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November 29, 2019

EPA-HQ-OAR-2019-0136
U.S. Environmental Protection Agency
Office of Air and Radiation
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted via: www.regulations.gov

Re: **EPA-HQ-OAR-2019-0136**

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. 84 FR 57677 (October 28, 2019)

The American Petroleum Institute (API) is the national trade association that represents all aspects of America's oil and natural gas industry. Our more than 620 corporate members represent all segments of the industry. These companies are producers, refiners, suppliers, marketers, pipeline operators and marine transporters as well as service and supply companies that support all segments of the industry, and they provide most of our nation's energy. As refiners and importers of transportation fuels, our member companies are obligated parties under the Renewable Fuel Standard (RFS) program. The RFS mandate is unworkable, and API continues to call on Congress to repeal or significantly reform the program.

The burden of the Renewable Fuel Standard (RFS) program impacts the entire refining sector with costs that are ultimately borne by consumers. API recommends that EPA establish RFS standards that are consistent with consumption capabilities of the fuels marketplace. When the RFS volume standards exceed the limits of the fuel distribution system and the vehicle fleet, significant market disruptions could occur, and the overall cost of the program increases. The economic impact of high-volume standards is potentially felt across the marketplace.

API's primary concern with the RFS is the ethanol blendwall. Nearly seventy percent of light-duty vehicles on the road today were not designed and warranted for ethanol blends above 10%, and there remain serious infrastructure compatibility issues with blends above 10%. The increases in gasoline demand that



were projected at the inception of the RFS have not materialized, nor has the commercialization of cellulosic biofuels progressed at the rate Congress envisioned in 2007. The statutory volumes set in the Energy Independence and Security Act of 2007 are unattainable and maintaining these mandated levels could result in fuel supply disruptions that harm our economy. Congress provided EPA with waiver authority that should be used to reduce the RFS volumes and avoid the potential negative impacts on America's fuel supply and prevent harm to American consumers.

The supplemental notice proposes several changes to the July 29, 2019 Notice of Proposed Rulemaking (NPRM) which will create problems with the administration of the RFS in 2020. The supplemental notice was issued by EPA in response to certain comments on the July NPRM that centered on the claim that Small Refinery Exemptions (SREs) were causing a reduction in the amount of ethanol blending in the US. The supplemental notice proposes a mechanism to "reallocate" the exempted volume granted for previous compliance years by increasing the percentage standards in 2020. API opposes both EPA's policy on granting a large number of SREs and also the proposal to implement a reallocation mechanism. EPA should not include the proposed changes from the supplemental notice. Instead, EPA should finalize the 2020 RFS Volume Standards based on historical procedures and the July NPRM. An appendix to these comments provides additional clarity regarding API's legal concerns with the supplemental notice.

API opposes EPA's policy regarding Small Refinery Exemptions.

In recent years, EPA has granted Small Refinery Exemptions (SREs) liberally, creating significant turmoil in the RFS program. The exemptions have created an unlevel playing field in the marketplace. The ongoing issues with the RFS program are structural in nature, apply to all regulated parties, and need to be addressed on a nationwide basis. While we recognize EPA's statutory authority to grant small refinery exemptions, API recommends that EPA discontinue the practice of granting large numbers of SREs each year.

At the start of the RFS2 program, the statute provided a blanket exemption for all small refineries through the 2010 compliance year, which was subsequently extended for certain refineries for another two years based on a study by the Department of Energy. After this initial period, the statute allows EPA to extend to an individual small refinery an exemption from the annual RFS volume standards if compliance with RFS obligations imposes a "disproportionate economic hardship". The disproportionate economic hardship provision was intended to address unique circumstances to extend the waivers for refineries that could justify such an extension of the exemption based on a showing of undue economic harm arising from compliance with the RFS, rather than to provide a blanket exemption for a large number of small refineries.

The size of a refinery alone does not determine operational competitiveness, and small refinery exemptions can distort the marketplace among competing refiners. Several studies^{1,2,3} have concluded that RIN costs are largely recovered by refineries, both large and small, through the increased value of

¹https://energypolicy.columbia.edu/sites/default/files/Renewable%20Fuel%20Standard_A%20Path%20Forward_April%202015.pdf

² <https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0111-0062>

³ <https://www.govinfo.gov/content/pkg/FR-2019-03-21/pdf/2019-05030.pdf>



gasoline and diesel fuel they supply to the market. EPA's own analysis in denying petitions to change the RFS point of obligation comes to the same conclusion.⁴ We urge EPA to maintain a level playing field when considering small refinery exemption petitions. Our belief, which is consistent with EPA's own analysis in point of obligation debate, is that it is not possible to demonstrate that the economic harms caused by the RFS are disproportionate to specific entities.

In summary, the EPA lacks justification to continue granting large numbers of SREs and should discontinue this practice.

API opposes EPA's proposal to reallocate SRE volumes in the 2020 RFS Program.

The reallocation of exempted small refinery volumes to other refiners is an additional market distortion that exacerbates this unlevel playing field and punishes non-exempt refiners that are already facing challenging RFS requirements. In addition, reallocation puts unnecessary pressure on the blendwall and increases the overall societal cost of the program.

The Supplemental Proposal would radically change EPA's approach to setting annual Renewable Volume Obligations ("RVOs") by reallocating the obligations of exempt small refineries to other obligated parties. This drastic shift in course would be both contrary to the statute and arbitrary and capricious for several reasons, as summarized below and explained in the enclosed appendix.

First, the Clean Air Act does not permit reallocation. The Act contains several provisions regarding small refinery exemptions, and authorizes only a single pertinent adjustment to the annual RVO: a *reduction* "to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt."⁵ These provisions demonstrate that Congress knew how to grant EPA authority to alter the RVOs, and how to allow for changes to the RFS program in light of small refinery exemptions. The absence of express authorization to reallocate volumes as a result of those exemptions thus indicates that EPA lacks such authority.

Second, the Supplemental Proposal arbitrarily departs from EPA's longstanding position on this issue. EPA's explanation for the proposed change is threadbare and factually inaccurate. For example, EPA argues that, for the first time, small refinery exempt volumes constitute a significant portion of the transportation fuel supply. But in 2011 and 2012, EPA extended small refinery exemptions to 24 small refineries, a number not exceeded until 2017, yet repeatedly confirmed that reallocation was not appropriate. EPA does not address that history in its proposal, nor does it provide any other adequate rationale for a change in course.

Third, reallocating waived volumes would be unlawful because the Supplemental Proposal's approach is based on an unstable and unpredictable EPA policy regarding small refinery exemptions. EPA proposes to reallocate volumes in *future* years based on how it believes its *current* small refinery exemption policy would have applied in *past* years. Perhaps such an approach could be defensible if EPA's small refinery exemption policy remained consistent, but EPA has repeatedly shifted course in recent

⁴ Assessment and Standards Division Office of Transportation and Air Quality U.S. Environmental Protection Agency, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation. EPA-420-R-17-008. November 2017.

⁵ 42 U.S.C. § 7545(o)(3)(B)(ii)(II), (3)(C).

years, such that any attempt to project small refinery exempt volumes in future is speculative and unreliable.

Fourth, reallocation would violate basic principles of due process, as well as the Clean Air Act and the Administrative Procedure Act, because EPA issues its small refinery exemption decisions without providing third parties any notice or opportunity to participate. As the D.C. Circuit recently put it, EPA’s small refinery exemptions “paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency’s actions without a viable avenue for judicial review.”⁶

Fifth, reallocation would be arbitrary and capricious because it would result in exceedance of the “blendwall,” by imposing a total renewable fuel obligation of 11.46%, marking the first time that the 11% threshold would be exceeded. Yet EPA does not even *mention* the blendwall in its supplemental proposal, much less explain why this increase would be practicable.

Sixth, EPA has failed to consider the relevant statutory factors for biomass-based diesel and so may not reallocate any biomass-based diesel volumes.

Seventh, EPA’s Supplemental Proposal demonstrates that the underlying legal flaw is EPA’s drastic and unlawful expansion of small refinery exemptions. That increase is contrary to the Act, which authorizes only a limited and temporary *extension* of a pre-existing exemption, not a reinstatement of an exemption.⁷ EPA’s recent expansion is also unlawful because EPA has repeatedly found that obligated parties, including small refineries, generally are able to pass through RIN costs to consumers. As a result, the RFS program should have *no* economic impact on most small refineries, much less inflict a “disproportionate economic *hardship*” on over 30 small refineries. In the handful of recent small refinery exemption decisions EPA has made public, the agency failed even to acknowledge that RIN costs generally are passed through. Accordingly, rather than reallocate small-refinery exempt volumes, EPA should limit its small refinery exemptions to those actually authorized by the statute and supported by the administrative record.

SREs are not causing ethanol demand destruction – reallocation is not warranted.

Biofuel advocates have incorrectly asserted that small refinery exemptions have significantly harmed ethanol producers and led to demand destruction for ethanol in the U.S. However, data from the Energy Information Administration (EIA) show a different story in Figure 1 (next page). According to the EIA October 2019 Monthly Energy Review (which contains data through July 2019), domestic ethanol *consumption* has not decreased, but rather increased in 2019.⁸ Ethanol *production* data, which includes exported ethanol, is down in 2019, commensurate with the reduction in net exports of ethanol.⁹

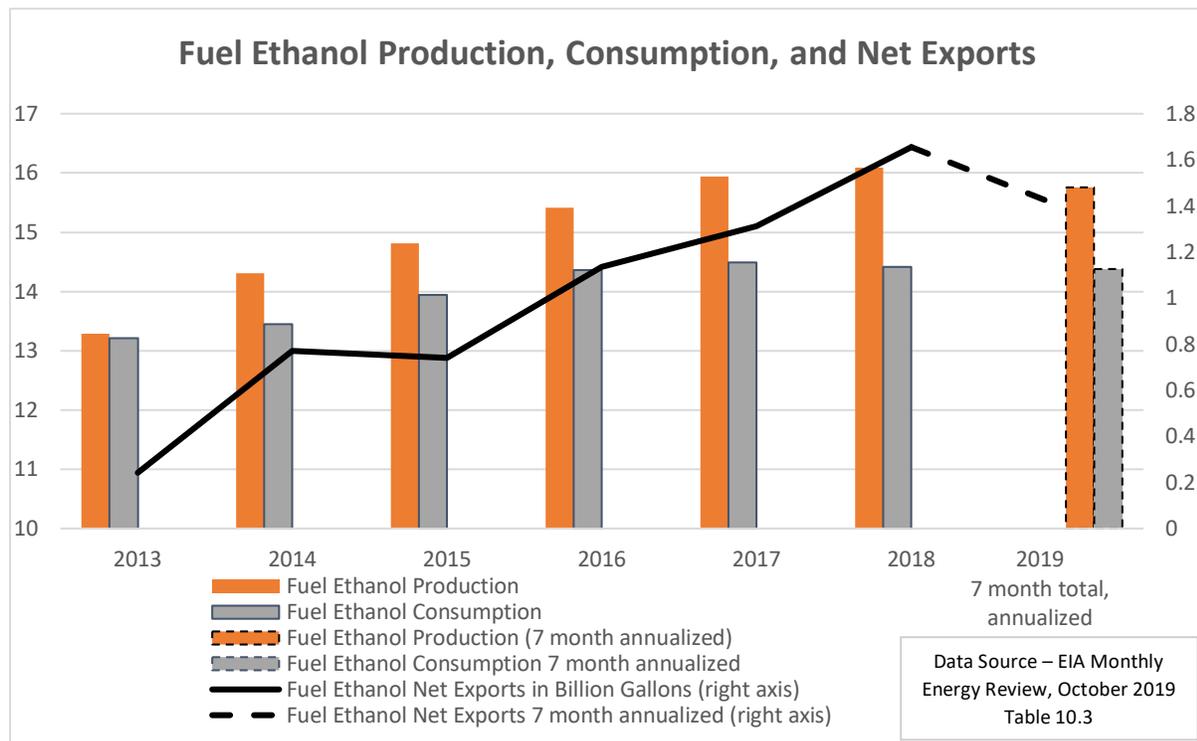
⁶ *Advanced Biofuels Ass’n v. EPA*, No. 18-1115, Slip. Op. at 5 (D.C. Cir. Nov. 12, 2019).

⁷ 42 U.S.C. § 7545(o)(9)(B).

⁸ [Monthly Energy Review, EIA, October 2019 Table 10.3](#)

⁹ [Ibid.](#)

Figure 1:



Testimony and comments from ethanol producers point to challenging market conditions that have impacted their operations. However, small refinery exemptions are not the cause of these challenging market conditions affecting ethanol production, which are more significantly impacted by broader trade policies and global market conditions for ethanol. In fact, U.S. Agriculture Secretary Sonny Purdue recently stated: “most of the macroeconomic issues we’ve had with ethanol this year have been because of lower exports, not small refinery waivers and [...] I’ve got the facts to prove it.”¹⁰

Reallocation will reduce the balance of carryover RINs.

In comments to the 2020 proposal, API noted that setting aggressive biofuel standards runs counter to EPA’s stated position that carryover RINs should not be relied upon for meeting the 2020 compliance obligation. Reallocating the volume of renewable fuels from small refinery exemptions also runs counter to this position, and we reiterate the need for adequate levels of carryover RINs to provide flexibility for obligated parties. Carryover RINs provide compliance flexibility for obligated parties and facilitate market functionality. The balance of carryover RINs will likely decline with the reallocation of the obligated volumes from exempted small refineries and the associated increase in demand for RINs for compliance purposes. We urge EPA to ensure that adequate carryover RINs are available to provide a program buffer.

Reallocation will cause unintended consequences in the RIN market.

Throughout the history of the RFS, and even more so since arrival at the ethanol blendwall, the existence of a properly functioning RIN market has been the subject of much scrutiny by the EPA. The supplemental

¹⁰ Boyer, Lorrie. “Interview with Sonny Purdue, U.S. Secretary of Agriculture.” *Sec. Purdue Comments on Ethanol and SREs*, Agwired, 18 Nov. 2019.



notice seeks to redefine two terms within the formula used to determine applicable percentage standards for each renewable fuel category, by projecting a volume of gasoline and diesel expected to be exempted from the RFS. As proposed by EPA, projecting exempted volumes reduces the denominator in the percentage standard formula and increases the percentage standard when the other factors remain equal.

Multiplying this higher percentage standard by the gasoline and transportation diesel production volumes results in higher RVOs, and increased RIN requirements for compliance. Thus, this proposed change has direct implications on RINs and the availability of RIN carryover across compliance years. EPA should look at a range of scenarios and the resultant impact on the RIN bank. EPA has the duty to ensure the RIN market is functioning properly and, as part of that responsibility, should provide this scenario analysis to the public in conjunction with release of a final rule. A robust RIN bank is essential to provide program flexibility and ensure compliance.

The changes sought in the supplemental notice increase uncertainty because the aggregate number of RINs needed for compliance will now be subjected to the actual volume of SREs and the timing and announcement of such SREs, in addition to currently existing uncertainties. In a scenario where physical blending is insufficient to meet the applicable percentage standards, or if obligated parties are not granted future exemptions, it could put increased reliance on the bank of carryover RINs to demonstrate compliance, causing a rapid depletion of RINs.

The DOE hardship evaluation is based on outdated metrics.

The statute directs EPA to consult with the Secretary of Energy when evaluating petitions for SREs. During the early years of the RFS, the Department of Energy (DOE) developed a scoring template to evaluate SRE petitions.^{11,12} At the time, much of the gasoline in the country did not contain 10% ethanol, and there were logistical constraints that prevented more ethanol and biodiesel from being blended. The current environment is substantially different than it was in 2010, with over 97% of the gasoline in the country being E10. Most of the items considered in the template are no longer applicable, and as a result this template is now obsolete.

Ethanol blending in gasoline at the 10% level (E10) is ubiquitous across the country. The current blending volumes of biodiesel and renewable diesel are many times greater than during the early years of the program. Significant infrastructure investments have been made for the distribution and blending of renewable fuels. DOE should revise the scoring template to accurately reflect the economic circumstances in the current market and to limit the analysis to the economic impacts of compliance with the RFS, as opposed to factors that affect a refinery's competitiveness that have nothing to do with RFS compliance. The DOE and EPA should completely revamp the template to reflect the current operating environment and to focus exclusively on harm caused by the RFS. These changes would likely result in a drastic reduction of the number of small refinery exemptions.

¹¹ US Department of Energy, "Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship," March 2011

¹² US Department of Energy, "Addendum to the Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship," May 2014



Specific terms that are no longer relevant include:

Element	Justification
Market acceptance of renewables (E10, E85, Biodiesel)	Over 97% of the gasoline in the U.S. is blended with ethanol. ASTM addresses biodiesel blending to B20 level.
Subject to exceptional state regulations	State fuel regulations are either neutral towards biofuels or directly promote their use. There are no state regulations which impair a small refinery's ability to generate RINS.
Renewable fuel blending	E10 blending is widespread at terminals. The market has demonstrated ability to increase blending capability commensurate with increases in biodiesel availability.
RINs a net revenue or cost	Studies by the EPA and third-party consultants have shown that the RIN costs are included in the wholesale price of product and are passed on to the consumer.

In addition, we have concerns with two of the economic criteria that are used. First, the template evaluates other lines of business that could be used to support the refinery. While this metric may be of value in the short term, in the long-term companies will not support an underperforming asset because of other assets in the portfolio. This term should not be included in the analysis. Second, the template compares the margin of the facility versus the average refinery margin of the country. This can skew the results. The margins across PADDs can vary widely. A more representative measure would be to compare margins within PADDs or other geographic areas.

A revised template should be more closely linked to the intent of the economic hardship provision. This provision was intended to address unique circumstances to extend the waivers for refineries that could justify such an exemption based on a showing of undue economic hardship arising only from compliance with the RFS, not from unrelated business factors.

Specific comments on EPA's proposal for the 2020 RFS Annual Rulemaking.

As stated above, API opposes EPA's intent to reallocate the SRE volumes in the 2020 RFS Rulemaking or any future years. However, if EPA proceeds to implement a mechanism for reallocation, obligated parties will be directly and negatively impacted. Therefore, we provide the following suggestions to minimize the negative impacts of reallocation. These suggestions should not be interpreted as support for the supplemental notice or imply any change in our opposition to this action. Specifically, we provide the following comments:

- If EPA is going to rely on DOE recommendations for reallocation, then EPA must also follow DOE recommendations whenever granting any SRE petition.

For the purposes of setting the 2020 RVO, EPA proposes to base its projected volume of exempt gasoline and diesel on the recommendations it receives from DOE. However, EPA has not committed to only grant exemptions consistent with DOE recommendations. To be consistent, EPA must at a minimum commit to only approve 2019 SRE applications (which will be reviewed in 2020) consistent with DOE recommendations, including the issuance of partial waivers. If a full exemption is granted when only a partial exemption is recommended, the EPA is giving the refinery a windfall that is even larger than the windfall recommended by DOE. That creates an unlevel playing field and grants the exempt refinery an unfair and unwarranted competitive advantage.

- If EPA intends to project exempted volumes from future SRE decisions, then EPA should base the projection on DOE recommended SRE volumes for 2020.

To minimize the negative market consequences of reallocation, it is more appropriate for EPA to use DOE estimates, rather than actual exemptions from prior years, in projecting the exempted volume in 2020. EPA requested comment on using a 3-year range, from either the 2016-2018 or 2015-2017 time periods, to calculate this average. It is impossible to predict which of these time periods will more accurately match actual SREs in 2020. EPA should use a data set that minimizes the negative consequences from its reallocation policy.

- If EPA revises the 80.1405 definitions for GE_i and DE_i, then EPA should maintain the definitions as proposed in the supplemental notice.

EPA's proposal to redefine the 80.1405 definitions for GE_i and DE_i will allow EPA to maintain flexibility for future changes in potential reallocation policies.

EPA should not engage in rulemaking that will weaken consumer protections regarding E15 use.

In its October 4th announcement, EPA has also indicated its intention to conduct rulemaking to “streamline labeling and remove other barriers to the sale of E15.”¹³ API has concerns that granting a 1.0 psi RVP waiver for E15 has increased the risk of consumer misfueling for the numerous vehicles on the road that are not manufacturer approved to use E15, and the vehicles and nonroad equipment prohibited from using E15. A recent OPEI survey supports these misfuelling concerns, particularly as retailers use terms like “Octane 88” to market E15 fuel.¹⁴

Consumers should be made aware that E15 is not compatible with many vehicles and equipment. E15 pump labels should direct consumers to the manufacturer of their vehicle/engine/equipment for

¹³ <https://www.epa.gov/newsreleases/president-trump-delivers-key-promise-american-farmers-epa-usda-announce-agreement>

¹⁴ Outdoor Power Equipment Institute (OPEI), *Confusion At the Gas Pump Could Be Costing Americans Dearly When it Comes to Outdoor Power Equipment* (Mar. 4, 2019), <https://www.opei.org/news-updates/confusion-at-the-gas-pump-could-be-costing-americans-dearly-when-it-comes-to-outdoor-power-equipment/>



appropriate fuel choices. It is critical that EPA at least maintain the stringency of the current minimal labeling requirements. It is also critical that EPA should enforce the requirements in both the Misfueling Mitigation Rule (MMR) and the rule extending the 1-psi vapor pressure waiver to E15. The labeling requirements provided in the MMR give the consumer important information about the ethanol content and appropriate use of the product. API supports more robust labeling to protect consumers, as we noted in our comments to that rulemaking proposal in 2011.¹⁵

The recommendation to maintain the current labeling requirements is emphasized by the potential growth in E15 to new retail markets enabled by the inappropriate extension of the 1 psi vapor pressure waiver beyond E10. The retail blending of E15 presents several compliance concerns, including: use of uncertified components; variable ethanol content contributing to an inconsistent product offering; and incorrect utilization of the deemed to comply provisions in 40 CFR 80.28(g), which should receive more scrutiny from the EPA.

Choosing to “streamline labeling and remove other barriers to the sale of E15” and failing to enforce current rules would have negative consequences for consumers. EPA should not conduct a separate rulemaking to revise E15 pump labels or make other changes that would result in providing less information to consumers about E15 or that would risk causing vehicle damage due to misfueling with E15.

Conclusion.

API opposes EPA policy that grants a large number of small refinery exemptions, and we strongly oppose the proposal to reallocate exempted volumes as described in the supplemental notice. EPA should not include the proposed changes from the supplemental notice when finalizing the 2020 RFS volume standards. Instead, EPA should finalize the 2020 RFS Rule based on their historical procedures and the July 29, 2019 NPRM.

The supplemental notice is a clear demonstration of a failed process and a broken program. EPA is following a flawed directive to “ensure that more than 15 billion gallons of conventional ethanol be blended into the nation’s fuel supply beginning in 2020.”¹⁶ The RFS program does not have a mechanism to accomplish this goal, and any additional pressure on the blendwall is more likely to result in additional biodiesel use or a drawdown of carryover RINs.

Regulatory certainty is important to our industry and to the effective governance of this program. The procedural failures that have plagued the RFS since its inception have only been made worse by the supplemental notice. Acknowledging that it is not possible for EPA to consider public comments received on November 29 and publish a Final Rule by November 30, 2019, we urge EPA to expeditiously finalize this rulemaking before the compliance period begins on January 1, 2020.

It is ultimately up to Congress to repeal or reform the RFS. Meanwhile, API seeks regulatory solutions that: are based on sound science; are achievable for regulated parties; are cost effective for the consumer; and, maintain a level playing field in the market. EPA should cease granting large numbers of SREs, and only

¹⁵ EPA-HQ-OAR-2010-0448-0081

¹⁶ <https://www.usda.gov/media/press-releases/2019/10/04/president-trump-delivers-key-promise-american-farmers-epa-usda>



consider an extension request where the facility can make a showing that it is being disproportionately impacted by compliance with the RFS. Furthermore, we urge EPA refrain from reallocating volumes of renewable fuel from small refinery exemptions and to use its waiver authority to establish annual volumes consistent with the blendwall. API and our member companies appreciate your attention to these issues. If you have any questions or concerns, please contact me at (202) 682-8167.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank J. Macchiarola", written over a light grey rectangular background.

Frank J. Macchiarola
Senior Vice President
Policy, Economics and Regulatory Affairs

Encl: API legal concerns with the supplemental notice