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January 28, 2016

The Hon. Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
(*via email and certified mail*)

Re: Petition for Reconsideration of 40 C.F.R. § 80.1406
EPA–HQ–OAR–2005–0161

Dear Administrator McCarthy:

I am counsel to Monroe Energy, LLC. Attached please find a petition for reconsideration, pursuant to 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), concerning 40 C.F.R. Section 80.1406. That regulation, which was originally promulgated in 2007, *see* EPA, "Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program," 72 Fed. Reg. 23,900 (May 1, 2007) ("2007 Rule"), and re-promulgated in 2010, *see* EPA, "Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program," 75 Fed. Reg. 14,670 (March 26, 2010) ("2010 Rule"), makes refiners and importers of gasoline or diesel fuel "obligated parties" for the purpose of compliance with the Renewable Fuel Standard ("RFS"). As explained in the attached petition, grounds arising within the previous 60 days have rendered that regulation arbitrary and capricious.

We look forward to EPA's timely response to our petition. Please be in touch if you have any questions.

Sincerely,

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cc: EPA Docket Center
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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

MONROE ENERGY LLC, Petitioner.	)	EPA Docket #: EPA–HQ–OAR–2005–0161

PETITION FOR RECONSIDERATION

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Dated: January 28, 2016

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INTRODUCTION

Monroe Energy LLC ("Monroe"), a refiner that is an obligated party under 40 C.F.R. §e80.1406, respectfully submits this petition, pursuant to 42 U.S.C. § 7607(d)(7)(B), 5 U.S.C.e §e553(e), and *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975),e concerning Section 80.1406. That regulation, which was originally promulgated in 2007, *see* EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900 (May 1, 2007) ("2007 Rule"), and re-promulgated in 2010, *see* EPA, Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010) ("2010 Rule"), makes refiners and importers of gasoline or diesel fuel "obligated parties" for the purpose of compliance with the Renewable Fuel Standard ("RFS"). These "obligated parties" are required to demonstrate that the requisite amount of renewable fuel has been blended into transportation fuel, by retiring credits known as Renewable Identification Numbers ("RINs"), each of which represents one gallon of ethanol or ethanol-equivalent renewable fuel. Because many refiners and importers do not blend fuel themselves, they do not directly decide whether or how much renewable fuel to blend. Instead, they must purchase RINs separated from renewable fuel by blenders, who respond to the economic incentives created by the RFS program.

On December 14, 2015, EPA released its most recent annual rulemaking for the RFS Program, *see* EPA, 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) ("2014-16 Rule"), as well as certain analyses on which EPA relied in formulating the 2014-16 Rule.[1] As a result of

[1] *See, e.g.*, Dallas Burkholder, An Assessment of the Impact of RIN Prices on the Retail Price of E85, Office of Transportation and Air Quality, EPA, EPA–HQ–OAR–2015–0111-3631 (Nov. 2015) ("Burkholder Paper"). Although the Burkholder Paper is dated November 2015, it was not

the findings made by EPA for the first time in the 2014-16 Rule, as well as the EPA analyses released to the public for the first time in conjunction with the publication of the 2014-16 Rule, EPA's regulation identifying the "obligated parties" as refiners and importers, 40 C.F.R. § 80.1406, is now arbitrary and capricious.e

In promulgating Section 80.1406, EPA drew upon the authority given to it by Congress, which instructed EPA that each year's renewable fuel obligation "shall be applicable to refineries, blenders, and importers, *as appropriate*." 42 U.S.C. § 7545(o)(3)(B)(ii)(I) (emphasis added). Congress made clear that an "appropriate" choice among these entities was one that would allow EPA to "*ensure* that transportation fuel sold or introduced into commerce in the United States . . . on an annual average basis, contains at least the applicable volume" of biofuels Congress set for each calendar year. *Id.* § 7545(o)(2)(A)(i) (emphasis added). Thus, Congress instructed that, "[r]egardless of the date of promulgation," EPA regulations must contain provisions "applicable to refineries, blenders, distributors, and importers, *as appropriate, to ensure* that the requirements of this paragraph are met." *Id.* § 7545(o)(2)(A)(iii) (emphasis added).

EPA's landmark 2014-16 Rule finalized a finding that EPA had never before made: EPA's regulation of refiners and importers as obligated parties could no longer "ensure" that transportation fuel, on an annual average basis, would contain the applicable biofuels volumes set by Congress. Therefore, for the first time in the program's history, EPA determined that it must exercise its waiver authority to reduce the total annual requirements below the volumes set by Congress. *See, e.g.*, 80 Fed. Reg. at 77,422-23.[2]

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publicly available until uploaded to the docket contemporaneous with the publication of the 2014-16 Rule on December 14, 2015.

[2] Monroe strongly supports EPA's use of its waiver authority.

Additionally, in reaching that determination, EPA for the first time reversed its earlier position that it could meaningfully impact the annual supply of biofuels in transportation fuel in the near term by increasing the price that refiners and importers pay for RINs. EPA previously had theorized that higher RIN prices could significantly impact renewable fuel usage by effectively subsidizing the retail price of high-ethanol gasoline blends such as E85. Under this theory, the value of the RIN is passed through by blenders and retailers to retail customers in the form of reduced prices for E85. However, in the 2014-16 Rule, EPA found for the first time that marketplace realities did not reflect its theoretical model, stating that "the RIN is currently an inefficient mechanism for reducing the price for higher level ethanol blends at retail, and therefore unlikely to be able to significantly impact the supply of ethanol in the United States in 2016." 80 Fed. Reg. at 77,457. It thus concluded that the RFS program as currently structured "likely cannot substantially increase the available supply of renewable transportation fuels to consumers in the United States to the volumes envisioned by Congress in the short term." *Id.* at 77,460.

EPA based these conclusions on a research paper, the findings of which EPA had never previously endorsed and which was not released to the public prior to the publication of the final rule. *See* 80 Fed. Reg. at 77,459 n.84 (citing the Burkholder Paper, *supra* note 1). That paper found that only a portion of the RIN value was being passed through to retail customers in the form of subsidized pricing for E85. The remainder was taken as profit by either blenders or retailers.

In light of these new findings, EPA can no longer regard it as "appropriate" under 42 U.S.C. § 7545(o)(2)(A)-(B) to place the compliance obligation on refiners and importers. If EPA were to place the compliance obligation on blenders, these newly-obligated parties would have a

strong incentive and much greater ability than refiners or importers to ensure that the value of RINs is fully passed through to consumers, thereby bringing about greater usage of renewable fuel and helping EPA move closer to ensuring that Congress's statutory volume requirements are satisfied. At the very least, EPA has a duty to justify continuing its present policy in light of these new circumstances, and should take and respond to public comment on the wisdom of doing so. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and capriciously when it fails to "articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)); *id.* at 42-43 ("Normally, an agency rule would be arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem.").

The arbitrariness and capriciousness of maintaining the obligation on refiners and importers in light of these changed circumstances is further underscored by the fact that, when EPA re-promulgated Section 80.1406 in 2010, it acknowledged that its original rationale for imposing the compliance obligation on refiners and importers was "no longer valid." 75 Fed. Reg. at 14,722. Yet it chose to leave its rule unchanged, because it found no pressing reason to alter course. However, EPA pledged to revisit its decision in the future if it "determine[d] that the RIN market is not operating as intended." *Id.* That is exactly what EPA has now found.

Accordingly, EPA "shall convene a proceeding for reconsideration" of Section 80.1406. 42 U.S.C. § 7607(d)(7)(B). After notice and comment, it should then shift the compliance obligation to blenders.

STATUTORY AND REGULATORY BACKGROUND

A. EPA's Statutory Obligations.

Congress directed EPA to "*ensure* that transportation fuel sold or introduced into commerce in the United States . . . on an annual average basis, contains at least the applicable volume" of biofuels that Congress set for each calendar year. 42 U.S.C. § 7545(o)(2)(A)(i) (emphasis added); *see also id.* § 7545(o)(2)(B). Congress instructed in the same paragraph that, "[r]egardless of the date of promulgation," EPA's regulations must contain provisions "applicable to refineries, blenders, distributors, and importers, *as appropriate, to ensure* that the requirements of this paragraph are met." *Id.* § 7545(o)(2)(A)(iii) (emphasis added).

While Congress vested EPA with a degree of discretion to determine the "appropriate" obligated party, such discretion is not unbounded. The word "appropriate" means "[s]uitable for a particular ... condition...; fitting." *Am. Heritage Dictionary of the English Language* 88 (4th ed. 2000). Here, Congress directed EPA to assess the "appropriate[ness]" of placing the obligation on refiners, blenders, or importers in connection with EPA's obligation to "ensure" that the volumes of renewable fuel set forth by Congress were introduced into domestic transportation fuel. 42 U.S.C. § 7545(o)(2)(A)(i). Thus, by using the phrase "as appropriate," Congress underscored that EPA must impose the compliance obligation on the parties best suited to achieve the overall purpose of the statutory scheme, which is to increase renewable fuel usage. *Cf. Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866-67 (D.C. Cir. 2000) (holding that regulations must be consistent with the purpose of the Clean Air Act).

Moreover, Congress underscored that EPA must continue to reassess whether an initial decision to place the compliance obligation on particular entities *remains* "appropriate" over time. Thus, Congress directed that, "*[r]egardless of the date of promulgation,*" EPA regulations

must contain provisions "applicable to refineries, blenders, distributors, and importers, *as appropriate*, to ensure that the requirements of this paragraph are met." 42 U.S.C. § 7545(o)(2)(A)(iii) (emphasis added). Accordingly, EPA cannot, consistent with its statutory obligations, ignore changed circumstances or new evidence that calls into question whether its decision to place the compliance obligation on refiners and importers remains "appropriate." As the Supreme Court recently held, the word "'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." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (op. of Kavanaugh, J.), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (2015), and *State Farm*, 463 U.S. at 43) (alteration in original)).

B. EPA's Decisions in 2007 and 2010 That It Was "Appropriate" to Make Refiners and Importers the Obligated Parties.

EPA first decided to impose the compliance obligation on refiners and importers (but not blenders) in the 2007 Rule, when it promulgated regulations governing the first RFS program ("RFS1"). *See* 72 Fed. Reg. at 23,923-24. EPA based that decision largely on administrative convenience. *Id.* at 23,923. It acknowledged that refiners and importers "do not generally produce or blend renewable fuels at their facilities," *id.* at 23,937, and thus would need to rely on the actions of third parties, such as blenders and ultimate consumers, to satisfy the RFS requirement. *See id.* ("[T]he actions needed for compliance largely center on the production, distribution, and use of a product by parties other than refiners and importers."). Yet refiners and importers were already subject to agency regulation, so it was administratively convenient to impose the RFS obligation on those parties as well.

In the 2007 Rule, EPA also explained that it would rely on tradable RINs in order ensure and enforce Congress' annual statutory mandates. As EPA explained, the "RIN-based trading program is an essential component of the RFS program, ensuring that every obligated party can comply with the standard while providing the flexibility for each obligated party to use renewable fuel in the most economical ways possible." *See id.* at 23,908; *id.* at 23,932 (explaining that refiners' and importers' accumulation of RINs "will effectively be causing the renewable fuel represented by the RINs to be consumed as motor vehicle fuel."); *see also id.* at 23,939 ("The RFS program places the renewable fuels obligation on parties based on ownership of the gasoline at the refiner or importer level. We believe this approach is the most effective way to implement and enforce the renewable fuels requirement.").

One could certainly question the rationality of requiring one industry (refiners and importers) to demonstrate, under threat of significant penalties, that another (blenders) use a certain amount of renewable fuel. *See Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013) (criticizing regulatory scheme that "applies the pressure to one industry (the refiners)" when "it is another ... that enjoys the requisite expertise, plant, capital and ultimate opportunity for profit."). Nevertheless, EPA's choice in 2007 arguably was "appropriate" so long as the RIN market operated as EPA intended, and so long as imposing the obligation on refiners and importers would not interfere with EPA's duty to ensure that Congress' annual volume requirements were satisfied in a cost-effective manner.

In 2010, EPA revisited its determination to impose the compliance obligation on refiners and importers when implementing the second version of the RFS program ("RFS2"). EPA acknowledged in that rulemaking that the 2007 Rule's administrative "rationale ... for placing the obligation on just the upstream refiners and importers is no longer valid." 75 Fed. Reg. at

14,722. Under the 2010 Rule, it was no longer the case that imposing the obligation on refiners and importers would minimize the number of parties subject to regulation. That is because, in the RFS2 program, "essentially all downstream blenders and terminals are now regulated parties under RFS2 since essentially all gasoline will be blended with ethanol." *Id.* Nevertheless, EPA worried that shifting the obligation from refiners and importers to blenders threatened to "disrupt the operation of the RFS program during the transition from RFS1 to RFS2." *Id.* Moreover, EPA (at least arguably) had no reason for concluding that it was *inappropriate* to continue placing the obligation on refiners and importers, as the agency felt that it had been able to ensure achievement of Congress's statutory volume requirements. As EPA explained at the time: "RINs represent the basic framework for ensuring that the statutorily required volumes of renewable fuel are used as transportation fuel in the U.S. Since the RIN-based system generally has been successful in meeting the statutory goals, we are maintaining much of its structure under RFS2." *Id.* at 14,684.

In subsequent rulemakings, EPA has articulated the economic theory for how RINs can drive increased renewable fuel usage, consistent with Congress's objectives. This theory depends upon blenders, who separate the RIN and sell it to refiners for compliance, passing the value of the RIN through to retailers, and retailers then passing the value of the RIN through to retail customers, in the form of reduced prices for E85 relative to the E10 blend that most Americans consume. *See, e.g.*, EPA, Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794, 49,822 (Aug. 15, 2013) ("The effect of increasing RIN prices is … to reduce the price of more renewable-fuel intensive fuels (e.g. E85) relative to the price of fuels with a lower renewable content (e.g. E10).") ("2013 Rule"). According to this theory, using RINs to subsidize the price of high-ethanol blends in this manner will encourage

customers to consume more E85 and thereby increase renewable fuel usage. *See, e.g.*, *id.* at 49,821 (explaining that "some increase in volumes of higher ethanol blends could be accomplished, with the extent of the required subsidy to E85 consumers through higher RINs prices depending on E85 infrastructure, consumer acceptance, and the price of corn relative to the price of oil.").

Consistent with its obligations to Congress, however, EPA pledged in the 2010 Rule that it would "continue to evaluate the functionality of the RIN market," and that it would "consider revisiting" its decision to impose the compliance obligation on refiners and importers if it "determine[d] that the RIN market is not operating as intended...." 75 Fed. Reg. at 14,722.

ARGUMENT

I. Due to Changed Circumstances, EPA's Placement of the Compliance Obligation on Refiners and Importers Is No Longer "Appropriate."

The 2014-16 Rule found for the first time that EPA cannot "ensure" achievement of the volume requirements mandated by Congress, and that its "primary" mechanism for incentivizing increased use of renewable fuels to meet Congress' requirements—the current RIN market—is "ineffective" as presently structured. 80 Fed. Reg. at 77,457. Thus, for the first time, EPA used its waiver authority to reduce the total renewable fuel volume obligations. In light of that finding and its supporting rationale, it is no longer "appropriate" to place the compliance obligation on refiners and importers, rather than blenders. Accordingly, Section 80.1406 is now arbitrary and capricious.

A. EPA Can No Longer "Ensure" Achievement of the Statutory Volume Requirements By Imposing the Compliance Obligation on Refiners and Importers, Because the RIN Market Is Not Working as Intended.

In the 2014-16 Rule, EPA found for the first time that it could not achieve the volume requirements mandated by Congress, and thus, for the first time, it invoked its waiver authority

to reduce those requirements to amounts it believed could be reasonably achieved. 80 Fed. Reg. at 77,431, 77,433-39. In reaching that determination, it found that even "if EPA were to increase the total renewable fuel volume requirement significantly, we would expect to see sharply higher RIN prices, but sales volumes of E85 would be expected to see only modest increases that would be insufficient to enable the market to reach the statutory targets." *Id.* at 77,459. As EPA recognized, "[w]hile economic theory and the illustrations above support the idea that RINs can serve as a mechanism to increase the production, distribution, and consumption of renewable fuels, it is important to note that this result is dependent on the marketplace working both efficiently and quickly." *Id.* And EPA found, for the first time, that the marketplace was *not* working efficiently or quickly. As EPA explained, "the market [since 2013] was not sufficiently responsive to higher RIN prices to drive large increases in E85 sales volumes." *Id.* It therefore stated bluntly that "the RIN is currently an inefficient mechanism for reducing the price for higher level ethanol blends at retail, and therefore unlikely to be able to significantly impact the supply of ethanol in the United States in 2016." *Id.* at 77,457.

In reaching this conclusion, EPA relied upon a research paper by EPA economist Dallas Burkholder released with the final rule. *See* An Assessment of the Impact of RIN Prices on the Retail Price of E85, Docket No. EPA–HQ–OAR–2015–0111-3631 (Nov. 2015) ("Burkholder Paper"). The paper's purpose was to test the extent to which empirical evidence supported the pass-through theory that EPA had endorsed. *Id.* at 3. As Burkholder explained, whether RIN value is passed through to retail customers is "a significant issue, as it is one of the primary ways the RFS program can incentivize the increasing use of renewable fuels." *Id.* The paper found that blenders and/or retailers selling E85 take a significant portion of the RIN value as profit, rather than passing it along to retail customers in the form of subsidized pricing for E85. *Id.* at

10.e While Burkholder posited that, in the long run, high profits for blenders and retailers mighte induce increased competition, and thus reduced E85 prices relative to E10, EPA did not even venture a guess as to when in the course of the RFS program the current market dynamics might change so that RINs could meaningfully impact annual renewable fuel supply. Instead, EPA concluded that "while the RFS program can be effective at increasing the renewable content of transportation fuels over time, it likely cannot substantially increase the available supply of renewable transportation fuels to consumers in the United States to the volumes envisioned by Congress in the short term." 80 Fed. Reg. at 77,460.

B. In Light of These New Circumstances, Blenders Are the "Appropriate" Obligated Party, Not Refiners or Importers.

These new market realities acknowledged by EPA require the agency to revisit its definition of "obligated parties" set forth in Section 80.1406. Placing the obligation on refiners and importers no longer allows EPA to achieve Congress's statutory volume requirements. Consistent with EPA's mandate to "ensure" that such requirements are met to the extent possible, EPA must consider whether it can come closer to meeting those requirements if the compliance obligation were switched from refiners and importers to blenders.

There are good reasons, already recognized by EPA, to conclude that blenders would be the more "appropriate" obligated party. EPA's 2014-16 Rule confirms that any possible hope of getting the RFS on track depends on a consumer shift to higher biofuel blends. 80 Fed. Reg. at 77,423. To the extent EPA wishes to achieve steadier, more robust growth in E85 consumption, EPA must now find a way to break through the bottleneck that prevents RIN values from being passed through to consumers in the form of lower E85 prices. That is precisely what EPA can expect by moving the compliance obligation from refiners and importers to blenders.

To the extent blenders are the source of the bottleneck that prevents the value of RINs from being passed on to retail customers, EPA could eliminate profit-taking behavior by eliminating the profit source—*i.e.*, the revenue that blenders receive from selling RINs to refiners. Imposing a direct RFS obligation on blenders would give blenders a strong incentive to begin blending larger volumes of high ethanol blends such as E85 and to competitively price E85 in their sales to retailers. To the extent retailers are the bottleneck, blenders again are in a better position than refiners or importers to exert financial pressure on retailers to lower their retail prices for E85, or else to work in cooperation with retailers (and perhaps EPA) to expand retail competition for E85. Indeed, many blenders are affiliated with retailers, whereas at least 89 percent of refiners and importers are not. *See, e.g.*, NERA Economic Consulting, *Effects of Moving the Compliance Obligation under RFS2 to Suppliers of Finished Products*, at 11-12, Fig. 1 (July 27, 2015), EPA-HQ-OAR-2015-0111-2765.

By contrast, the compliance obligation currently is imposed on the parties worst situated to ensure that the value of RINs is passed along to the consumer. Refiners—particularly merchant refiners—have little to no control over the retail markets for biofuels. They own fewer than 4 percent of retail stations,[3] do not contract directly with them, and do not otherwise exercise much influence over the decision-making of these downstream market players. To be sure, EPA still maintains that refiners and importers can take certain actions such as "modifying their requirements for branded retail stations to make it easier to offer and advertise sales of E15, E85, and biodiesel" or "creating a consortium to pool funds for investment in infrastructure at retail." 80 Fed. Reg. at 77,443. But EPA still has provided no reason at all to conclude that

[3] *See* Letter from the Petroleum Marketers Ass'n of America to Chairman Fred Upton and Ranking Member Frank Pallone, House Committee on Energy and Commerce (May 1, 2015), http://www.pmaa.org/weeklyreview/attachments/PMAA_Rebuttal_RFA_April_2015_FINAL%20.pdf ("Approximately 96 percent of U.S. gas stations are owned by independent retailers.").e

refiners and importers are better situated than blenders to take these steps—and thus no reason for believing that, in the present circumstances, it is "appropriate" to place the compliance obligation on refiners and importers rather than blenders.

In short, while EPA cannot at present ensure that the statutory volume requirements are satisfied, there is strong reason to believe that EPA could at least come significantly closer to doing so if the compliance obligation were shifted to blenders. Accordingly, blenders are the "appropriate" party, 42 U.S.C. § 7545(o)(2)(A)(i), (B)(ii), on which to impose the RFS compliance obligation. EPA's failure to even consider this possibility, despite the changed circumstances that it acknowledges, would flatly violate its mandate to impose the compliance obligation as "appropriate," *id.*, and is the paradigm of arbitrary and capricious regulation. *See State Farm*, 463 U.S. at 42-43. That conclusion is further underscored by EPA's pledge in 2010 to revisit its decision to place the obligation on refiners and importers if "the RIN market is not operating as intended." 75 Fed. Reg. at 14,722.

There is no apparent downside to the RFS program to shifting the obligation to blenders. In fact, doing so would also remove another major inefficiency in the current regulatory scheme. The current RFS program places on refiners and importers an unnecessary degree of price risk in the highly illiquid secondary markets for RINs. As economists Christopher Knittel, Ben Meiselman, and James Stock explain, "[e]ven with full pass-through, ... an obligated party could face RIN price risk because of timing differences between when the RIN obligation is incurred and when RINs are acquired."[4] As Professor Stock further notes: "The purpose of the RIN system is to ensure compliance with the RFS, not to add price risk to the balance sheets of

[4] Christopher R. Knittel, et al., *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard*, at 20 (June 2015), http://scholar.harvard.edu/files/stock/files/pass-through_of_rin_prices_1.pdf.

obligated parties that happen to have a . . . mismatch" between the number of RINs they generate and the number that they must retire.[5] Given that refiners are less able than blenders to control how much E85 is consumed and at what price, there is no reason for imposing that kind of market risk on refiners. Doing so does not advance the purposes of the RFS program, but merely penalizes refiners who are short on RINs.

Imposing the compliance obligation on refiners is even more misguided to the extent that refiners are unable fully to pass through the cost of RINs to blenders by charging higher blendstock prices, as some parties have argued.[6] In such circumstances, the RFS program merely imposes a tax on refiners, and that tax does not promote any increase in renewable fuel usage by consumers.[7]

Nor should EPA be concerned that shifting the obligation to blenders would create an administrative burden that would threaten the RFS program. A preliminary analysis of the administrative impact suggests that moving the point of obligation would not increase the number of obligated parties and, indeed, the number of directly obligated parties may decrease depending on how EPA exercises its discretion to shift the obligation away from refiners. *See*

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[5] James H. Stock, Center on Global Energy Policy, *The Renewable Fuel Standard: A Path Forward*, at 29 (Apr. 2015), http://energypolicy.columbia.edu/sites/default/files/energy/Renewable%20Fuel%20Standard_A%20Path%20Forward_April%202015.pdf.

[6] Comments of the Small Refinery Owners Coalition, EPA-HQ-OAR-2015-0111-2339 (July 25, 2015).

[7] Monroe notes that out of an abundance of caution, following EPA's initial notice of proposed rulemaking for 2014, it filed a petition for review and companion administrative petition with EPA on the issue of whether refiners and importers should remain the obligated parties. EPA has not acted on that petition; it has now been pending for two years. The petition for review has been held in abeyance pending EPA's action on the administrative petition. *See* Respondent EPA's Status Report, at 3, *Monroe Energy, LLC v. EPA*, Case No. 14-1014 (D.C. Cir. Jan. 25, 2016) ("At this time, EPA continues to evaluate the issues raised in Monroe's administrative petition, but has not yet taken final action on that petition.").

Valero Supplemental Comments on Proposed Renewable Fuel Standards for 2014, 2015 and 2016 and Biomass-Based Diesel Volume, EPA-HQ-OAR-2015-0111-3583 (Oct. 16, 2015). Of course, even if switching the point of obligation did increase the number of directly obligated parties or resulted in other administrative costs, EPA still must consider those costs against the backdrop of its mandate to "ensure" that the statutory volume requirements are achieved. EPA has not done so.

There is a growing consensus that EPA must shift the obligation. Multiple parties with varied interests have now submitted comments urging EPA to give serious consideration to the many potential advantages of shifting the point of obligation to blenders. This list includes a producer of renewable fuel, and parties like Valero, which are involved in refining, blending, and retailing, as well as a wide array of refiners.[8] It also includes a high-ranking former policymaker in the Obama Administration.[9] EPA acknowledged these comments in the 2014-16 Rule:

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[8] This conclusion is consistent with comments submitted in the 2014-16 rulemaking by various parties. *See* Comments of Monroe Energy, LLC and Philadelphia Energy Solutions Refining and Marketing, LLC, EPA-HQ-OAR-2015-0111-2603 (July 25, 2015); Comments of American Fuel & Petrochemical Manufacturers and American Petroleum Institute, EPA-HQ-OAR-2015-0111-1948 (July 25, 2015); Comments of Crimson Renewable Energy LP, EPA-HQ-OAR-2015-0111-1823 (July 25, 2015); Comments of CVR Refining, LP, EPA-HQ-OAR-2015-0111-2500 (July 25, 2015); Comments of Holly Frontier Corporation, EPA-HQ-OAR-2015-0111-2257 (July 25, 2015); Comments of PBF Holding Company LLC, EPA-HQ-OAR-2015-0111-1724 (July 25, 2015); Comments of The Valero Companies, EPA-HQ-OAR-2015-0111-2765 (July 25, 2015); Comments of the Small Refinery Owners Coalition, EPA-HQ-OAR-2015-0111-2339 (July 25, 2015). EPA refused to address these comments, however, on the ground that the identity of "obligated parties" was beyond the scope of the 2014-16 Rule. 80 Fed. Reg. at 77,431.

[9] Former Special Assistant to the President for Energy and Environment Ronald Minsk has argued that integrated refiners with large marketing operations "are almost immediately long on RINs at the beginning of every compliance period" and therefore they have "little incentive to participate financially in the expansion of blending infrastructure to allow for higher level blends (E85 and E15) or additional advanced renewable fuels (B5-B20)." Comments of Ronald E. Minsk at 6-7, EPA-HQ-OAR-2015-0111-1307 (July 25, 2015). Mr. Minsk also observed that placing the obligation on refiners may actually create a *disincentive* to invest in higher blends or even blend to the blendwall, as "generation of fewer RINs could help them maximize their return on existing blending (E10)" since "meeting the mandate level decreases RIN profits generated

> Other actions can also play a role in improving incentives provided by the RFS program to overcome challenges that limit the potential for increased volumes of renewable fuels. A number of commenters provided ideas in this regard, including suggestions that EPA ... change the RFS program's point of obligation from its current focus on producers and importers of gasoline and diesel.... [T]hese issues are beyond the scope of this rulemaking. *However, we will continue to actively monitor the functioning of the market, assess all relevant data, and review our options as necessary.*

80 Fed. Reg. at 77,431 (emphasis added). In light of EPA's findings in the 2014-16 Rule, it must immediately reconsider Section 80.1406 and shift the obligation to the parties closest to the bottleneck.[10] EPA should not continue to "appl[y] the pressure to one industry (the refiners), . . . [when] it is another ... that enjoys the requisite expertise, plant, capital and ultimate opportunity for profit." *Am. Petroleum Inst.*, 706 F.3d at 480.[11]

II. This Petition Is Timely and Should Be Considered Expeditiously.

Although Section 80.1406 was initially promulgated in 2007 and re-promulgated in 2010,e parties may seek judicial review of that regulation if the petition for review is based solely upon grounds arising after the time for judicial review otherwise would have expired, so long as the petition is filed within 60 days after the after-arising grounds. 42 U.S.C. § 7607(b)(1). That requirement is satisfied here, as Petitioner's claims are based solely on (1) EPA's determination

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from being a RIN-long party." *See also* Comments of The Valero Companies at 17, EPA-HQ-OAR-2015-0111-2765.

[10] To be sure, parties who may become subject to the obligation if it is shifted have raised arguments opposing a shift to blenders. *See, e.g.*, Comments of Nat'l Ass'n of Convenience Stores et al., EPA-HQ-OAR-2015-0111-2480. While EPA should consider the merits of these arguments in a reconsideration proceeding, the fact that these parties submitted these comments at all demonstrates the seriousness with which the overall community has turned its attention to shifting the obligation.

[11] *See also* Comments of Ronald E. Minsk, EPA-HQ-OAR-2015-0111-1307, at 7 ("EPA's current view is that the parties facing ever increasing costs for RINs will be incentivized to build new infrastructure or to invest in blending operations. . . .This is akin to telling a product's manufacturer that it also must become its distributor. Stated differently, EPA expects that RIN pricing will become so severe, that it will reverse the last 20 years of de-integration in the refinery industry.").

in the 2014-16 Rule that, for the first time, it could not "ensure" that the statutory volume requirements would be achieved by placing the obligation on refiners and importers; and (2) EPA's reliance in the 2014-16 Rule on previously unreleased research conducted by the agency showing that the reason for this failure was, at least in part, the failure of blenders and retailers to pass through the value of RINs to retail customers in the form of subsidized E85 prices.

In accordance with 42 U.S.C. § 7607(b)(1), Petitioner will file such a petition for review with the D.C. Circuit within 60 days of the publication of the 2014-16 Rule. However, the D.C. Circuit has held that a petition for review based upon such after-arising grounds must first be presented to the agency. *See Oljato*, 515 F.2d at 666; *Nat. Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1091-92 (D.C. Cir. 1988). *Oljato* outlines a three-step process by which a petitioner is to present such grounds to the agency. First, "[t]he person seeking revision of ... [a] standard reviewable under [Section 7607] should petition EPA to revise the standard in question." *Oljato*, 515 F.2d at 666. Second, "EPA should respond to the petition and, if it denies the petition, set forth its reasons." *Id.* Third, "[i]f the petition is denied, the petitioner may seek review of the denial in this court pursuant to [Section 7607]." *Id.* This petition satisfies the first step, and EPA now must respond. Because such a petition to the agency is filed "within the time specified for judicial review," 42 U.S.C. § 7607(d)(7)(B), that is, within 60 days of the after-arising grounds, *see id.* § 7607(b)(1), such a petition is one for reconsideration under Section 7607(d)(7)(B).

EPA should consider this petition expeditiously. Monroe appreciates EPA's efforts to place the RFS program back on its statutory timeline, in which final annual rules are issued by November 30 of the year *before* they are to be applied. Monroe urges EPA to act on this petition

promptly so that the point of obligation can be switched in time for the issuance of the final rule for 2017, allowing EPA to more readily achieve Congress's goals for the program.

CONCLUSION

For the foregoing reasons, EPA should reconsider 40 C.F.R § 80.1406 and, after reconsideration, determine that blenders are the "appropriate" party on which to impose the RFS compliance obligation, 42 U.S.C. §§ 7545(o)(2)(A)(iii), (3)(B)(ii)(I), rather than refiners and importers.

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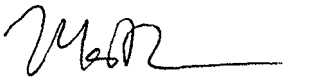
Respectfully submitted,



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