United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

November 29, 2019

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Wheeler:

I write in opposition to EPA's recent proposal to reallocate the blending obligations of small refineries, which receive hardship relief under the Renewable Fuel Standard (RFS), to refineries (small and large), which do not receive or are ineligible for hardship relief. I note that EPA's proposal fails to cite any explicit authority under the Clean Air Act to reallocate the obligations of small refineries to other refineries. To the contrary, the Act mandates that EPA ensure the blending obligations met by small refineries, which receive hardship relief, are *not* born by other refineries. EPA's proposal fails to adhere to this statutory requirement and, for these reasons, must be abandoned before the agency finalizes its annual renewable fuel obligations (RVOs).

In the proposal, EPA bases its authority to reallocate the obligations of small refineries, which receive hardship relief, to other refineries on a single word: "ensure." EPA says that it believes reallocation is "a reasonable interpretation…especially in light of our authority to 'ensure' that the renewable fuel volumes are met."[1] EPA says this is simply a change in policy. However, it is not just a change in policy. It is a claim of new authority, which does not exist in law. EPA has previously stated: "we are *not* required to ensure that the biofuel volumes in the statute are precisely met. We are required to use the specified volumes to set the percentage standards, but *there are no provisions* for ensuring that the percentage standards actually result in the specified volumes actually being consumed."[2] In April of this year, you even testified that EPA "would need to be given" the authority to reallocate the obligations of small refineries by Congress.[3]

EPA's tortured interpretation of the word "ensure" is especially arbitrary given that the agency refuses to use its *explicit* authority to include entities, which blend renewable fuel into gasoline and diesel fuel, as obligated parties under the RFS. Section 211(o)(3)(B)(ii)(I) states that "[t]he renewable fuel obligation determined for a calendar year…shall be applicable to refineries, blenders, and importers, as appropriate."[4] However, EPA has decided only to include refineries and importers as obligated parties. EPA has rejected requests to include blenders as obligated parties.[5] As a result, blenders *only blend renewable fuel when it is in their economic interest to*

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[1] 84 Fed. Reg. 57677, 57680 (Oct. 28, 2019).
[2] 77 Fed. Reg. 1320, 1340 (Jan. 9, 2012) (emphasis added).
[3] *Review of the FY2020 Budget Request for the Environmental Protection Agency:* Hearing Before S. Subcomm. on Interior, Environment, and Related Agencies (Apr. 3, 2019) (statement of Andrew Wheeler, Admin. of the Environmental Protection Agency).
[4] 42 U.S. C. 7545(o)(3)(B)(ii)(I).
[5] 82 Fed. Reg. 56779, 56780 (Nov. 30, 2017).

do so. If the Act (now) requires EPA to ensure that its RVOs are precisely met, EPA would presumably first obligate blenders to comply with the RFS whether or not they lose money.

EPA's proposal is also at odds with the Act's mandate that EPA ensure that the blending obligations met by exempted small refineries are not born by other refineries. Section 211(o)(3) directs EPA how to set the percentage of renewable fuel that obligated parties must blend into the fuel supply in a given year. Subparagraph (C) says that "[i]n determining the applicable percentage for a calendar year, the Administrator shall make adjustments…to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt."[6] The purpose of the provision is to ensure that EPA does not require other refineries to meet the blending obligations that small refineries satisfied prior to receiving hardship relief. Small refineries satisfy their blending obligations because they generally do not know whether EPA will grant them relief until after the RFS compliance deadline has passed.

In 2010, EPA analyzed section 211(o)(3)(C). According to EPA,"[a]ccounting 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."[7] EPA explained that it has not made these adjustments in the past because "the amount of renewable fuel that would qualify…is expected to be very small" and "would not significantly change the resulting percentage standards."[8] EPA further added that: "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."[9]

EPA's data indicates small refineries, which received hardship relief, generated or purchased as many as: 790 million Renewable Identification Numbers (RINs) in 2016; 1.82 billion RINs in 2017; and 1.43 billion RINs in 2018.[10] Moreover, if EPA reallocates the obligations of exempted small refineries to other refineries, these volumes will no longer be reflected as surplus RINs in the market. In other words, refineries, which do not receive or are ineligible for hardship relief, will no longer be able to meet their own blending obligations through the availability of additional RINs in the market. Instead, these refineries will have higher total blending obligations and will have to meet those obligations by paying a higher price for individual RINs.

You recently testified that "[e]thanol demand has not been impacted by the small refinery program and in fact we've seen an uptick in ethanol over the last two years."[11] You have also testified that, "[i]f we were to try to do [reallocation], that would probably send more small refiners into financial hardship based upon the number of gallons would then be spread out over fewer refineries."[12] I couldn't agree more. However, this begs the question: What is the purpose of EPA's proposal and why does EPA plan to grant partial relief for the 2020 small refinery petitions? If reallocation is likely to send more small refineries into financial hardship, EPA has

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[6] 42 U.S.C. 7545(o)(3)(C)(ii).
[7] 75 Fed. Reg. 14670, 14717 (Mar. 26, 2010).
[8] Ibid.
[9] Ibid.
[10] EPA data, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.
[11] *Science and Technology at the Environmental Protection Agency:* Hearing Before H. Comm. on Science, Space, and Technology (Sept. 19, 2019) (statement of Andrew Wheeler, Admin. of the Environmental Protection Agency). *See* Interview with Sonny Perdue, Secretary of Agriculture (Nov. 18, 2019) ("Most of the macroeconomic issues we've had with ethanol this year have been because of lower exports – not small refinery waivers. I'll say that. I've got the facts to prove it."), http://energy.agwired.com/2019/11/18/sec-perdue-comments-on-ethanol-and-sres/.
[12] *Supra* note 3.

no reasoned basis for reducing relief to small refineries, let alone prejudging their petitions. In the end, I can't help but view EPA's recent proposal not only as illegal and arbitrary, but incoherent and without any legitimate purpose. The agency should scrap it in its entirety.

Sincerely,

John Barrasso

John Barrasso, M.D.
Chairman