RENEWABLE
FUELS
ASSOCIATION

March 19, 2013

Robert Perciasepe, Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Jon Leibowitz, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Steven Chu, Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington DC 20585

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Dear Acting Administrator Perciasepe, Chairman Leibowitz, Secretary Chu, and Secretary Vilsack:

Over the years, the United States has taken steps to wean this country from its addiction to foreign oil, increasing our energy independence. As part of this effort, the federal government has consistently sought to remove regulatory and market barriers that were preventing the introduction of safe and clean renewable fuels, including E85, biodiesel, and, more recently, E15. These efforts date back at least to the Gasohol Competition Act of 1980 and the Environmental Protection Agency's regulatory undertakings to bring E10 to the market. More recently, Congress enacted protections for marketers of renewable fuels through amendments to the Petroleum Marketing Practices Act that were included in the Energy Independence and Security Act of 2007 (EISA), and EPA cleared the way to bring E15 to the market. In addition to lifting regulatory and market barriers, the federal government has mandated the production and, ultimately, the consumption of renewable fuels. Specifically, the 2005 Energy Policy Act's Renewable Fuel Standard (RFS) mandated minimum amounts of renewable fuel to be sold in the United States. Shortly thereafter, Congress dramatically increased RFS volume requirements through the EISA—requirements that will obligate the oil companies to ramp up the delivery of renewable fuels into the American market.

However laudable these and other efforts, the oil industry is blocking the delivery of alternative fuels in a desperate attempt to maintain its monopoly over the fueling of America's cars, trucks, and light-duty vehicles. Just as troubling, Big Oil is actively undermining the delivery of renewable fuel even while simultaneously claiming that it is impossible to meet purposefully increasing RFS mandates. As a result, unless executive action is taken, the federal government will have lifted major regulatory barriers to the introduction of renewable fuels, only to allow the oil industry to wield its market power to effectively block the delivery of these fuels to the American public.

The story of a Lawrence, Kansas, fuel station illustrates just how far Big Oil will go to obstruct congressional purposes in enacting the RFS, limit the availability of renewable fuels in the American marketplace, and, not coincidentally, bolster their campaign to repeal the RFS altogether. For many years, a ConocoPhillips franchisee, Zarco 66 Inc. ("Zarco 66"), offered E85 at its fueling station. One of the station's fuel tanks contained "regular" gasoline and a second tank contained straight ethanol—a tank that might have otherwise been reserved for "premium" gasoline at a more antiquated station. Zarco 66 offered customers E85 by blending the appropriate mixture of gasoline and ethanol straight at the pump—using "blender" pumps that it obtained through a grant administered by the Department of Energy. Because only certain vehicles can use E85, the oil industry likely viewed this alternative fuel as a gimmick—one that posed no real threat to the industry's monopoly. But shortly after Zarco 66 became the first fueling station in the nation to offer E15—a fuel that can be used in any light-duty vehicle manufactured over the last decade—the oil industry suddenly changed its tune. ConocoPhillips quickly threatened to terminate Zarco 66's franchise agreement and charge Zarco 66 hundreds of thousands of dollars in penalties unless Zarco 66 started offering "premium" gasoline—gasoline that would replace the ethanol housed in one of Zarco 66's fueling tanks, and a gasoline that is likely to result in far fewer sales than the ethanol blends that would be available if Zarco 66 maintained the current ethanol contents.

For franchisees like Zarco 66, the message that the oil industry is delivering is loud and clear: Stop selling renewable fuels, or face the consequences. Not surprisingly, in addition to directly undermining the policies embodied in both the Gasohol Competition Act of 1980 and the Petroleum Marketing Practices Act, Big Oil's conduct here is highly anticompetitive.

As an initial matter, the oil industry is enforcing a classic "tying" arrangement in violation of Section 1 of the Sherman Act. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992). As the Supreme Court has long recognized: "Such an arrangement violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Id.* at 462 (quoting *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U. S. 495, 503 (1969)).

Here, the oil industry is forcing fuel stations to purchase and carry a product that they otherwise do not wish to carry (premium gasoline) as a condition for purchasing and carrying the tying product (regular gasoline). Because franchisees are locked into franchise agreements (and such a lock-in effect is magnified when, as in the case of Zarco 66, the oil franchisor changes the terms of the relationship midstream), an oil franchisor holds appreciable economic power over the franchisee, which it is using to force franchisees to purchase premium fuel that they might not otherwise wish to carry. Moreover, because premium gasoline requires a separate tank that would otherwise hold the ethanol necessary to offer gasoline-ethanol blends (and the oil industry is well-aware that most fuel stations have only two tanks devoted to gasoline), the oil industry is effectively eliminating ethanol competition by tying the sale of premium to regular gasoline.

In addition, the oil industry's conduct is contrary to the Gasohol Competition Act of 1980. That legislation makes it unlawful to "unreasonably discriminate[] against or unreasonably limit[] the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability." 15 U.S.C. § 26a(a)(2). By enforcing a premium requirement to the exclusion of ethanol blends, the oil industry is unreasonably limiting the sale of E15, which both qualifies as gasohol in its own right and is also "synthetic motor fuel of equivalent usability" to E10. Indeed, in granting E15 a waiver under Section

211(f)(4) of the Clean Air Act, the EPA effectively found that E15 was of "equivalent usability" to straight gasoline for use in model year 2001 and newer vehicles, extending the waiver that it had previously granted to E10 roughly three decades' prior. As a result, the oil industry is unreasonably limiting the sale of E15 by enforcing its premium requirements on unwilling franchisees.

Similarly, the oil industry's actions violate the policies that underlie the Petroleum Marketing Practices Act. By forcing franchisees to purchase premium gasoline, franchisors are acting to preclude franchisees from "converting an existing tank or pump on the marketing premises of the franchisee for renewable fuel" in violation of that legislation. *See* 15 U.S.C. § 2807(b)(1)(B). What is more, the Act was intended to allow franchisees to sell "a renewable fuel in lieu of 1 . . . grade of gasoline." *Id.* § 2807(c). As a result, the oil industry is directly subverting this legislation by making it impossible for franchisees to offer gasoline-ethanol blends higher than E10, such as E85 and biodiesel.

Put simply, the oil industry's efforts to suppress renewable fuels belies the industry's claims that it cannot meet the RFS that Congress included in the Energy Policy Act of 2005 and expanded in the EISA. As amended, the RFS requires qualifying refiners and importers of gasoline or diesel to introduce into American commerce a specified, annual increasing volume of renewable fuel. 42 U.S.C. § 7545(o)(2)(A)(i). The oil industry has claimed that it cannot meet these standards—in part, because few stations are offering E15 or greater gasoline. Yet, as made plain by the events related above surrounding the efforts of Zarco 66 to market E15 and the obstacles that ConocoPhillips has placed in its path, it is the industry's own behavior that is limiting E15's availability. Like a child who breaks all of his pencils and then tells his parents he can't do his homework, the oil industry should not be permitted to claim the RFS is not achievable when it is deliberately taking steps to stifle the introduction of E15.

Ironically, the oil industry is limiting the advancement of renewable fuels by using a premium-fuel requirement to achieve this highly anticompetitive outcome. Only a small fraction of consumers choose to pay, on average, 30 cents-a-gallon extra for premium, and few, if any, cars actually require such gasoline. Indeed, study after study confirms that premium fuel provides no appreciable benefit to the vast majority of vehicles on America's roadways. And yet, the oil industry is demanding that fuel stations offer a fuel that few consumers actually want or need, while blocking the introduction of cheaper, cleaner, and renewable alternatives.

Americans want choice at the pump. For all of these reasons, we respectfully request that each of you direct your agencies to investigate and put an end to the oil industry's highly discriminatory and unlawful conduct—conduct that is impeding the delivery of renewable fuels to the American marketplace. Otherwise, Zarco 66 will simply represent the first casualty in the oil industry's war against the marketing and delivery of cheaper, more sustainable renewable fuels.

Sincerely,

Bob Dinneen

Bob Dinneen
President & CEO