



November 27, 2019

Hon. Andrew R. Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
a-and-r-docket@epa.gov

Via Electronic Submission on Regulations.gov

RE: Comments on 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; Proposed Rule, 84 Fed. Reg. 57,677 (Oct. 28, 2019), EPA-HQ-OAR-2019-0136

Monroe Energy, LLC (“Monroe”) respectfully submits these comments on EPA’s Supplemental Notice of Proposed Rulemaking (“Supplemental Notice”) with respect to the Renewable Fuel Standard (“RFS”) program for 2020. Monroe owns a refinery in southeastern Pennsylvania and is an obligated party under the RFS program.

EXECUTIVE SUMMARY

When EPA issued its initial proposed rule on the RFS standards for 2020 (“2020 NPRM”), it expressly declined to adjust the RFS percentage standards to account for projected volumes of gasoline and diesel produced by refiners that might receive small-refinery exemptions (“SREs”) for 2020.¹ As in prior years, EPA correctly recognized that making such projections would be an

¹ *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*, 84 Fed. Reg. 36,762, 36,797 & n.165 (July 29, 2019).

impossible task given the significant fluctuations in the exempted volumes year-over-year. In the face of political pressure from the farming and ethanol industries, however, EPA has now reversed course, issuing a Supplemental Notice in which it proposes forcing non-exempt obligated parties to meet higher Renewable Volume Obligations (“RVOs”) to compensate for projected exempted volumes.

The Supplemental Notice is a dangerous solution targeting an illusory problem. There is no evidence that SREs actually decrease demand for ethanol. And more fundamentally, EPA lacks the statutory authority to alter percentage standards based on projected future SREs. Moreover, the Supplemental Notice poses serious risks for those obligated merchant refiners that are too large to seek SREs for themselves but will be compelled to shoulder the burden of projected exempted volumes. These refiners—particularly those located in the PADD 1 region—already face severe economic harm as a result of the RFS program, which Monroe has comprehensively demonstrated in its comments on the 2020 NPRM. EPA should not move forward with a proposal that will compound that harm—especially where the proposal will not remove any actual impediments to ethanol demand. Finally, the Supplemental Notice is not the product of reasoned decisionmaking reflecting a cogent explanation for EPA’s abrupt about-face; rather, it is a thinly veiled attempt to placate interest groups and the politicians who represent them. For all of these reasons, EPA should stay the course and reaffirm its longstanding position that percentage standards will not be adjusted to account for projected volumes produced by small refiners that might receive an exemption after promulgation of the annual standard.

If EPA nevertheless decides to disregard the limitations on its statutory authority and break from past practice by starting to account for projected future SREs, it should not base its projections on a three-year average of exempted volumes, which is likely to lead to wildly

inaccurate projections. Instead, EPA should use the lowest exempted volume over the past five years as the basis for its projections. This alternative would minimize the additional economic harm to merchant refiners such as Monroe.

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COMMENTS

I. EPA SHOULD NOT INCREASE PERCENTAGE STANDARDS BASED ON PROJECTED SMALL-REFINERY EXEMPTIONS.

For multiple reasons, EPA should not adopt its proposal to adjust RFS percentage standards to account for the projected volume of gasoline and diesel produced by small refiners that might receive SREs after promulgation of the 2020 standards.

A. Small-Refinery Exemptions Do Not Negatively Affect Demand For Ethanol.

EPA's proposed policy reversal stems from political pressure by the farming and ethanol industries, which claim that SREs undercut the demand for ethanol.² One of EPA's express rationales for issuing its Supplemental Notice is its contention that SREs "potentially impact[] the volume of renewable fuel used in the U.S."³ In addition, the agency stated that it issued the Supplemental Notice "[i]n light of" comments it received in response to the 2020 NPRM, in particular the comments from the Renewable Fuels Association and Growth Energy.⁴ Those comments incorrectly assert that SREs have destroyed demand for ethanol.⁵

² See, e.g., David J. Lynch, *Farm State Fury Pressure for Trump as Trade, Energy Pain Collide*, WASH. POST (Oct. 1, 2019), https://www.washingtonpost.com/business/economy/farm-state-fury-creates-pressure-for-trump-as-trade-ethanol-pain-collide/2019/10/01/74a94d4a-df16-11e9-b199-f638bf2c340f_story.html ("The [small-refinery] waivers . . . have undercut demand for ethanol and the corn used to make it, farmers said.").

³ *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 Fed. Reg. 57,677, 57,680 (Oct. 28, 2019).

⁴ *Id.* at 57,679-80 & nn.7, 10-11.

⁵ See Comments from the Renewable Fuels Association 2, Dkt. No. EPA-HQ-OAR-2019-0136-0281 (Aug. 30, 2019) ("The RFS Demand Destruction from Small Refinery Exemptions Is Absolute and Pernicious.") (italics omitted); *id.* ("Demand destruction has already occurred as a result of the exemptions that were granted for 2016 and 2017."); see also Comments from Growth Energy 32, Dkt. No. EPA-HQ-OAR-2019-0136-0312 (Aug. 30, 2019) (discussing "demand-suppressing practices" such as SREs).

The notion of SRE-induced demand destruction directly contradicts Administrator Wheeler’s testimony from just a month prior to the release of the Supplemental Notice. Testifying before the House Committee on Science and Technology, Administrator Wheeler publicly acknowledged that “[e]thanol demand has not been impacted by the small refinery program” and that “we’ve seen an uptick in ethanol over the last two years.”⁶ Specifically regarding 2019 ethanol production, Administrator Wheeler stated that EPA did “not see any demand disruption from the small refinery program on ethanol production.”⁷

As this testimony acknowledges, SREs have no impact on ethanol demand. Ethanol demand has remained stable and even increased despite the higher number of SREs granted in recent years.⁸ The data also belie any claim of demand destruction. Data from the U.S. Energy Information Administration (“EIA”) reveal that, between January 2017 and July 2019, “[c]orn consumption for fuel has remained steady” and that, between January 2018 and July 2019, “[e]thanol consumption for fuel has increased despite a drop in RIN prices.”⁹ EIA data further demonstrate that the ethanol blend rate and ethanol consumption have increased year-over-year

⁶ EPA Administrator Andrew Wheeler, Testimony before the United States House Committee on Science and Technology, at 49:10 (Sept. 19, 2019), <https://science.house.gov/hearings/science-and-technology-at-the-environmental-protection-agency>.

⁷ *Id.* at 49:20.

⁸ Fueling American Jobs Coalition, Power Point Presentation Analyzing SREs 1–2, 5 (attached as Exhibit A) (using data from the U.S. Energy Information Administration).

⁹ Fueling American Jobs Coalition, Corn and Ethanol vs. RIN Prices (attached at Exhibit B) (using USDA corn consumption data, EIA Total U.S. Ethanol Refinery & Blender Input, and Argus D6 RIN pricing).

since 2010 with only a negligible decrease from 2017 to 2018.¹⁰ This is irrespective of the movement of RIN prices, meaning the data show “no correlation” with D6 RIN prices.¹¹

The same is true of biodiesel. EIA data show that U.S. biodiesel consumption and production have also increased year-over-year with only a small dip from 2017 to 2018 for consumption and 2016 to 2017 for production, with the data suggesting only “very minimal correlation between Biodiesel Consumption and D4 RIN Price.”¹²

Other studies have reached the same conclusions. Charles River Associates (“CRA”) found “that increased SREs and lower ethanol RIN prices have not caused ethanol demand destruction.”¹³ After examining the data, CRA determined that “[e]mpirical evidence suggests that RIN prices do not drive ethanol blending rates and volumes.”¹⁴ SREs “have not impacted the incentive to blend ethanol up to the blend wall and therefore have not eroded ethanol demand.”¹⁵

¹⁰ Fueling American Jobs Coalition, Power Point Presentation Analyzing SREs 1–2, 5; *see also* U.S. Energy Information Admin., *Increase in U.S. Fuel Ethanol Production Capacity Slows*, <https://www.eia.gov/todayinenergy/detail.php?id=41393> (Sept. 20, 2019) (showing capacity increased by 2% from 2018 to 2019).

¹¹ Fueling American Jobs Coalition, Power Point Presentation Analyzing SREs 6. In addition, government data consistently reveal that SREs are not responsible for low ethanol prices. Fueling American Jobs Coalition, Power Point Presentation Analyzing SREs 1–2, 5; *see also* Letter from Thomas M. Conway, President, United Steelworkers, to President Donald J. Trump 2 (Sept. 6, 2019); Letter from Sean McGarvey, President, NABTU, to President Donald J. Trump 1 (Aug. 22, 2019). Instead, it is the rapid increase in ethanol supply that has been “the primary driver” of these low prices. In 2018, U.S. ethanol production “topped 16 billion gallons for the first time,” which “has simply been too much for the domestic (and export) fuel markets to absorb.” Scott Irwin, *Why Are Ethanol Prices So Low?*, FARMDOC DAILY (Feb. 8, 2019), <https://farmdocdaily.illinois.edu/2019/02/why-are-ethanol-prices-so-low.html>.

¹² Fueling American Jobs Coalition, Power Point Presentation Analyzing SREs 11, 14–16, 18.

¹³ Charles River Assocs., *Economics of Small Refinery Exemptions Under the RFS 1* (Sept. 2018), http://www.fuelingusjobs.com/library/public/CRA_SREimpacts_Report_09_15_2018-002-.pdf.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 13.

In sum, CRA concluded, “SREs have provided relief to small refineries while not impacting ethanol volumes blended into motor gasoline. In fact, the volume of ethanol blended continues to rise.”¹⁶

Even Professor Scott H. Irwin—a scholar frequently cited by the ethanol industry—agrees that “the available evidence shows that the aggregate blend rate for ethanol has [] not been impacted by SREs.”¹⁷ As Professor Irwin explains, “there is little if any evidence that the physical use of ethanol has declined” since EPA began granting large numbers of SREs in December 2017.¹⁸ Even after that date, Professor Irwin has found, “ethanol demand in the form of E10 has not been affected by SREs,” and “[t]here is little if any evidence that the blend rate for ethanol was reduced as the [SREs] went into effect. If there has been any ethanol ‘demand destruction’ to date it was very small.”¹⁹

In Professor Irwin’s view, the absence of demand destruction is attributable to the fact that “all but a tiny sliver of domestic ethanol is consumed in the form of E10 and ethanol is highly price competitive in the E10 gasoline blend.”²⁰ “SREs” therefore “should not have any impact on th[e E10] component of domestic ethanol demand.”²¹ Professor Irwin further determined that

¹⁶ *Id.*

¹⁷ Scott Irwin, *Clearing the Logjam on the RFS and SREs: A Simple Proposal*, FARMDOC DAILY (Sept. 19, 2019), <https://farmdocdaily.illinois.edu/2019/09/clearing-the-logjam-on-the-rfs-and-sres-a-simple-proposal.html>.

¹⁸ Scott Irwin, *Why Are Ethanol Prices So Low?*, FARMDOC DAILY (Feb. 8, 2019), <https://farmdocdaily.illinois.edu/2019/02/why-are-ethanol-prices-so-low.html>.

¹⁹ Scott Irwin, *More on Small Refinery Exemptions and Ethanol Demand Destruction*, FARMDOC DAILY (Dec. 13, 2018), <https://farmdocdaily.illinois.edu/2018/09/small-refinery-exemptions-and-ethanol-demand-destruction.html>.

²⁰ *Id.*

²¹ *Id.* at 4.

SREs have likewise had very little impact on higher ethanol blends, such as E15 and E85; to the contrary, the data show “a consistent *upward* trend since December 2017” in demand for E85.²²

The ethanol industry’s attempt to convince EPA that SREs cut into their business is thus devoid of empirical support. EPA should decline to move forward with a proposal that is founded on a demonstrably false premise.

B. EPA Lacks Statutory Authority To Adjust Percentage Standards Based On Projected Exemptions.

Section 7545(o) directs the Administrator, when setting the renewable fuel obligations for a calendar year, “to account for the use of renewable fuel during the *previous* calendar year by small refineries” that have been granted SREs.²³ Historically, EPA has interpreted this provision as “draw[ing] a line between exemptions granted before the rule is issued and those that are not,” so that EPA “only include[s] the former in calculating the standards.”²⁴ In other words, the statute permits EPA to account for any 2019 SREs that have already been granted when setting the 2020 percentage standards. If no 2019 SREs have been granted by the time the 2020 standards are issued, no adjustments can be made. Indeed, EPA has stated that this interpretation may even be

²² Scott Irwin, *Small Refinery Exemptions and E85 Demand Destruction*, FARMDOC DAILY (Jan. 16, 2019), <https://farmdocdaily.illinois.edu/2019/01/small-refinery-exemptions-and-e85-demand-destruction.html>. Although Professor Irwin does not draw the same conclusion about demand for biodiesel, the data demonstrate that the correlation is similarly lacking between SREs and biodiesel demand. *See supra* at 3. The recent challenges faced by biodiesel producers are attributable to Congress’s refusal to reinstate the biodiesel tax credit for the past two years—not to SREs. *See* John M. Urbanchuk, *The Importance of the Biodiesel Tax Credit*, ABF ECONOMICS (July 24, 2019), https://www.eenews.net/assets/2019/11/13/document_daily_02.pdf; *see also* FUELING AM. JOBS COALITION, *Don’t Cry for American Biodiesel Producers, Argentina! Small Refiner Exemptions Are Not Causing Biodiesel Demand Destruction* (Nov. 28, 2018), <http://www.fuelingusjobs.com/november-28>.

²³ 42 U.S.C. § 7545(o)(3)(C)(ii) (emphasis added).

²⁴ EPA Br. 73, No. 17-1258, *AFPM v. EPA* (D.C. Cir. Jan. 10, 2019), 2019 WL 169300 (“EPA *AFPM* Br.”).

“required by the statute.”²⁵ Now, EPA proposes abandoning this interpretation and instead accounting for projected *future* SREs when setting percentage standards.

EPA was right the first time. The Clean Air Act does not authorize EPA to adjust percentage standards based on projected SREs. While Congress directed EPA to account for the use of renewable fuel during the *previous* calendar year by small refineries that were granted SREs, it conspicuously omitted any authorization for EPA to adjust annual percentage standards to account for projected *future* SREs. Moreover, Congress “knew how to” refer to projected future fuel volumes “when it wanted to.”²⁶ The statute refers to volumes “projected to be sold or introduced” in Section 7545(o)(3)(A), only two subsections before Section 7545(o)(3)(C). “When Congress includes particular language in one section of a statute but omits it in another,” courts presume that “Congress intended a difference in meaning.”²⁷ The fact that Congress expressly referred to projected future fuel volumes in a closely related provision of the Clean Air Act but did not do so in the provision governing “adjustments” to RFS percentage standards confirms that the Clean Air Act does not give EPA the authority to adjust percentage standards on the basis of projected future SREs.

C. Accounting For Projected Small-Refinery Exemptions Unfairly Increases The Economic Burden On The Remaining Obligated Parties.

EPA’s new proposal forces obligated refiners ineligible for SREs to bear the burden of EPA’s exemption decisions through higher RFS percentage standards. It is manifestly unfair to compel these obligated parties to shoulder an additional burden over and above their already-

²⁵ *Id.*

²⁶ *Americans for Clean Energy v. EPA*, 864 F.3d 691, 733 (D.C. Cir. 2017).

²⁷ *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quotation marks and alterations omitted).

substantial RFS obligations, especially when they have no ability to participate in the process through which EPA decides whether to grant SREs. This increased regulatory burden will inevitably exacerbate the ongoing economic harm to Monroe and other merchant refiners that are already struggling under their current RFS obligations.

Moreover, the proposal could result in a cascade effect, whereby small refineries that almost, but not quite, qualified for an exemption in the past would now experience the requisite economic harm by virtue of the increased burden of higher percentage standards and thus qualify for an SRE. This sort of vicious cycle could then further increase the compliance burden on large refiners that are not themselves eligible for exemptions.

These pernicious economic consequences will disproportionately affect refiners in the PADD 1 region, where refiners operate with particularly narrow margins and are unable to pass on the bulk of their RIN costs to the end purchaser of the fuel.²⁸ Monroe has repeatedly brought to EPA's attention data demonstrating the economic harm that PADD 1 refiners experience due to the RFS program, and the agency has repeatedly ignored this evidence. Instead, EPA continues to insist that the RFS program cannot impose severe economic harm because "RFS compliance costs" are supposedly "passed through to consumers in the marketplace" and therefore "do[] not represent a net cost to obligated parties."²⁹ But there is a glaring inconsistency in EPA's reasoning: Its

²⁸ See Monroe Energy, LLC, Comment Letter on Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes; Proposed Rule, 84 Fed. Reg. 36,762 (July 29, 2019) 2-6, EPA-HQ-OAR-2019-0136-0021 (Aug. 30, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0136-0204> [hereinafter Monroe Comment Letter on 2020 Standards].

²⁹ Renewable Fuel Standard Program - Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments 14-15 (Nov. 2018), <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2018-0167-1387>; see also Dallas Burkholder, Office of Transp. & Air Quality, U.S. EPA, *A Preliminary Assessment of RIN Market*

premise that obligated parties' RFS compliance costs are passed through to consumers cannot be squared with the agency's practice of granting *scores* of exemptions to small refineries based on the "disproportionate economic hardship" they would suffer from the RFS program.³⁰ Over the past three years alone, EPA has granted 85 SREs³¹ based on its determination that "RIN prices, and the cost of compliance through RIN purchases," can impose economic burdens on refineries.³² And, as the Supplemental Notice indicates, EPA apparently anticipates continuing to grant substantial numbers of SREs in the future.

As the Fourth Circuit recently recognized, this focus on RIN prices in evaluating SREs "appears inconsistent" with EPA's theory that RFS compliance costs do not burden obligated parties because the costs are passed through to consumers.³³ Studies have found that "the pass-through rates of the smallest and largest firms are not statistical[ly] different from one another in the gasoline market."³⁴ Accordingly, if compliance with the RFS program imposes an economic burden on small refiners, it must also impose economic harm on larger refiners. It thus defies logic

Dynamics, RIN Prices, and Their Effects (2015); *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*, 84 Fed. Reg. 36,762, 36,807 (July 29, 2019); *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 32,024, 32,058 (July 10, 2018); *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704, 63,742 (Dec. 11, 2018).

³⁰ 42 U.S.C. § 7545(o)(9)(B)(i).

³¹ See EPA, *RFS Small Refinery Exemptions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

³² EPA, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests 2* (Dec. 6, 2016), <https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf>.

³³ *Ergon-W. Va., Inc. v. U.S. EPA*, 896 F.3d 600, 613 (4th Cir. 2018).

³⁴ Jesse Burkhardt, *The Impact of the Renewable Fuel Standard on US Oil Refineries*, 130 Energy Policy 429, 429 (2019).

to claim that larger refiners fully recoup RIN costs by passing them through to consumers while simultaneously granting dozens of SREs to smaller refiners based on the premise that RFS compliance costs impose economic hardship on small refiners.

Recent academic studies confirm that refiners in the PADD 1 region, such as Monroe, are *not* able to fully pass through their RFS compliance costs. Iowa State’s Sebastien Pouliot, U.C. Davis’s Aaron Smith, and Harvard’s James Stock have estimated that outside of the East Coast, suppliers are generally able to pass through RIN prices, with pass-through rates of 86% of the RIN value for branded fuel in the Midwest and 99% for unbranded fuel.³⁵ In the Gulf region, the estimates are 88% for branded fuel and 89% for unbranded.³⁶ In the East Coast PADD 1 region, however, there is “significantly less than” complete pass-through, with only 38% pass-through for branded fuel and 50% for unbranded.³⁷ This “incomplete pass-through” on “the East Coast” indicates that RIN costs are “not being fully passed through to consumers.”³⁸

These conclusions were confirmed in a study published earlier this year by Colorado State University’s Jesse Burkhardt.³⁹ Professor Burkhardt, too, found “incomplete pass-through in PADD 1” and confirmed that his study’s “findings are consistent with” the 2017 study by Professors Pouliot, Smith, and Stock, which also found “less than complete pass-through to rack

³⁵ Sebastien Pouliot, Aaron Smith & James H. Stock, *RIN Pass-Through at Gasoline Terminals* 21 (Feb. 22, 2017) (attached as Exhibit C).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 3, 29.

³⁹ *See* Burkhardt, *supra* note 34.

prices along the Eastern Seaboard.”⁴⁰ Professor Burkhardt’s findings therefore “present an important robustness check” for the 2017 study.⁴¹

In addition, a CRA study has found “signs of incomplete pass-through” *across* the United States.⁴² And a recent study by Energy Ventures Analysis (“EVA”) has found that, for merchant refiners, “the RIN obligation affects net profits” and that “[p]urchasing RINs is [] a profit-burdening obligation for merchant refiners.”⁴³ EVA calculated that merchant refiners are at a 9.4 cents/gallon disadvantage compared to integrated refiners because they bear the RIN costs themselves.⁴⁴

These studies are further evidence that the RFS program is already imposing severe economic harm on the PADD 1 region, as Monroe explained at length in its comment letters on the proposed 2019 and 2020 standards.⁴⁵ In those comment letters, Monroe introduced into the administrative record yet another study demonstrating that PADD 1 refiners face greater economic harm from the RFS program than do other refiners, which supports the application of EPA’s general waiver authority.⁴⁶ That comprehensive study of the RFS program’s economic impact by Dr. Craig Pirrong, Professor of Finance and Energy Markets and Director of the Global Energy

⁴⁰ *Id.* at 430, 434.

⁴¹ *Id.* at 430.

⁴² Charles River Assocs., *Evaluating the Response of Blender Margins to RIN Price Changes: A More Direct Approach to Determining Pass-Through 2-3* (Feb. 2017) (attached as Exhibit D).

⁴³ Energy Ventures Analysis, *An Assessment of the Renewable Fuel Standard Using EVA-NEMS 22-23* (July 17, 2019), https://www.evainc.com/wp-content/uploads/2019/07/EVA_RFS_REPORT-final.pdf.

⁴⁴ *Id.* at 24.

⁴⁵ Monroe Comment Letter on 2020 Standards at 2–6.

⁴⁶ *Id.* at 2–6 (citing Craig Pirrong, *Analysis of the RFS Program and the 2019 Proposed Standards* (Aug. 17, 2018) (“Pirrong Study”)).

Management Institute at the University of Houston’s Bauer College of Business, found that “any further increases in the RFS mandates could inflict devastating financial effects on the PADD 1 region and beyond.”⁴⁷ The Pirrong Study determined that “[t]he impact” of increased RVOs “will fall particularly heavily on refiners on the East Coast,” cutting their refining margins by “enough to make many [of them] unprofitable.”⁴⁸ This, in turn, could “cause some refineries to shut down, with a consequent loss of jobs.”⁴⁹ Increasing the already-onerous compliance burden on merchant refiners to compensate for SRE volumes could have a crushing economic impact on Monroe, PADD 1 refiners, and the economy of the entire PADD 1 region.

Moreover, EPA itself has already concluded that the volume requirements set forth in the 2020 NPRM are “not reasonably attainable.”⁵⁰ Given the profound uncertainty attending EPA’s projections about future SREs—uncertainties that EPA has repeatedly acknowledged—EPA’s supplemental proposal could end up requiring refiners to meet volume requirements that are not even remotely attainable, which would dramatically increase RIN prices and overall compliance costs. Those risks are substantial and wholly unwarranted.

D. EPA Has Failed To Adequately Explain Why It Is Proposing To Reject Its Prior Position Of Not Modifying Percentage Standards In Light Of Projected Small-Refinery Exemptions.

In its Supplemental Notice, EPA has proposed a dramatic about-face in its treatment of future SREs. In the past, EPA has declined “to speculate on hypothetical future exemptions”

⁴⁷ *Id.*

⁴⁸ Pirrong Study at 29.

⁴⁹ *Id.*

⁵⁰ 84 Fed. Reg. at 36,777.

because of the extreme uncertainty in such projections.⁵¹ EPA has expressly acknowledged that it “cannot predict . . . the amount of additional small refinery hardship exemptions that may be granted in the future.”⁵² Indeed, EPA described the task as “nigh impossible.”⁵³ And for good reason: “[T]he year-to-year variance in the number of exemptions sought and granted confirms that EPA cannot accurately predict future exemptions.”⁵⁴ “And, of course, if EPA gets this task wrong, it could end up setting compliance standards that are unachievable for obligated parties.”⁵⁵ Yet now, EPA has proposed switching positions, even while it continues to “acknowledge that there is uncertainty with projecting the exempted volume for 2020, as petitions for 2020 SREs have not yet been submitted to or evaluated by the Department of Energy (DOE) or EPA.”⁵⁶

To satisfy the requirements of the Administrative Procedure Act, EPA must do more than “acknowledge” a change in policy. Agencies may change their existing policies only if “they provide a reasoned explanation for the change” and “show that there are good reasons for the new policy.”⁵⁷ And when a change “rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests,” an agency must “provide a more detailed justification.”⁵⁸

⁵¹ EPA *AFPM* Br. 73.

⁵² *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 32,024, 32,030 (July 10, 2018) (emphasis added).

⁵³ EPA *AFPM* Br. 75.

⁵⁴ *Id.* at 74 n.34.

⁵⁵ *Id.* at 75.

⁵⁶ 84 Fed. Reg. at 57,680; *see also id.* (projection is “subject to uncertainty”).

⁵⁷ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal quotation marks omitted).

⁵⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

EPA has failed to provide an adequate justification for rejecting its prior approach to SREs—especially in light of the agency’s repeated acknowledgement in the Supplemental Notice that there is substantial “uncertainty in the projection” of future SREs.⁵⁹ EPA’s inability to provide an adequate justification for its change in position is the inevitable consequence of the fact that the Supplemental Notice is not the product of reasoned decisionmaking; rather, it is a politically motivated effort to accommodate demands from farmers and ethanol manufacturers, as well as the politicians who represent them.⁶⁰

⁵⁹ 84 Fed. Reg. at 57,680.

⁶⁰ Statements from numerous politicians leave no doubt that the Supplemental Notice was the product of political pressure, not reasoned agency decisionmaking. Prior to EPA’s formal announcement of the Supplemental Notice, President Trump tweeted: “[T]he Farmers are going to be so happy when they see what we are doing for Ethanol. . . . It will be a giant package, get ready!” Erin Voegele, *Trump Teases Work on Policy Package to Boost Ethanol*, Ethanol Producers Mag. (Aug. 29, 2019), <http://ethanolproducer.com/articles/16493/trump-teases-work-on-policy-package-to-boost-ethanol>. This pronouncement followed sustained political pressure from prominent senators criticizing EPA’s granting of SREs. Senators Grassley, Thune, Blunt, Fisher, and Ernst issued a joint statement on SREs, calling them a “backdoor attempt . . . to destroy the Renewable Fuel Standard” and “unfair . . . to all the farmers and biofuels workers across the country who are counting on President Trump to keep his word.” Sen. Chuck Grassley, *Grassley, Thune, Blunt, Fischer, Ernst Joint Statement on EPA Attacks on RFS* (Apr. 12, 2018) (internal quotation marks omitted), <https://www.grassley.senate.gov/news/news-releases/grassley-thune-blunt-fischer-ernst-joint-statement-epa-attacks-rfs>. After the agency’s issuance of 31 SREs this year, Senator Ernst stated that she did not “think the president fully understood how detrimental it would be by giving those waivers. . . . I guarantee you that we are focusing on the administration and making him understand how important this is for the Midwest.” *Ethanol Fuel Rule ‘Under Attack,’ Ernst Says*, THE GAZETTE (Aug. 20, 2019), <https://www.thegazette.com/subject/news/government/ethanol-iowa-senator-joni-ernst-fuel-standard-under-attack-dupont-tour-cedar-rapids-20190820>. Senator Grassley responded to the 31 SREs by stating: “[N]ot only is the government not keeping its word, but it’s also screwing the farmer when we have low (corn) prices.” *Id.*

Following the October 4 announcement of a deal to address SREs, Senator Grassley praised President Trump for “ma[king] clear that he is an ally of corn and soybean farmers as well as ethanol and biodiesel producers. He is fighting for the farmer.” Sen. Chuck Grassley, *Grassley: Trump Delivers for Iowa, Farmers and Biofuels Producers* (Oct. 4, 2019) (internal quotation marks omitted), <https://www.grassley.senate.gov/news/news-releases/grassley-trump-delivers-iowa-farmers-and-biofuels-producers>. Senators Fischer and Ernst issued

Not only has EPA succumbed to political pressure in issuing the Supplemental Notice, but it has also impermissibly predetermined the outcome of the rulemaking. Weeks before EPA released its Supplemental Notice, Administrator Wheeler announced that the agency had already entered into “an agreement” regarding the RFS program, and the U.S. Department of Agriculture (“USDA”) Secretary Sonny Perdue released a statement that the “forward-looking agreement” “makes improvements to the RFS program.”⁶¹ EPA also issued a public statement laying out actions that “*will be undertaken* by EPA and USDA” under the terms of their deal,⁶² even though no Supplemental Notice had been issued and USDA has no statutory role in the RFS program. The President, too, announced that the Administration had “come to an agreement” regarding how

similarly laudatory statements. See Sen. Deb Fischer, *RFS Deal Provides Certainty for Farmers and Ethanol Producers* (Oct. 4, 2019) (“In my discussions with the president, I fought hard for a fair deal for Nebraska’s farmers and ethanol producers. I thank the president for following through on his commitment to rural America.”), <https://www.fischer.senate.gov/public/index.cfm/2019/10/rfs-deal-provides-certainty-for-farmers-and-ethanol-producers>; Sen. Joni Ernst, *Ernst: Iowa’s Farmers and Biofuels Producers Have Been Heard*, (Oct. 4, 2019) (“President Trump is following through on his commitment to our nation’s hardworking farmers and biofuels producers.”) (internal quotation marks and emphasis omitted), <https://www.ernst.senate.gov/public/index.cfm/2019/10/ernst-iowa-s-farmers-and-biofuels-producers-have-been-heard>; see also EPA, *What They Are Saying: President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels* (Oct. 4, 2019) (collecting statements from agency officials, senators, House members, governors, and state officials revealing the politically motivated nature of the proposal) (internal quotation marks omitted), <https://www.epa.gov/newsreleases/what-they-are-saying-president-trump-delivers-key-promise-american-farmers-epa-usda>.

⁶¹ EPA, *What They Are Saying: President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels*, EPA (Oct. 4, 2019), <https://www.epa.gov/newsreleases/what-they-are-saying-president-trump-delivers-key-promise-american-farmers-epa-usda>.

⁶² EPA, *President Trump Delivers on a Key Promise to American Farmers as EPA, USDA Announce Agreement on Promoting Biofuels*, EPA (Oct. 4, 2019) (emphasis added), <https://www.epa.gov/newsreleases/president-trump-delivers-key-promise-american-farmers-epa-usda-announce-agreement>.

to account for projected SREs.⁶³ In other words, the agency had already predetermined the outcome of this rulemaking before the comment period even began in a nakedly political surrender to the agricultural and biofuels industries.

This political reality, however, is nowhere to be found in the Supplemental Notice. Instead, EPA has contrived a justification, arguing that increasing percentage standards to account for projected SREs “furthers Congressional intent to ‘ensure’ the renewable fuel volumes are met.”⁶⁴ There can be no doubt that this explanation is contrived because only a few months ago EPA argued at length to the D.C. Circuit that this very interpretation of the Clean Air Act is flawed. EPA called this “ensure” argument “a variant of one the [D.C. Circuit] rejected in” *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), and the agency condemned this reading of the statute because it “would require EPA to pile prejudice and speculation on the one hand and amount to a re-write of the RFS statute on the other.”⁶⁵ EPA’s unequivocal statements to the D.C. Circuit leave no doubt that the Supplemental Notice offers up a manufactured explanation for EPA’s change in position that does not reflect its actual motivation.

⁶³ Reuters, *Trump Says Ethanol Deal Will Be Around 16 Billion Gallons* (Oct. 7, 2019) (internal quotation marks omitted), <https://www.reuters.com/article/us-usa-biofuels/trump-says-ethanol-deal-will-total-16-billion-gallons-idUSKBN1WM298>.

⁶⁴ 84 Fed. Reg. at 57,680.

⁶⁵ EPA *AFPM* Br. 73-74. In *Americans for Clean Energy*, the D.C. Circuit had rejected the argument that “EPA’s statutory duty to ‘ensure[]’ that the mandated volume requirements are met” required EPA to “consider carryover RINs as a supply source of renewable fuel.” 864 F.3d at 714. The D.C. Circuit explained that Congress did not “pursue its purposes of increased renewable fuel generation at all costs.” *Id.* Instead, the statute contains “waiver provisions” that “lessen the Renewable Fuel Program’s requirements in specified circumstances,” *id.*, and also authorizes EPA to grant SREs, 42 U.S.C. § 7545(o)(7), (8), (9). These waivers and exemptions “are as much a part of the [statute’s] purpose” as the provision requiring EPA to “ensure” that statutory volumes are met. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

As the Supreme Court recently made clear, “[i]n order to permit meaningful judicial review, an agency must ‘disclose the basis’ of its action.”⁶⁶ When an agency’s purported explanation for its action is “incongruent with what the record reveals about the agency’s priorities and decisionmaking process,” the agency has abdicated its responsibility to provide a reasoned explanation.⁶⁷ “The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.”⁶⁸

II. AT A MINIMUM, EPA SHOULD ADOPT AN ALTERNATIVE APPROACH.

As Monroe has shown, EPA lacks the statutory authority to adjust percentage standards based on projected SREs and, even if it did possess the requisite statutory authority, making such adjustments would inflict serious economic harm on obligated parties. If EPA nevertheless presses forward with jettisoning “its long-standing treatment of small-refinery exemptions”⁶⁹—and a court concludes that EPA actually has the authority to take that unprecedented step—EPA should alter its methodology because using the proposed three-year average of SREs is unworkable.

First, there is great uncertainty year-to-year regarding the number of gallons that will ultimately be exempted. EPA has not only recognized this uncertainty but has on multiple occasions determined that the uncertainty is so significant as to preclude EPA from even venturing

⁶⁶ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962)).

⁶⁷ *Id.* at 2575.

⁶⁸ *Id.* at 2575–76.

⁶⁹ EPA AFPM Br. 72.

a guess as to projected exemptions.⁷⁰ Accordingly, there is no realistic prospect that the proposed three-year average will result in a remotely accurate projection of the SREs that are actually granted in a given year.

Second, EPA's explanation for adopting a three-year average cannot withstand scrutiny. EPA emphasizes that its proposed approach "helps to average out the effects of unique events or market circumstances that occurred in individual years."⁷¹ Yet the chart listing DOE's past SRE volume recommendations—which would serve as the basis for the three-year average underpinning the SRE projection—reveals that there is no general trend at all.⁷² Over the past four years, DOE has recommended exempting gasoline volumes of 1.59 billion gallons, 2.45 billion gallons, 5.65 billion gallons, and 4.62 billion gallons, respectively.⁷³ As EPA acknowledges, "there are many factors that affect the number of SREs that are granted in a given year and those factors are inherently difficult to estimate with precision."⁷⁴ Because it is impossible to predict the volume of exempted fuel in any given year, EPA's proposed rolling three-year average will inevitably vary wildly from the actual figure.

Moreover, EPA's proposed approach itself could increase variability and unpredictability. Increasing percentage standards to account for projected exempted volumes could itself exacerbate the economic distress of small refiners that did not previously qualify for an exemption and thereby result in an unanticipated increase in the number of SREs. Alternatively, once the regulatory

⁷⁰ See EPA *AFPM* Br. 73; 83 Fed. Reg. at 32,030.

⁷¹ 84 Fed. Reg. at 57,682.

⁷² See *id.* at 57,682, tbl. II.B-1.

⁷³ *Id.*

⁷⁴ *Id.* at 57,682.

burden has increased for all non-exempt obligated parties as a result of the augmented percentage standards, EPA and DOE would be forced to reassess their application of the “disproportionate economic hardship” language governing SREs to reflect the fact that *all* refiners are suffering economic hardship.⁷⁵ This in turn could result in the granting of *fewer* SREs, which would mean that the current three-year average would grossly overestimate the actual volumes exempted. And, as discussed above, if the volume of exempted fuel drops dramatically in a given year, obligated parties could be left responsible for meeting artificially inflated RVOs that are not even *attainable*, let alone reasonably attainable.⁷⁶ EPA’s proposed approach exposes the entire RFS program to these inherent and unpredictable risks.

Accordingly, although Monroe firmly opposes any reallocation of projected SRE volumes, if EPA insists on incorporating projected SRE volumes into the annual RVOs, it should take the path that presents the least risk of inflicting harm on obligated parties and the broader economy. To that end, EPA should base its projection of estimated volumes on the lowest number of exempted gallons over the prior five-year period. This alternative approach would help to mitigate at least some of the economic harm that will inevitably result from EPA’s misguided proposal to adopt a new and entirely unjustified approach to SREs.

CONCLUSION

EPA should reject the approach to SREs proposed in its Supplemental Notice and, as in prior years, should not adjust percentage standards to account for future SREs.

⁷⁵ *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 997 (10th Cir. 2017) (holding that, in determining disproportionate impact in an SRE application, “EPA must compare the effect of the RFS Program compliance costs on a given refinery with the economic state of other refineries”).

⁷⁶ *See supra* at 11.

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Respectfully submitted,

Amir C. Tayrani
Lochlan F. Shelfer
Of Counsel
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 887-3692
Facsimile: (202) 530-9645
atayrani@gibsondunn.com

MONROE ENERGY, LLC
4101 Post Road
Trainer, PA 19061
Telephone: (610) 364-8000