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November 3, 2016

Certified #7012 1010 0000 6146 1565

VIA CERTIFIED MAIL

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Notice of Intent to Sue

Dear Administrator McCarthy:

Earlier this year, Valero Energy Corporation and its subsidiaries ("Valero") submitted a petition for a rulemaking to EPA requesting that EPA initiate a rulemaking to correct a flaw in the Renewable Fuel Standard ("RFS") program, specifically the Point of Obligation in the RFS (the "Petition"). Valero has worked tirelessly to provide EPA data and all information relevant to the Point of Obligation and the requested revision. Valero will continue to fully cooperate with EPA regarding any information EPA might need to evaluate the Petition and the issue. However, Valero must pursue all legal avenues available to promote a change in the RFS program that Valero believes is necessary for the program's success.

Litigation is not Valero's preferred means of resolving this regulatory issue. We consider it now only because of the dire situation created by the current misalignment of the Point of Compliance and the Point of Obligation. Under the Clean Air Act ("CAA"), Congress authorized aggrieved parties to challenge EPA action or inaction. To proceed with litigation, the CAA requires advance notice of the intent to bring such action. Therefore, pursuant to the CAA's citizen-suit provision, 42 U.S.C. § 7604(b)(2), Valero hereby notifies you of Valero's intent to file suit against EPA for failing "to perform [an] act or duty under [the] [Clean Air] Act which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). This Notice of Intent to Sue provides the necessary notice required before such actions can be filed with a court, which may occur sixty (60) days from the date of this notice. 42 U.S.C. § 7604. Alternatively, this letter also serves as Valero's notice of intent to file suit for agency action unreasonably delayed under Section 304(a)(3) of the CAA. 42 U.S.C. § 7604(a); *see* 40 C.F.R. § 54.

Specifically, EPA has failed under the Act to perform these non-discretionary duties, which relate to defining the obligated party for Renewable Fuel Standards ("RFS"):

- To "determine and publish" a regulation "that ensures that the requirements of" the CAA's RFS program are met, as required by CAA § 211(o)(3)(B). *See* 42 U.S.C. § 7545(o)(3)(B).

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- To conduct "periodic reviews of . . . the feasibility of achieving compliance with the requirements" and 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, as required by CAA § 211(o)(11). *See* 42 U.S.C. § 7545(o)(11).
- To regulate entities, as appropriate, to ensure that EPA's own rule does not contribute to the necessary use of the statute's waiver authority to address the inadequate supply of renewable fuel. *See* 42 U.S.C. § 7545(o)(2)(A), (o)(3)(B).

The CAA and EPA regulations compel EPA to fulfill these duties within sufficient time to publish a final rule every November. CAA § 211(o)(3)(B)(i); 40 C.F.R. § 80.1405(b). Alternatively, if these duties are found to be discretionary, EPA has unreasonably delayed fulfilling these duties.

The harms flowing from these omissions are exacerbated by the continuing constraint on the supply of renewable fuel to consumers, a constraint that EPA has correctly acknowledged. 80 Fed. Reg. at 77,457. To address the renewable fuel supply constraint, on December 14, 2015, EPA relied on statutory waiver authority to adjust renewable fuel volumes below statutorily mandated levels for the renewable fuel obligation ("RVO") for calendar years 2014, 2015, and 2016 (the "2015 RVO Rule"). EPA nonetheless has failed to consider and address through rulemaking its determination of the appropriate party obligated to satisfy the RFS volumes. The current Point of Obligation itself (i) functions as a renewable fuel supply constraint and (ii) imposes unjustifiable and disproportionate impacts among obligated refiners.

Valero is directly and indirectly harmed by EPA's failure to fulfill its statutory duties. The market inefficiencies associated with the misplaced Point of Obligation harm Valero both as a refiner and a renewable fuel producer. As a refiner, Valero is an obligated party under the RFS rules and must comply with the RFS volume mandates. As a renewable fuel producer, Valero is harmed by any constraint on the renewable fuel market that fails to ensure that transportation fuels contain at least the minimum statutorily specified volumes of renewable fuel. Relief is particularly important when harms, like this one, are created by EPA's RFS rule and are within EPA's authority to correct.

Worse than harming the affected parties, however, the market inefficiencies created by the current RFS in no way advance the CAA's renewable fuel goals and, in fact, affirmatively undermine them. Under the CAA and fundamental principles of administrative law, EPA is duty-bound to investigate the impacts of its regulatory requirements and to appropriately adjust its regulations to ensure that they support the growth of the renewable fuel market. These failings can be addressed through a rulemaking pursuant to the Clean Air Act and the Administrative Procedure Act.

Valero has petitioned EPA to conduct a rulemaking that would satisfy these mandatory duties and would provide the forum for EPA's thorough consideration of adjusting the Point of Obligation to maximize the supply of renewable fuels in the market. Although EPA ultimately has discretion to determine whether the rule revision is appropriate and has discretion as to the substance of the rule, that discretion does not "convert this mandatory duty to a discretionary one, as '[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.'"[1]

Background

In the 2015 RVO Rule, EPA increased renewable fuel volume mandates for 2014, 2015, and 2016. However, EPA adjusted the volume mandates to below statutorily mandated levels by relying on the statutory general waiver authority and EPA's determination that there is an inadequate domestic supply of renewable fuels. 80 Fed. Reg. 77,420 (Dec. 14, 2015). The 2015 RVO Rule was EPA's first use of the RFS general waiver authority. It was also EPA's first acknowledgement of supply constraints, including the blendwall, that impact the total RFS volumes. EPA's basis for using the general waiver authority underscores the need for EPA to satisfy several mandatory duties within prescribed timeframes when setting (and considering adjustments to) the renewable fuel volumes.

In the proposed 2015 RVO rule, EPA asserted that its broad interpretation of "inadequate domestic supply" encompasses "the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers, including fuel infrastructure and other constraints." 80 Fed. Reg. at 33,111. Valero's comments on the proposed rule established that the Point of Obligation is a constraint on supply that EPA must address, because EPA otherwise could not ensure that the market would increase the supply of available renewable fuels to consumers. Valero also emphasized that, unless EPA corrected the Point of Obligation constraint, the market would not function properly, seriously undermining the CAA's express goal of expanding the availability of renewable fuels. EPA rejected Valero's comments related to the Point of Obligation solely because, in EPA's view, the issue was beyond the scope of the rule.[2] EPA's refusal to explore the supply ramifications of obligating refiners and importers to comply with the volume mandate is at odds with EPA's insistence in the Rule that all supply constraints were under review.

When EPA adopted the 2014-2016 RVOs, it failed to comply with its non-discretionary duties related to appropriate regulations under CAA § 211(o)(3)(B)(ii)(I). As explained below,

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[1] *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 54 (D.D.C. 2013) (quoting *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 550 (D.D.C.2005) (Walton, J.) (quoting *Bennett*, 520 U.S. at 172)).

[2] Valero does not agree that the issue is outside the scope of the rule and preserves its arguments related to Valero's Petition for Review of the rule. EPA's characterization of the Point of Obligation as outside the scope of proposal of the 2015 RVO Rule, however, also indicates that EPA did not consider Valero's comments and, as a result, EPA failed to respond substantively to Valero's comments in the 2015 RVO Rule. Valero preserves arguments regarding EPA's obligation to consider and respond to significant comments for the Petition for Review; this NOI is not intended to address EPA's obligations related to Valero's comments on the 2015 RVO Rule.

EPA's nondiscretionary duties did not end when it promulgated the Point of Obligation regulations that still apply today. Nothing in the Act mandates that EPA must meet its obligation within the RVO rule itself rather than through a separate rulemaking. Thus, EPA remains obligated to promptly fulfill its continuing, nondiscretionary duties that Congress imposed on it, even though the 2016 RVOs were set in the 2015 RVO Rule.

The statute also requires EPA to periodically evaluate the RFS program's impact on individuals and entities subject to it as obligated parties. *See* CAA § 211(o)(11). EPA acknowledged in the preamble to the 2015 RVO Rule that the RFS program is at a critical transition stage. 80 Fed. Reg. at 77,423. EPA has not undertaken the statutorily mandated evaluations, which are specifically designed to generate appropriate adjustments to the RFS program to "ensure" that specified minimum volumes of renewable fuel enter the market. EPA, therefore, must complete the evaluations and make appropriate adjustments to the RFS program.

This notice and Valero's Petition for Rulemaking seek a rulemaking applicable to calendar years 2016 and thereafter. EPA action is necessary for 2016 and 2017 to prevent further harm resulting from an already-distorted renewable fuel market. Absent a change to the Point of Obligation, EPA will adversely affect the renewable fuel market beyond the adjustment to the statutory mandates for 2014, 2015, and 2016. By using only its general waiver authority and failing to consider the effect of an improperly placed Point of Obligation, EPA ensures supply constraints will be magnified. This result is far worse than not advancing the statutory goal—it affirmatively *impedes* the CAA's purpose of ensuring adequate supply in the coming years. This EPA-induced constraint on supply will annually undermine the goal of the RFS program and will result in EPA's serial use of waiver authority for RVOs through 2022 to set volumes that do not reflect a properly functioning market.

Additionally, because of the current structure of the RFS program, to comply with the 2016 mandated volumes, obligated parties that lack control at the Point of Compliance will use carry-over RINs and will draw down the RIN credits made available in the RIN bank from prior years. Without a change in the Point of Obligation, those obligated parties will face excessive compliance costs because they have no control over the means of compliance. EPA should undertake the required analyses as soon as possible to fully explore these troubling outcomes.

I. EPA has failed to perform mandatory duties that ensure that statutory volumes of renewable fuel are met.

Through the RFS program, Congress mandated the introduction of increasing volumes of renewable fuel into the pool of transportation fuel. CAA § 211(o)(2)(A)(i). EPA unequivocally embraces this goal: "the fundamental objective of the RFS provisions under the CAA is clear: To increase the use of renewable fuel in the U.S. transportation system every year through at least 2022 in order to reduce greenhouse gases (GHGs) and increase energy security." 80 Fed. Reg. at 77,421. EPA must implement the mandates of the statute—including the *continuing* duties the statute imposes—consistent with this objective.

Congress imposed two specific continuing obligations on EPA relevant to the Point of Obligation; EPA has satisfied neither. Congress also established the timeframe for these duties. EPA has invoked its waiver authority to change the minimum volume requirements, but use of that authority should be informed by the continuing duties that EPA has thus far ignored. Valero addresses these three points in turn.

A. The CAA imposes two continuing nondiscretionary duties on EPA, neither of which EPA has satisfied.

1. EPA must annually evaluate and adjust the rules—including the definition of obligated party—to ensure that they are "appropriate."

The CAA requires EPA to promulgate regulations that appropriately regulate parties to ensure that gasoline and diesel introduced into commerce contain renewable fuel. CAA § 211(o)(2)(A)(iii). This was not a one-time requirement. Rather, by statute, EPA has an annual nondiscretionary duty to evaluate whether the appropriate parties are regulated. That threshold decision is indispensable to EPA's continuing obligation to ensure that the renewable fuel mandates can be met. This annual obligation arises under the following provisions:

- 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." CAA § 211(o)(3)(B)(i) (emphasis added).

- The renewable fuel obligation shall "be applicable to refineries, blenders, and importers, *as appropriate*." CAA § 211(o)(3)(B)(ii)(I) (emphasis added).

To ensure the renewable volumes are met, the statute mandates that EPA develop regulations that apply to entities *as appropriate*—not as appropriate at one point in time. EPA must fulfill this obligation each year in conjunction with setting the RVO. EPA was not relieved of this statutory mandate by having set an initial design for the program in 2010 pursuant to § 211(o)(2)(a)(iii). EPA must consider that question anew whenever it evaluates the basis for setting or adjusting the renewable fuel volume. Only in this way may EPA give proper consideration to changing market conditions and parties' responses to market signals. If the regulatory structure of the Point of Obligation may affect the market's ability to meet the volume mandates for that calendar year, EPA must take that factor into consideration when determining volumes for compliance years.

The CAA does not mandate that refineries be a location at which EPA imposes the obligation. Rather, the obligation must be set on the *appropriate* party or parties. The U.S. Supreme Court recently expressed its view on the term "appropriate":

> One does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." Although this term leaves agencies with flexibility, an agency may not "entirely fai[l] to consider an important aspect of the problem" when deciding whether regulation is appropriate.[3]

The choice of *which* entity and where in the supply system it is obligated to comply is "an important aspect" of ensuring that the renewable fuel volumes are met. Thus, every year when EPA determines the renewable fuel obligation, EPA lacks authority to ignore the constraints that were created by its own rule's design.

Nor can EPA ignore an irrational rule's manifest flaws that implicate the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The current Point of Obligation fails that test because it lacks any rational relationship with the RFS program's purpose—to "ensure" adequate volumes of renewable fuels in the American fuel supply. 42 U.S.C. § 7545(o)(2)(A)(i). Indeed, the current Point of Obligation is directly *at odds* with that legitimate government interest. Therefore, at best, leaving the Point of Obligation on refiners and importers (rather than owners of gasoline and diesel at the blending point) raises a serious question of rationality—and, therefore, of constitutionality.

EPA must consider whether its regulations avoid absurd results and unnecessary harm. To overcome certain market barriers, EPA has suggested that refiners invest in the downstream portion of the fuel market by adding blending facilities; this amounts to suggesting that because some refiners have no control over the compliance point, they should acquire the compliance point—blending facilities. The suggested investment is far more complicated, costly, burdensome, and disruptive—perhaps even unlawful, given antitrust concerns—than moving the Point of Obligation to that compliance point. EPA has discretion to revise this regulation to remove the market barriers without forcing market participants to undertake absurdly burdensome steps to restructure the entire petroleum market. Indeed, EPA's suggestion is an implicit acknowledgment that the current obligation point is irrational.

EPA's choice of the Point of Obligation labors under more particularized due-process problems because some obligated parties do not have meaningful control over compliance. Whether current obligated parties (fuel owners at the refining stage, before blending) are able to comply with the annual RVO depends on activity by third-parties (fuel owners at the blending point). The fuel owners at the blending point are often different parties than the owners at the refining stage, and some obligated parties exercise no control over the fuel owners at the blending rack. Yet the CAA penalizes obligated parties if they fail to meet the annual RVO. *See e.g.*, 42

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[3] *Michigan v. EPA,* 135 S. Ct. 2699, 2707 (2015) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983)) (internal citation omitted).

U.S.C. § 7545(d)(1). Nonsensical arrangements like this one that punish one party for the actions of another over which it has no control raise serious Due Process concerns.

To comply with the statutory mandate that the RFS rule apply to entities "as appropriate," EPA must review the RFS, including the Point of Obligation, to ensure those provisions avoid serious constitutional violations and comply with the Due Process Clause, the CAA, and the Administrative Procedure Act.

2. EPA must complete the periodic review mandated by the statute to allow for the appropriate adjustment of the requirements.

Related to the § 211(o)(3)(B) duty to appropriately assign compliance obligations, CAA § 211(o)(11) makes clear that EPA has a mandatory duty to review the impact of EPA's renewable fuel volume decisions:

> To allow for appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the administrator shall conduct periodic reviews of –
>
> (A) existing technologies;
> (B) the feasibility of achieving compliance with the requirements; and
> (C) .the impacts of the requirements described in subsection (a)(2) of this section on each individual and entity described in paragraph (2).

Under these provisions, the appropriateness of changes to renewable fuel volumes must be informed by EPA's analysis of whether the volumes can be met and the impact of the volumes on "each individual" refiner, blender, and importer. Per the plain text of the statute, this periodic review is directly associated with volume adjustments.

EPA considered in general terms whether to change the Point of Obligation in the 2010 rulemaking but deferred changing it. EPA acknowledged in the proposed and final 2015 RVO rule that the RFS program is materially different today than it was in 2010.

> As the gasoline market became saturated with E10 in 2013 and 2014, the constraints on the supply of ethanol began to change. . . . In order for the supply of ethanol to increase it now needs to be sold in higher level blends, such as E15 and E85.

80 Fed. Reg. at 77,456. EPA has expressly acknowledged that the RFS program is at a critical stage. 80 Fed. Reg. at 77,423. At this critical juncture, the statutorily required review of the feasibility of compliance and impacts of the requirements on each individual and entity that are obligated parties are essential to "appropriate adjustment of the requirements." CAA § 211(o)(11). EPA has a duty to investigate and understand precisely how the RFS program creates incentives and disincentives, what compliance challenges it presents, how its current form distorts the renewable fuel market, and how it affects any party that EPA could obligate to comply with the fuel volumes. Feasibility of compliance and impacts on potentially obligated parties are related to

the impacts of RIN prices on fuel. EPA did study how RIN prices affect consumer fuel prices,[4] but this research does not satisfy the statutory mandates for evaluating feasibility of compliance and impacts on regulated entities and individuals. The statute compels EPA to learn how the Point of Obligation interacts with the legal and structural constraints that EPA itself identified in the 2015 RVO Rule as justifying the waiver.

B. Statutory Deadlines Require Immediate Action by EPA.

Congress set a deadline of November 30 of each year for EPA to set renewable fuel volumes for the following year:

> Not later than November 30 of each calendar years 2005 through 2021 . . . , [EPA] shall determine and publish … the renewable fuel obligation that *ensures* that the requirements of paragraph (2) are met.

CAA § 211(o)(3)(B)(i) (emphasis added).

Congress also established substantive requirements for the volume decision: it must *ensure* that statutory amounts of fuel are blended (CAA§ 211(o)(3)(B)(i)) and the *appropriate* party must be obligated to satisfy those volumes (CAA § 211(o)(3)(B)(ii)). In addition, if EPA adjusts the volumes, the adjustment must be demonstrably *appropriate*; EPA must have considered the feasibility of compliance and the impacts on each refiner, blender, and importer (CAA § 211(o)(11)).

These substantive requirements demand—if nothing else—that EPA study the compliance structure of the rule in a timeframe relevant for compliance with the RVO rules. EPA has already missed this deadline in all prior RVO rules where EPA has not performed these analyses. However, a change to the Point of Obligation would be relevant for 2016 volumes at least through the end of 2016.[5] As evidenced by the 2015 RVO Rule, EPA has retroactively established RFS obligations (the 2015 RVO Rule published December 14, 2015 set the standards for 2014 and 2015).

C. EPA's use of the waiver authority itself indicates that it is necessary to consider an adjustment to the definition of obligated parties.

Congress gave EPA authority to waive the statutory volumes in certain limited circumstances:

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[4] 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 12 (May 14, 2015); 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 (Nov. 2015).

[5] Immediately commencing a CAA § 211(o)(11) review is also critical if EPA plans to reset the statutory volumes as required within one year of triggering the statutory reset obligation in CAA § 211(o)(7)(F).

> EPA may waive the statutory volumes based on a determination that there is an inadequate domestic supply.

CAA § 211(o)(7)(A)(ii). In the 2015 RVO Rule, EPA waived the total renewable volume for the first time.

The fact that EPA has responded to an acknowledged problem with the RFS program by using its waiver authority only emphasizes how EPA's failure to undertake its nondiscretionary duties has exacerbated the problem. The waiver authority—by which EPA actually rewrites statutory volumes—is available only when anterior measures within EPA's control are unable to mitigate inadequate supply. But EPA has not yet undertaken the effort to resolve known problems in the RFS program, including the Point of Obligation. Surely, when EPA considers whether it is necessary to reduce Congress's renewable volumes based on inadequate domestic supply, EPA must complete a review under CAA § 211(o)(11) of the compliance feasibility and impacts of the RFS program on potentially obligated parties to ensure that EPA's own rules are not contributing to the inadequate supply.

EPA acknowledged in the 2015 RVO Rule that "the statutory volumes cannot be met according to the schedule reflected in the statute." 80 Fed. Reg. at 77,456. EPA then downgraded the statutory volumes without even conducting the evaluations Congress requires before *setting* volumes, much less before *downgrading* volumes.

EPA has also presaged future supply constraints and downward adjustments to the statutory volumes: "the current constraints on growth in supply mean that each additional supply increment is likely to be more difficult to achieve than previous increments, and likely require more time to overcome than past constraints." 80 Fed. Reg. at 77,481. Thus, it is apparent that EPA intends to adjust volume mandates for future years, using its waiver authority as it has proposed to do for 2017 volumes. With foreknowledge that it expects to downgrade Congress's volume mandates again, EPA can legitimize such decisions only through completion of the mandatory § 211(o)(3) and (11) analyses.

According to EPA, in developing future RVO rules, EPA will consider the "ability of the RFS to spur growth" in renewable volumes:

> In future years, we would expect to use the most up-to-date information available to project the growth that can realistically be achieved considering the ability of the RFS to spur growth in the volume of ethanol, biodiesel, and other renewable fuels that can be supplied and consumed by vehicles.

80 Fed. Reg. at 77,431. Such an analysis is highly relevant to—but does not supplant—the comprehensive, in-depth analyses already required of EPA. In EPA's study, the ability of the RFS program to spur growth is a factor to consider in anticipated future reductions of statutory volumes. The congressionally mandated studies require EPA to explore the *elements* of the RFS program and expose root causes of its *in*ability to spur growth. EPA's

study is directed at justifying any *reversal* of Congress's volumes. By contrast, Congress directed EPA to find the appropriate structure for *achieving* those volumes.

EPA admits that the task of predicting how the market will respond is very challenging. *See* 80 Fed. Reg. at 77,426.

> Whether the market will respond to the standards we set by increasing the use of E15 – E85 is unclear, as it is a function of actions taken by various fuel market participants, including obligated parties, renewable fuel producers, distributors and marketers, gasoline and diesel retailers and consumers.

80 Fed. Reg. at 77,457.

Valero and others have provided EPA with information related to improving incentives for the various fuel market participants that EPA identifies as key to a responsive market. Congress has directed EPA not to merely stand by and passively observe the market to determine whether the volume standards alone can push growth in the market. Instead, EPA must conduct the review that provides the basis for adjusting the regulatory framework of the RFS to more appropriately and directly link the standards to the market participants that need incentives to act.

In light of EPA's use of its waiver authority to address inadequate supply and the statutory mandates, EPA must ensure that the RFS regulatory framework does not reduce the market's ability to supply renewable fuel. But to use the waiver "only to the extent necessary," as EPA committed to do, EPA must address constraints with less extraordinary measures where it can: i.e., by making a simple but critical modification to the Point of Obligation under the program.

The U.S. Supreme Court has rejected previous EPA attempts to gerrymander plain statutory commands to address harms resulting from the agency's unreasonable interpretation of *other* statutory commands. EPA may not, that is, forego a reasonable application of an ambiguous term while choosing to stretch the meaning of an unambiguous term: "Agencies are not free to 'adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'"[6] In *UARG*, the Court ruled that a long-standing interpretation of the Act for stationary sources was neither compelled by the statute nor reasonable as it applied to new regulation of greenhouse gas emissions. In other words, EPA could not correct a problem created by EPA's own interpretation and administrative action by resorting to the legal doctrine of "administrative necessity."

Likewise, without addressing the Point of Obligation, EPA cannot use the general waiver authority to reduce the volumes below the statutorily mandated levels to make up for the volumes of renewable fuel that *EPA's own regulatory framework* keeps from the market. In light of the various barriers for renewable fuels in the market that EPA has little or no ability to address, EPA must consider the barriers created by its own regulations when it uses its waiver authority to

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

address constrained renewable fuel market conditions that are in substantial part attributable to EPA's own actions.

As explained further in Valero's Petition for Rulemaking, many of the market barriers EPA identified in the 2015 RVO Rulemaking and on which EPA bases its decision to use the waiver authority result directly from the misplaced Point of Obligation. EPA cannot continue to use its limited waiver authority to mask the dysfunction it has caused by ignoring its essential duties in administering the RFS program. Rather, EPA must correct the flaw in the framework that constrains supply so that adjustments made under the reset provisions and the waiver authority are made only to the extent necessary based on factors external to the regulatory framework.

Again, litigation is not our first choice. Valero is committed to working with EPA to resolve the concerns outlined above in a constructive manner that will further the goals of the RFS program. I am available at your convenience to discuss Valero's views on the point of obligation. Please contact me at (210) 345-2000 should you have any questions.

Sincerely,

Richard J. Walsh
Senior Vice President and Deputy General Counsel
The Valero Companies

cc: Janet McCabe
Chris Grundler
Ben Hengst

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