 73 Fed. Reg. 71,560 (Nov. 25, 2008), and 73 Fed. Reg. 71,940 (Nov. 26, 2008); 70 Fed. Reg. 77,325 (Dec. 30, 2005) (establishing the RVO for 2006).
[2] *See* 70 Fed. Reg. 77,325 (Dec. 30, 2005) (establishing the RVO for 2006).

regulations, the EPA placed the obligation to demonstrate compliance with the RFS program on refiners and importers of gasoline or diesel fuel. In these rules, EPA considered but decided against placing the obligation on the blenders that produce the finished products that contain biofuels.[3]

Grounds warranting reconsideration of these rules, which are identified in the following paragraph and are "of central relevance to the outcome of the rule[s]," arose after the public comment periods for these rules.[4] Because these grounds arose after these rules had been issued, Valero could not have raised them during the public comment periods for the 2006, 2007 and 2010 rules. The CAA requires that EPA "shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."[5] Separately, the Administrative Procedure Act provides a right to petition for amendment of a rule.[6]

The grounds arising after EPA's prior rule took place in the final rule issued on December 14, 2015.[7] In this rule, for the first time, EPA used its general waiver authority to waive a portion of the advanced biofuels and total renewable fuel requirements based on inadequate supply.[8] Over the course of the RFS program, EPA has acknowledged the existence of constraints on the supply of renewable fuel.[9] But EPA has never before waived Congress's mandated advanced biofuel and total renewable volumes. Also for the first time, EPA concluded that under the RFS program as presently formulated, EPA will not in the near future be able to achieve Congressionally mandated volumes[10] and that the RIN market cannot serve as the instrument to ensure the renewable fuel volumes will be met.[11] In addition, EPA acknowledged the blendwall as a constraint on supply of renewable fuels and EPA nonetheless set volumes higher than the blendwall. These actions and regulatory conclusions demonstrate that EPA cannot now, or in the future, "ensure that the statutory volumes are met," under the existing RFS regulatory program. These constitute new grounds warranting convening a reconsideration proceeding.

---

[3] *See* 75 Fed. Reg. 14,670 (Mar. 26, 2010); 72 Fed. Reg. 23,900 (May 1, 2007), *as amended in* 73 Fed. Reg. 57,248 (Oct. 2, 2008), 73 Fed. Reg. 71,560 (Nov. 25, 2008), and 73 Fed. Reg. 71,940 (Nov. 26, 2008).

[4] 42 U.S.C. § 7607(d)(7)(B); *see also Oljato Chapter of the Navajo Tribe v. Train,* 515 F.2d 654, 666 (D.C. Cir. 1975).

[5] 42 U.S.C. § 7607(d)(7)(B).

[6] *See* 5 U.S.C. § 553(e).

[7] *See* 80 Fed. Reg. 77,420 (Dec. 14, 2015).

[8] *See* 80 Fed. Reg. at 77,435 (discussing "inadequate domestic supply").

[9] *See, e.g.,* 78 Fed. Reg. 9,282, 9,288 (Feb.7, 2013) (discussing that cellulosic biofuel production had been "limited to small-scale research and development, pilot, and demonstration-scale facilities"); 75 Fed. Reg. 76,790, 76,795 (Dec. 9, 2010) ("No approved pathway currently exists under the RFS program for the generation of RINs for methanol. . . ."); 58 Fed. Reg. 14,670, 14,758 (Mar. 26, 2010) (acknowledging the need for additional terminal storage capacity, truck receipt facilities for biofuels and equipment to blend biofuels, as well as additional E85 retail facilities).

[10] *See, e.g.,* 80 Fed. Reg. at 77,433 ("In the longer term, sustained ambitious volume requirements are necessary to provide the certainty of a guaranteed future market that is needed by investors").

[11] *See, e.g.,* 80 Fed. Reg. at 77,459 ("Our analysis suggests that the market was not sufficiently responsive to higher RIN prices to drive large increases in E85 sales volumes. . . ."); Memorandum from Dallas Burkholder, Office of Transportation & Air Quality, U.S. EPA, An Assessment of the Impact of RIN Prices on the Retail Price of E85 at 10-11 (Nov. 2015) (the "Burkholder Memo").

EPA agrees that it has the inherent authority under the CAA to "consider the full range of constraints, including legal, fuel infrastructure and other constraints, that could result in an inadequate supply of qualifying fuels to consumers. . . ."[12] Nevertheless, EPA has steadfastly refused to relieve the one supply constraint that is fully within its control – misplacement of the point of obligation.

As detailed below, the supply constraints created by the existing point of obligation can be redressed with a simple revision to EPA's regulations. EPA should propose and finalize revisions to the definition of "obligated party" in 40 C.F.R. § 80.1406.

Valero supports the use of EPA's waiver authority for 2014, 2015 and 2016, but EPA must also take action to move the point of obligation so that supply constraints are lifted. Doing so will further the statutory goal of meeting increasing statutory volume mandates or any increasing mandates EPA sets while continuing to use the waiver authorities. Given the current difficulties in meeting the statutory volumes established in the RFS program and EPA's recent need to exercise its general waiver authority, the time to reconsider the point of obligation is now. The increased volume mandates and EPA's recognition of market constraints in the 2015 renewable volume obligation ("RVO") rule compel EPA to take action to remove the market constraint imposed by its regulations. As EPA has stated, its authority to interpret the term "inadequate supply" is broad. Therefore, it is not reasonable for EPA to unnecessarily constrain its assessment of the adequacy of supply by failing to review of the impacts of the RFS requirements on obligated parties. Rather, EPA should reconsider the term "obligated party" to verify whether moving the point of obligation might relieve ongoing inefficiencies in the program. By interpreting "inadequate supply" broadly such that it includes reviewing the point of obligation, EPA will be utilizing all means at its disposal to try to fulfill the statutory mandate in conjunction with determining the extent to which it is necessary to exercise its waiver authority.

II. The CAA requires changing the point of obligation to relieve supply constraints

Congress adopted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA § 101(b)(1). The fuels provisions of the CAA are a significant aspect of Congress's effort to accomplish these statutory goals. *See generally* CAA § 211. Through the RFS program, Congress mandated the introduction of statutory volumes of renewable fuel into the pool of transportation fuel. CAA § 211(o)(2)(A)(i).

Congress set the initial statutory volumes at levels that were considerably lower than they are now. Unsurprisingly, the deficiencies of the current program mechanisms were not as obvious at these lower volumes. The current higher volume mandates have exacerbated the problems created by the misplaced point of obligation. Congress foresaw the need for revisions to the RFS program and thus, mandated an ongoing obligation for EPA to "conduct periodic reviews of . . . the impacts of the requirements . . . on each individual and entity" regulated under the program "[t]o allow for appropriate adjustment" of the statutory volumes.[13] This obligation

[12] 80 Fed. Reg. at 77,438.
[13] CAA § 211(o)(11).

is distinct from and in addition to EPA's obligation to set the renewable fuel volumes for each calendar year. For each calendar year volume, EPA must apply the volume obligation "to refineries, blenders, and importers, as appropriate."[14] Reading these two provisions in conjunction clarifies Congress's intent that EPA regularly re-evaluate the point of obligation. EPA's longstanding and repeated interpretation that refiners are the "appropriate" party impedes the accomplishment of Congress's renewable fuels mandate and thereby, the environmental and health protection goals of the CAA.

In 2015, when EPA proposed the 2014-2016 volumes, EPA stated that its "exercise of the waiver authorities should be consistent with the objectives of the statute to grow renewable fuel use over time."[15] EPA also stated that it was

> proposing to use the waiver authorities to derive applicable volumes that reflect the maximum volumes that can reasonably be expected to be produced and consumed. Thus, while the standards that we set must be achievable, we believe that they must reflect the power of the market to respond to the standards we set to drive positive change in renewable fuel production and use.[16]

EPA asserts that its regulations reflect the "power of the market to respond to standards."[17] It is not reasonable for EPA to draw this conclusion without fully considering the market effects that can derive from changing the point of obligation. Only then can EPA rationally base its waiver decision on the "power of the market."

An analysis of the market and its participants points to a logical, natural point at which compliance *would* reflect market dynamics. The current RFS imposes the obligation to assure blending on parties who do not necessarily have control over the entities who actually have the ability to blend renewable fuel. In this way, the current structure misaligns 1) where the market points to as a natural compliance point and 2) the regulatory point of obligation. This is not rational or market based. Further, by misaligning the natural point of compliance and the point of obligation, EPA dilutes the effectiveness of its regulatory mandates and puts limits on its ability to achieve the statutory goals.

Defining the "obligated party" is a central element of the RFS program, which, if not properly defined, limits the ability of the market to respond to volume mandates. The point of obligation is within EPA's control to define and EPA has a continuing obligation to analyze this definition and consider its effectiveness for achieving the statutory goals. EPA properly exercised its waiver authority to deduce the statutory volume that will not make it into the market, but EPA stopped prematurely. In exercising its authority, EPA must remove those structural obstacles that are limiting the market – not the least of which is the point of obligation. "Agencies are not free to 'adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'"[18] Here, in light of the various barriers for renewable fuels in the market, now expressly addressed by EPA's waiver of the

---

[14] CAA § 211(3)(B)(ii).
[15] 80 Fed. Reg. 33,100, 33,104 (June 10, 2015).
[16] *Id.*
[17] *Id.*
[18] *UARG v. EPA*, 134 S. Ct. 2427, 2446 (2014).

statutory volumes, EPA must reconsider the impediments created by its own regulations while further amending those volumes, as necessary.

In the 2009 proposed rule, EPA identified changes in the renewable identification number ("RINs") system that would likely require regulatory amendments.[19] "[O]bligated parties who have excess RINs are increasingly opting to retain rather than sell [RINs] to ensure they have a sufficient number for the next year's compliance."[20]

In the final RFS2, issued in 2010, EPA acknowledged that making refiners the obligated party was not working. In the final RFS2 rule published on March 26, 2010, EPA recognized that

> When the RFS1 regulations were drafted, the obligations were placed on the relatively small number of refiners and importers rather than on the relatively large number of downstream blenders and terminals in order to minimize the number of regulated parties and keep the program simple. However, with the expanded RFS2 mandates, essentially all downstream blenders and terminals are now regulated parties under RFS2 since essentially all gasoline will be blended with ethanol. Thus the rationale in RFS1 for placing the obligation on just the upstream refiners and importers is no longer valid.[21]

While acknowledging this flaw, EPA committed to reconsider the point of obligation in future rulemaking if the RIN market did not operate as intended.[22] EPA said: "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."[23] EPA also justified its lack of action by stating that "a change in the designation of obligated parties would result in a significant change in the number of obligated parties and the movement of RINs, changes that could disrupt the operation of the RFS program during the transition from RFS1 to RFS2."[24]

The transition from RFS1 to RFS2 has been completed for some time and the RIN market is not operating as intended.[25] Nearly six years later, the factors that EPA claimed would justify a change in the point of obligation are now upon us. EPA admits as much in its December 2015 rule. In particular, EPA adopted the RIN market analysis of Dallas Burkholder and relied on it to justify its use of its general waiver authority.[26] The Burkholder Memo points out the distortions in the RIN market, including the failure by the RIN holders to pass through the value of the

---

[19] *See* 74 Fed. Reg. 24,904 (May 26, 2009).
[20] 74 Fed. Reg. at 24,963.
[21] 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Numerous reports and studies have concluded that the RFS system is not performing as intended. *See, e.g.*, James H. Stock, Columbia University, Center on Global Energy Policy, "The Renewable Fuel Standard: A Path Forward" (Apr. 2015); NERA Economic Consulting, "Effects of Moving the Compliance Obligation under RFS2 to Suppliers of Finished Products" (July 2015) (the "NERA Report").
[26] *See, e.g.*, 80 Fed. Reg. 77,459 n.90 (citing the Burkholder Memo, *supra* n.11).

RINs.[27] EPA further concludes that the RINs cannot be relied upon as a tool to trigger renewable fuel production in the near future.[28] Thus, EPA's conclusion that the current RFS is incapable of achieving the statutory goals, provides new grounds for EPA to reconsider the definition of which party is "appropriate" to shoulder the compliance burden of the RFS.

Based on the performance of the system since 2010, EPA must consider revisions to the regulations to correct for the RIN market shortcomings that impede the penetration of renewable fuel into the transportation fuel market and lead to price-spikes, RIN-hoarding, and compliance through fuel exports.[29] These shortcomings caused by the current point of obligation indicate that EPA has not regulated the "appropriate" point in the fuel system.

We can expect that increasing volume mandates will exacerbate the shortcomings of the RFS program to a degree that the structure of the rule violates the Fifth Amendment's Due Process Clause as it places the burden of compliance, without any rational basis tethered to the unquestionably legitimate aims of the statute, on parties that do not have control over the means of compliance. EPA can avoid forcing the resolution of a serious constitutional issue by ensuring that its rule complies with the statutory mandate to regulate the appropriate entities to ensure that the renewable fuel is blended into transportation fuel. A rule that is unconstitutional is not an "appropriate" regulation, and the "appropriate" rational regulation of entities would pose no serious constitutional problems. Better alignment between the RFS obligation and the RIN system will improve all parties' ability to comply with the volume mandates as they increase and will reduce the program's other shortcomings including the massive current opportunities for RIN fraud and speculation. Both RIN fraud and speculation have imposed unnecessary additional burdens on the regulated community – and both seriously undermine Congress's purpose in enacting the RFS.

III. Obligated parties must have the ability and incentive to increase renewable fuel

A. The current structure of the RFS program limits the growth of renewable fuels

The current structure of the RFS program hampers the growth of renewable fuels into the U.S. fuels market because the obligation is not placed at the natural compliance point. The burden of compliance with the RFS program is currently on refiners and importers, yet "many never interact directly with renewable fuels (i.e., do not blend these products with renewable fuels)."[30] Rather, the actual means of compliance is achieved at the rack (terminal), where renewable fuels are blended into the fuel. The title holders of the gasoline or diesel at the blending point are the parties that determine how much of the various renewable fuels (E0, E10, E15, and E85) to produce and how to price them.[31] This structure has created a divergence between "the party needing RINs and the party producing the RINs."[32] As a result of this flaw, large integrated refiners are able to acquire a surplus of RINs because they own and operate their

[27] Burkholder Memo, *supra* n.11, at 10-11.
[28] *See* 80 Fed. Reg. at 77,482.
[29] *See* NERA Report, *supra* n.25, at 2 (explaining refiners can "escape the RFS2 system by exporting and still capture the value of the RIN").
[30] *Id.* at 1.
[31] *Id.*
[32] *Id.* at 33.

own blending facilities or, more significantly, control more fuel at the point of blending than they refine. This results in competing incentives that preclude the installation (or expansion) of blending infrastructure and the penetration of renewable fuels at higher levels. As EPA has found, the value of the RIN is not being passed through to retailers to encourage the sale of more E85.[33]

Parties that are long on RINs (after meeting their own RVO) have little incentive, and indeed may have an affirmative *dis*incentive, to expand existing blending capabilities to increase the volumes of renewable fuels or blend higher levels (E85 or E15). In fact, entities that are long on RINs have little financial incentive to blend to the blendwall – they already meet their own RVO, and if RINs are scarce, RIN prices will be higher. Thus, the current system, which exists to expand renewable fuels, irrationally encourages RIN hoarding and creates a disincentive for expanding blending capabilities.

B. Changing the point of obligation will incentivize the growth of renewable fuels

If EPA shifts the RFS compliance obligation to the entity that holds title as defined in this petition, the incentives to blend and invest in renewable fuel infrastructure would be materially altered in a way that furthers the purpose of the RFS: all parties – regardless of whether the fuels were produced by a merchant refiner or an integrated refiner – would have an equal incentive to maximize the generation of additional RINs and thus, would maximize blending and marketing of renewable fuel. Unlike today, no party would have a surplus of RINs merely by virtue of its downstream position and all parties would be equally obligated – and, most importantly, fully incentivized to push renewable fuels into the market. As obligated parties, gasoline and diesel title holders at the blending point would see value in renewable fuels with higher RIN values (such as advanced biofuels, biodiesel or E85) and would compete in the market to blend those higher RIN value renewable fuels. If the title holders of the fuel are the obligated parties, then they control the blending choices and can ensure their compliance.

EPA offered administrative ease as a key justification for making refiners the obligated party.[34] That justification is irrational and arbitrary because it is not true. Even if conditions that existed in the past that supported that rationale, the opposite is now true: changing the point of obligation away from refiners will be easier to administer. More fundamentally, even an easily administered regulatory provision must be revised if it impedes accomplishing the goals of a statute.

EPA initially selected refiners as the point of obligation, on the basis that they were a smaller population of obligated parties to manage. Yet, the current regulations already regulate the vast majority of gasoline and diesel title holders at the point of blending because they are required to comply with the transactional, quarterly, and annual reporting requirements for all RIN-related transactions through the EPA Moderated Transaction System ("EMTS"). Analysis of terminal rack records indicates that changing the point of obligation to the title holders of

[33] *See* Burkholder Memo, *supra* n.11, at 10.
[34] *See* 75 Fed. Reg. at 14,722.

gasoline and diesel at the point of blending would not increase the number of obligated parties to the program and would actually make the program easier to administer.[35]

The administrative burden of moving the point of obligation to the point of blending would be inconsequential and even beneficial. First, this change would not impose any downstream impacts (i.e., below the point of blending). Thus, down-rack blenders at the retail level will be unaffected. Second, terminal owners would not be affected unless they elected to take title to the fuel above the rack. Third, refiners will remain the predominant obligated parties.[36] Furthermore, even those fuel title holders at the point of blending that are not yet obligated parties are nonetheless already experienced with entering RINs transactions in EMTS; therefore, changing the point of obligation would not be disruptive to the RFS program.[37] There simply would not be a need for extensive outreach and education to a large population of previously unregulated parties, as EPA previously posited when circumstances were fundamentally different.[38]

Even so, it is not reasonable to claim that minor administrative convenience excuses considering a modification that will far more effectively achieve the goals of the statute. The U.S. Supreme Court recognized that agencies must balance administrative burdens of rules but held that agencies cannot undermine legal mandates on the basis of administrative burdens: "An agency confronting resource constraints may change its own conduct, but it cannot change the law."[39]

As a matter of fact, EPA's concerns about the additional administrative burden are unfounded. Valero provided EPA information that changing the point of obligation would reduce the number of obligated parties in the RFS program.[40] Thus, a change to the point of obligation would decrease the administrative burden of the rule. Valero found that the number of obligated parties under the proposed point of obligation based on the entities registered would be 107.[41] EPA's own estimate of the current number of obligated parties is 200.[42] Thus, there would be a significant reduction in the number of obligated parties which reduces the number of parties that EPA must oversee for compliance. In addition, the change would ease EPA oversight of the program because the current RFS places the point of obligation at multiple points in the transportation fuel system; the recommended change reduces the locations to one

---

[35] *See* Ronald E. Minsk Comments on RFS Program Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, dated July 24, 2015, EPA Docket ID EPA-HQ-OAR-2015-0111-1307 ("By moving the obligation to the rack, refiners will still be the predominant obligated parties."); *see also* Valero Supplementary Comments on the Proposed Renewable Fuel Standards for 2014, 2015 and 2016 and Biomass-Based Diesel Volume, dated Oct. 16, 2015, EPA Docket ID EPA-HQ-OAR-2015-0111-3583, at 2-3 (concluding that revising the rule will reduce the number of obligated parties).

[36] *See* Ronald E. Minsk Comments on RFS Program Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, dated July 24, 2015, EPA Docket ID EPA-HQ-OAR-2015-0111-1307 ("By moving the obligation to the rack, refiners will still be the predominant obligated parties."); *see also* NERA Report, *supra* n.25, at 7.

[37] RINs that have been banked by obligated parties in prior years may be retained and used in 2016 without impact to the overall program, thus preserving liquidity in the market.

[38] *See* 75 Fed. Reg. at 14,722.

[39] *UARG v. EPA*, 134 S. Ct. 2427, 2446 (2014).

[40] Valero Letter to EPA Docket Center, Re: Supplement to Valero Comments on Proposed Renewable Fuel Standards for 2014, 2015 and 2016 and Biomass-based Diesel Volume (Oct. 16, 2015).

[41] *Id.*

[42] *Id.*

point in the system. Placing the point of obligation at the point of blending resolves many anomalies of the current RFS program, such as those related to transmix, butane, and small refiners.

IV. EPA's remedy for every RIN-short refiner to acquire downstream blending capacity is irrational

EPA asserts that refiners can overcome the barriers in the RIN market by simply purchasing assets downstream.[43] This is patently irrational, lacking any record support and reflects a lack of understanding of the complexities of the fuel market. It is evident that the proper point of compliance is at the point of blending given that EPA suggests that refiners who are short on RINs should enter the blending business to achieve compliance.[44] In order to enter into the renewable fuel blending business, a company would need to acquire sufficient terminals and appropriate infrastructure, including the receipt and offloading equipment, dedicated renewable fuel storage tanks, heat traced transfer lines, and additional equipment at the rack, including injection meters and automation control systems. Aside from the considerable cost to acquire such terminals and install the requisite equipment, EPA does not recognize the market impediments to any new addition of blending facilities or the shifts in the market that would be needed to allow currently RIN-short refiners to re-position themselves as EPA suggests.

Even if RIN-short refiners still could find a way to acquire the requisite terminals and equipment and not violate anti-trust restrictions, they *still* would not be guaranteed sufficient RINs because the owner and operator of the terminal does not necessarily own the hydrocarbon that will be blended. Therefore, the refiner would need to ensure that it obtains title to the hydrocarbon and then modify its business by establishing a distribution network of parties that are interested in buying its product. Thus, a new market participant would also need to acquire renewable fuel supply contracts, which may be a costly endeavor because it may be necessary to displace existing participants. The biofuel would also need to be transported to the terminal either by pipeline or by barges. "Capacity on pipelines is already owned so this means additional cost to acquire capacity from an existing shipper."[45] To create an outlet for its renewable fuel, the new blender may need to buy out the existing contractual obligations of retailers that are already under contract with wholesalers.

In sum, it is not possible for RIN-short refiners to comply through investment in blending infrastructure without massive downstream restructuring. EPA has not evaluated the costs of the blending investment recommendation and the potential consequences on the market or on individual entities. It is unrealistic to believe that all independent refiners have sufficient resources to be able to acquire the blending facilities needed to comply with the RFS. In addition, it is impossible to purchase assets that are not for sale and to secure the market share

---

[43] *See* Memorandum from Dallas Burkholder, Office of Transportation & Air Quality, U.S. EPA, A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects at 3, 30 (May 14, 2015).
[44] *See id.* at 3 ("merchant refiners could . . . avail themselves of other compliance strategies such as . . . investing in fuel blending and distribution infrastructure. . . ."); *see also id.* at 30 ("If merchant refiners believe that owning and operating blending operations . . . would present a significant financial or strategic advantage, they may, and generally would, enter the marketplace in this capacity.").
[45] NERA Report, *supra* n.25, at 23.

necessary to ensure compliance without purchasing such assets and reversing the market trend away from integration.

EPA's suggestion that refiners should enter the blending business is further flawed because it does not take into consideration the potential antitrust issues. In its effort to ensure sufficient competition among industry participants in any industry sector to avoid price-setting and other anticompetitive behavior, the Federal Trade Commission ("FTC") monitors actions that could create a concentration in a given local or regional fuel market such that the fuel provider acquires undue control over fuel prices. The FTC has carefully scrutinized the aggregation of commercial interests in the petroleum sector. In particular, when several major refining companies engaged in mergers in the late 1990s and early 2000s, those companies were required to divest some retail markets and terminals in order to reduce their market share and dominance in certain geographic locations – exactly the opposite of what EPA proposes now.[46]

EPA's suggestion that merchant refiners (who are RIN short and who might own many refineries across the U.S.) should invest in terminals and distribution irrationally disregards antitrust concerns. Yet, implicit in EPA's suggestion that investment in blending infrastructure is the solution for these refiners is an admission by EPA that these refiners cannot comply without ownership of hydrocarbons at the rack. With this suggestion, EPA acknowledges that the very parties who are currently obligated under the RFS have no control over the object of the obligation. This is a hallmark of an irrational rule: compelling a party to comply who lacks a clear path to compliance.

Were EPA to fully analyze its unsupported assertions and conclusions about the point of obligation and the market, the record would overwhelmingly support moving the point of obligation. In particular, the analysis would underscore the unreasonableness of EPA's statutory interpretations and the arbitrariness of its conclusions. It would also demonstrate that the regulatory change discussed here offers a simple means to achieving the statutory goal – increasing renewable fuels in the market – and does not depend on a hypothetical market restructuring with no likelihood of success and obvious legal and logistical roadblocks. Where EPA has a choice between reasonable administrative changes to a rule or forcing a massive industry/market restructuring, EPA must choose the administrative change.[47]

V. Conclusion

For the foregoing reasons, Valero respectfully requests that EPA reconsider these rules and engage in notice and comment rulemaking to modify the definition of "obligated party" in 40 C.F.R. § 80.1406 and make any additional regulatory amendments consistent with that modification. In doing so, the obligation for compliance with the RFS program should be placed on the entity that holds title to the gasoline or diesel fuel, immediately prior to transfer from the truck loading terminal or bulk terminal to a retail outlet, wholesale purchaser-consumer or ultimate consumer, as reflected in the records maintained for federal excise tax purposes. A

[46] *See, e.g.*, NERA Report, *supra* n.25, at 26-30 (explaining, for example, that "[s]ince 1981, the FTC has required divestitures of terminals or required other remedies related to terminaling in at least 12 transactions.").

[47] *See UARG*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." (internal citation omitted)).

downstream blender that blends renewable fuel downstream of the terminal rack would not be an obligated party. This change would make the point of obligation the same as the point at which the federal excise tax is applied. EPA will thus be able to rely on the current tracking system utilized by the Internal Revenue Service to help validate yearly volume obligations.

As explained above, Valero supports EPA's use of its waiver authority for 2014, 2015, and 2016 – but EPA must now take action to move the point of obligation so that supply constraints are lifted. Valero is also pleased that EPA is committed to continuing to issue the annual RFS volumes on a timely basis in accordance with the schedule set by Congress. But for this very reason, the timing of EPA's reconsideration of the point of obligation is even more critical. Because EPA has likely begun the process of drafting the proposed 2017 RVO, we encourage quick action on this reconsideration so that this constraint on the RFS program can be resolved in advance of making a determination that there will be inadequate domestic renewable fuel supply in 2017. Waiting to address this issue will only forestall efforts to increase renewable fuel volumes.

Valero is committed to constructively working with EPA to further the goals of the RFS program. We look forward to your response.