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Via Electronic Submission on Regulations.gov

RE: Comments on Petitions for a Waiver of the 2019 and 2020 Renewable Fuel Standards, EPA–HQ–OAR–2020–0322

Monroe Energy, LLC ("Monroe") respectfully submits these comments on the petitions for a severe-economic-harm waiver of the Renewable Fuel Standard ("RFS") obligations for 2019 and 2020. Monroe owns a refinery in southeastern Pennsylvania and is an obligated party under the RFS program.

EXECUTIVE SUMMARY

In the last year, spiking Renewable Identification Number ("RIN") prices and the dramatic reduction in the use of fuel precipitated by the COVID-19 pandemic have devastated United States refiners, leading to refinery closures across the country. Against this backdrop, Monroe urges EPA to exercise its general waiver authority to prevent further refinery closures, job losses, and other economic harm to Pennsylvania and the entire Petroleum Administration for Defense District ("PADD") Region 1, a region that was already reeling from the effects of the RFS program. EPA has authority to waive the RFS program's renewable fuel requirements "in whole or in part" if the

EPA Administrator determines that "implementation of the requirement would severely harm the economy" of a "State, a region, or the United States."[1]

The severe-economic-harm standard is met here. Many refineries already struggle with slim margins, and the RFS program's RIN requirements, as well as the manner in which the RIN market operates, are currently inflicting serious economic harm on those businesses. These impacts are particularly acute in PADD 1, where margins are even thinner and refiners struggle to pass through their RFS compliance costs to consumers.

Accompanying Monroe's comment on the 2019 proposed rule was an expert study by Dr. Craig Pirrong examining the economic effects of the RFS program on refiners in PADD 1.[2] That study warned that EPA's proposed RFS requirements "have the potential to make a number of East Coast refineries unprofitable," which "will increase the probability that one or more of these refineries may be unable to continue production."[3]

Dr. Pirrong has been proven right. Monroe recorded an operating loss of $216 million in 2020, which was driven by a crippling $172 million in RFS compliance costs due to spiraling RIN prices. Monroe's current RFS compliance expenses exceed not only what it spent to purchase its refinery; they also exceed its annual costs for labor and capital investments combined. Indeed, RFS compliance costs are Monroe's largest expense other than crude costs.

Monroe is not alone in struggling under the weight of its RIN obligations. In 2018, Philadelphia Energy Solutions ("PES") filed for Chapter 11 bankruptcy due to the devastating financial impact of its RIN obligations, and on July 21, 2019, it again filed for Chapter 11

[1] 42 U.S.C. § 7545(o)(7)(A)(i).

[2] Craig Pirrong, *Analysis of the RFS Program and the 2019 Proposed Standards* (Aug. 17, 2018) ("Pirrong Study") (resubmitted as part of these comments and attached as Exhibit A).

[3] *Id.* at 2.

bankruptcy following a refinery fire that forced the closure of the facility and hurt liquidity. These bankruptcies ended in the sale and permanent closure of the PES refinery, even after EPA forgave the majority of PES's RIN obligations, which were PES's largest cost. The closure of PES resulted in the direct elimination of more than 1,000 jobs,[4] imperiled tens of thousands more, and sent other negative economic impacts rippling through the local, regional, and national economy.

The harmful effects of the RFS program are especially severe in current market conditions, with the demand for refined products suppressed by the COVID-19 pandemic and not expected to fully recover in the near future. The pandemic caused an unprecedented year-over-year decline in the demand for petroleum and other liquid fuels, leading to temporary and permanent refinery closures and other capacity reductions throughout the United States. Coupled with the ongoing strain imposed by the 2019 and 2020 RFS requirements, these impacts have fallen particularly heavily on East Coast refiners. For example, PBF Energy—which operates two of the four largest remaining refineries in PADD 1—cut its East Coast refining capacity by 85,000 barrels per day and eliminated 250 jobs at its Paulsboro, New Jersey refinery.

Given the spiking RIN prices and the crippling impacts of the pandemic—as well as the closure of PES and PBF Energy's curtailment of East Coast refining capacity—EPA should use its severe-economic-harm waiver authority to reduce RFS volume requirements and thereby prevent further refinery shutdowns and job losses in Pennsylvania and throughout the entire PADD 1 region. According to a study performed by the Commonwealth of Pennsylvania, each refining job in southeastern Pennsylvania has a large multiplier effect on the regional and national economy, supporting an estimated 18.3 jobs in southeastern Pennsylvania, 22 jobs statewide, and

[4] *Philadelphia Energy Solutions Refinery Surprises with Shutdown Plan, Loss of 1,000 Jobs*, NBC10 (June 26, 2019), https://www.nbcphiladelphia.com/news/local/Philadelphia-Energy-Solutions-Refinery-to-Close-511834392.html.

61 jobs nationwide.[5] These jobs—and the economic benefits they create—are needed now more than ever, particularly in PADD 1.

Moreover, although EPA has long relied on its theory that RFS compliance costs are swiftly and completely passed through to consumers—and therefore cannot cause economic harm to refiners—numerous studies have undermined those conclusions.[6] Indeed, recent studies, including some by the very economists whom EPA has relied on in the past, confirm that pass-through is "significantly" lower in the PADD 1 region than in other parts of the country.[7] EPA should mitigate the economic harm that the RFS program is wreaking by issuing a general waiver.

[5] Center for Workforce Information & Analysis, *Reemployment Assessment and Economic Impact of ConocoPhillips and Sunoco Closings*, Appendix C at 1 (Jan. 9, 2012), https://www.doleta.gov/performance/results/AnnualReports/PY2012/PA_Impact_Conoco_Sunoco_Closings.pdf.

[6] *See, e.g.*, Pirrong Study at 27.

[7] Sebastien Pouliot, Aaron Smith & James Stock, *RIN Pass-Through at Gasoline Terminals* 21 (Feb. 22, 2017) (attached as Exhibit C); Jesse Burkhardt, *The Impact of the Renewable Fuel Standard on US Oil Refineries*, 130 Energy Pol'y 429, 430, 434 (2019).

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The RFS program is currently—and, absent action by EPA, will continue—severely harming the economy of Pennsylvania and PADD 1, where Monroe's refinery is located. Given this ongoing and future economic harm, EPA should exercise its general waiver authority, which authorizes the agency to waive RFS volume requirements when, "after public notice and opportunity for comment," the Administrator determines that "implementation of the requirement[s] would severely harm the economy . . . of a State, a region, or the United States."[8] Congress afforded EPA this authority to adjust statutory volume requirements to prevent precisely the type of serious economic damage that the RFS program is currently causing in the PADD 1 region.

To prevent further refiner bankruptcies and closures—and the far-reaching economic harm that these developments would impose on the broader economy of the PADD 1 region—EPA should exercise its authority to grant a severe-economic-harm waiver that reduces the RFS volume requirements for 2019 and 2020 so that the implied ethanol inclusion rate is 9.7%, below the blend wall.

I. THE RFS PROGRAM IS INFLICTING SEVERE ECONOMIC HARM ON THE PADD 1 REGION.

The compliance obligations imposed by the RFS program make it extremely difficult for refineries in the PADD 1 region to operate profitably. And the closure of even a single refinery, and the resulting job losses, would have widespread economic consequences for the entire Northeast. As Monroe explained during the comment periods on the 2019 and 2020 RFS

[8] 42 U.S.C. § 7545(o)(7)(A)(i).

obligations, the non-cellulosic advanced biofuel and conventional renewable fuel volumes for those years are inflicting and will continue to inflict severe economic harm on the PADD 1 region.[9]

As a recent study demonstrates, the RFS program causes serious market distortion for merchant refineries, which "cannot offset their [RIN] obligation without making purchases from the RIN market because most of their sales are on the bulk level."[10] Thus, "the RIN obligation represents a net cost to the merchant refiners that has increasingly reduced their refining margin."[11] Moreover, it is nearly impossible for refiners to plan for future RIN compliance obligations because the price of a RIN can fluctuate wildly. In one seven-month period during 2013, for example, the price ranged from $0.07–$1.43 per D6 RIN.[12] In 2018, the price per D6 RIN fluctuated between $0.14 and $0.75.[13] And in 2020, D6 RIN prices more than quadrupled from

[9] Monroe Energy, LLC, Comments 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), EPA-HQ-OAR-2019-0136-0021 at 2–11 (Aug. 30, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0136-0204 [hereinafter Monroe Comment Letter on 2020 Standards]; Monroe Energy, LLC, Comment Letter on Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020; Proposed Rule, 83 Fed. Reg. 32,024 (July 10, 2018), EPA-HQ-OAR-2018-0167 at 13–25 (Aug. 17, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0622 [hereinafter Monroe Comment Letter on 2019 Standards].

[10] Energy Ventures Analysis, *An Assessment of the Renewable Fuel Standard Using EVA-NEMS* 5 (July 17, 2019), https://www.evainc.com/wp-content/uploads/2019/07/EVA_RFS_REPORT-final.pdf.

[11] *Id.*

[12] Gretchen Morgensen & Robert Gebeloff, *Wall St. Exploits Ethanol Credits, and Prices Spike*, N.Y. Times (Sept. 14, 2013), https://www.nytimes.com/2013/09/15/business/wall-st-exploits-ethanol-credits-and-prices-spike.html.

[13] Corey Lavinsky, *Spotlight: 2020 Spike in RIN Prices Largely Driven by Policy, Supply and Demand … and Then a Biden Bump*, S&P Global Platts (Nov. 17, 2020), https://www.spglobal.com/platts/en/market-insights/latest-news/agriculture/111720-spotlight-2020-spike-rin-prices-driven-by-policy-supply-demand-biofuels-biden-elections.

where they began, exceeding $0.70 by the end of the year,[14] and have continued to climb in 2021, surpassing the $1.00 mark in January.[15]

Monroe and other commenters have urged EPA to implement reforms to reduce this volatility.[16] Specifically, Monroe has argued that EPA should adopt position limits, place restrictions on participation in the RIN market and the duration non-obligated parties can hold RINs, work with the Commodity Futures Trading Commission to regulate the RIN market, impose a price collar or cap, institute a RIN-waiver credit, and allow RINs separated from exported renewable fuel to be used for RFS compliance.[17] To date, however, EPA has not adopted any of these measures. The combination of annual changes in RIN obligations and highly volatile RIN prices makes it extraordinarily challenging for refiners to engage in midterm economic planning and budgeting—let alone to attract capital to undertake long-term major investments that create new, high-quality jobs.

The economic harms resulting from RIN obligations were documented in a comprehensive study by Dr. Craig Pirrong, a leading economics expert, of the effects of the RFS program on PADD 1 refineries. "Using standard economic analysis, and extensive data on the production and refining of motor fuels and biofuels," Dr. Pirrong "quantif[ied] the impact of moving from a mandate where the price of RINs are zero, to the mandate proposed by the EPA for 2019," and

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[14] *Id.*

[15] Janet McGurty, *PBF Energy Considering Renewable Diesel Project at Chalmette, Louisiana, Refinery*, S&P Global Platts (Feb. 11, 2021), https://www.spglobal.com/platts/en/market-insights/latest-news/agriculture/021121-pbf-energy-considering-renewable-diesel-project-at-chalmette-louisiana-refinery.

[16] *See generally* Monroe Energy, LLC, Comments on Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations; Proposed Rule, 84 Fed. Reg. 10,584 (Mar. 21, 2019), EPA-HQ-OAR-2018-0775; FLR-0001-04-OAR (Apr. 29, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0775-0836.

[17] *See id.*

found that the "impact is large, on both consumers and producers."[18] He predicted that the impact would "fall particularly heavily on refiners on the East Coast of the United States," as their refining margins would "fall by 12.5 percent."[19] Because East Coast refineries already operated at exceedingly thin margins before the 2019 requirements' increase in volumes, this "decline in gross margin" would be "large enough to make many refineries on the East Coast unprofitable" and would therefore be "large enough to cause some refineries to shut down, with a consequent loss of jobs."[20] Indeed, Dr. Pirrong concluded that, "even with a high RIN price pass-through rate, refiners' profits can be adversely affected in a way that may affect their survival."[21] And the 2020 RFS requirements—which are higher overall than the 2019 volume requirements—only exacerbate those impacts.

These effects are not just hypothetical. When Monroe purchased its refinery in 2012, a D6 RIN cost less than $0.05, and RFS compliance costs were manageable. Since 2017, D6 RIN prices have remained well above that level, passing $0.70 by the end of 2020 and surpassing the $1.00 mark in January 2021.[22] On January 29, 2021, D6 RINs reached $1.13, the highest price point since 2013.[23]

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[18] Pirrong Study at 29.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 27.

[22] Janet McGurty, *PBF Energy Considering Renewable Diesel Project at Chalmette, Louisiana, Refinery*, S&P Global Platts (Feb. 11, 2021), https://www.spglobal.com/platts/en/market-insights/latest-news/agriculture/021121-pbf-energy-considering-renewable-diesel-project-at-chalmette-louisiana-refinery.

[23] Stephanie Kelly, *U.S. Renewable Fuel Credits Surge to at Least 7-yr High: Traders*, Reuters (Jan. 29, 2021), https://www.reuters.com/article/us-usa-biofuels-rins/u-s-renewable-fuel-credits-surge-to-at-least-7-yr-high-traders-idUSKBN29Y2TN.

The impact on PADD 1 refiners has been dire. Between 2009 and 2018, seven refineries in PADD 1 closed.[24] This eliminated 641,300 barrels per day of capacity from the region and left only eight refineries in the PADD 1 region.[25] The number of PADD 1 refineries fell to seven after the closure of PES, the region's largest refinery. In 2018, PES filed for Chapter 11 bankruptcy, specifically citing its inability to pay RFS compliance costs—its largest expense—as a primary reason for its insolvency.[26] PES emerged from the bankruptcy only after a settlement in which EPA forgave the vast majority of PES's outstanding RIN obligations.[27] Then, on July 21, 2019, it again filed for Chapter 11 bankruptcy following a devastating refinery fire that forced the closure of the facility and hurt liquidity.[28] During this second bankruptcy proceeding, EPA agreed to forgive millions more in outstanding RIN obligations held by PES, even after EPA had already agreed to forgive all but a fraction of PES's total outstanding obligations in the 2018 bankruptcy.[29] EPA explained in its filing in support of its settlement with PES that "[i]nsisting on greater compliance with the RINs retirement obligations would have presented a serious risk of failure of the Plan and liquidation."[30] PES's second Chapter 11 bankruptcy filing in two years culminated in the June 2020 sale of the refinery to a developer, which has announced that it plans to convert

[24] Monroe Comment Letter on 2019 Standards at 14, 16–18.

[25] Pirrong Study at 9.

[26] *Id.* at 16.

[27] Monroe Comment Letter on 2019 Standards at 17–18.

[28] Monroe Comment Letter on 2020 Standards at ii.

[29] Debtors' Motion for Entry of an Order Approving the Consent Decree and Environmental Settlement Agreement ¶ 16, *In re PES Holdings, LLC*, No. 19-11626 (LLS) (Bankr. D. Del. May 4, 2020).

[30] United States' Joinder in Support of Motion to Approve Proposed Consent Decree and Environmental Settlement Agreement ¶ 51, *In re PES Holdings, LLC*, No. 19-11626 (LLS) (Bankr. D. Del. June 1, 2020).

the property into a logistics facility and has no intention of restarting the refinery.[31] PES's closure eliminated 335,000 barrels per day, constituting approximately 27% of PADD 1's capacity.[32]

Moreover, PES's struggles occurred *before* EPA finalized the 2020 volume requirements, which have further amplified the economic pressure on non-exempt refiners. In its initial proposed rule on the 2020 RFS standards, EPA followed its typical practice by declining to adjust the RFS percentage standards to account for fuel volumes produced by refiners that might receive small-refinery exemptions.[33] In its final rule, however, EPA abruptly reversed course, forcing non-exempt obligated parties to meet higher volume obligations in the 2020 compliance year to compensate for projected exempted volumes.[34] This decision forced obligated merchant refiners that are too large to seek small-refinery exemptions for themselves to shoulder the burden of projected exempted volumes, further increasing their compliance costs.

In addition, rather than using the number of exemptions in prior years as a baseline for imposing this burden, EPA used a projection of volumes that will be exempted in the future, a methodology that is inherently error-prone and speculative.[35] Indeed, in past rules, EPA had acknowledged that the number of exemptions that will be granted in any future year is "inherently

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[31] Catalina Jaramillo, *'We Don't See the Refinery Starting': PES Site's New Owner Envisions an 'Environmentally Conscious' Commercial Hub*, WHYY (June 26, 2020), https://whyy.org/articles/we-dont-see-the-refinery-starting-pes-sites-new-owner-envisions-an-environmentally-conscious-commercial-hub/.

[32] Pirrong Study at 16–17 & Ex. 7.

[33] *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).

[34] *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, 57,679 (Oct. 28, 2019).

[35] *See* 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 at 11–12, 16–18 (Nov. 27, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0136-1284.

difficult to estimate with precision."[36] Similarly, EPA conceded in the 2020 Final Rule that, under its new approach, it might over-estimate the volume of fuel produced by exempt small refineries, with the result that "the actual required volumes of renewable fuel will be higher than the volumes used in calculating the percentage standards."[37] Nevertheless, EPA moved forward with imposing these new burdens on non-exempt refiners, adopting a methodology in the 2020 Final Rule that relies on projected estimates of future small-refinery exemptions that will inevitably vary wildly from the actual figure and will likely result in unnecessarily high volume obligations for non-exempt refiners—further exacerbating the economic strain on large refiners in PADD 1 and elsewhere.

The Tenth Circuit's decision in *Renewable Fuels Association v. EPA*[38] has further reduced the number of small-refinery exemptions that will be granted, thereby widening the chasm between the projected exemptions used by EPA to calculate the 2020 percentage standards and reality. In that case, the court held that only those small refineries that received a hardship exemption in every prior compliance year are eligible for an exemption going forward.[39] This decision rendered a large swath of small refiners ineligible for an exemption because only seven small refiners at most received an exemption in every compliance year prior to 2020.[40] *Renewable Fuels Association* both demonstrates the fraught nature of projecting future exemptions and has the potential to

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[36] 84 Fed. Reg. at 57,682.

[37] *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7016, 7051 (Feb. 6, 2020).

[38] 948 F.3d 1206 (10th Cir. 2020), *cert. granted sub nom. HollyFrontier Cheyenne v. Renewable Fuels Assn.*, No. 20-472, 2021 WL 77244 (U.S. Jan. 8, 2021).

[39] *Id.* at 1245.

[40] Cong. Rsch. Serv., *Tenth Circuit Ruling May Limit Availability of Small Refinery Exemptions from the Renewable Fuel Standard: Implications for Congress* 3 (Mar. 10, 2020), https://www.everycrsreport.com/files/2020-03-10_LSB10418_4060103b4189350eb6ac5db93343c4a89e3369e6.pdf.

virtually ensure that large refiners will be saddled with unnecessarily high volume obligations for 2020. The Supreme Court has granted certiorari to review the decision,[41] but if the Tenth Circuit's rule becomes the law of the land, it will foreclose many of the exemptions EPA projected in its calculation of the 2020 percentage standards and leave non-exempt refiners to deal with the economic repercussions of unnecessarily high volume obligations.

As Dr. Pirrong predicted, the 2019 and 2020 RFS requirements have exacerbated the hardships that PADD 1 refiners were already experiencing. Monroe incurred nearly $58 million in RIN compliance costs in 2019 and $172 million in 2020. Thus, Monroe is now spending more on RINs than the amount it paid to purchase its refinery, and more than on any other category of expenses—including labor and capital investments combined—other than the purchase of crude oil. RIN-compliance obligations make it difficult for Monroe just to break even, much less invest the necessary capital for sustaining and expanding operations.

These hardships are especially devastating when coupled with the unprecedented effects of COVID-19 on the demand for refined fuel products. The pandemic and the measures put in place to reduce its spread halted economic growth and depressed demand for transportation fuel and other refined products in the United States and around the world.[42] The U.S. Energy Information Administration ("EIA") estimates that world consumption of petroleum and other liquid fuels dropped to 92.2 million barrels per day in 2020, a nine percent drop from the previous year and the largest decline on record.[43] Although demand has improved to some degree when

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[41] *HollyFrontier Cheyenne v. Renewable Fuels Assn.*, No. 20-472, 2021 WL 77244 (U.S. Jan. 8, 2021).

[42] Kevin M. Camp et al., U.S. Bureau Labor Stat., *From the Barrel to the Pump: The Impact of the COVID-19 Pandemic on Prices for Petroleum Products*, Monthly Labor Rev. (Oct. 2020), https://www.bls.gov/opub/mlr/2020/article/from-the-barrel-to-the-pump.htm.

[43] U.S. Energy Info. Admin., *EIA Estimates that Global Petroleum Liquids Consumption Dropped 9% in 2020*, EIA.gov (Jan. 29, 2021), https://www.eia.gov/todayinenergy/detail.php?id=46596.

compared to its lowest point in 2020, EIA projects that "global petroleum demand will not recover to pre-pandemic levels . . . through at least 2021."[44]

This demand pullback heavily affected United States refiners of all sizes. Annual refinery inputs of crude oil declined by an estimated 2.3 million barrels per day in 2020.[45] In the wake of this abrupt reduction in demand, the nation's seven largest refiners reported a combined year-over-year revenue decline of $62.03 billion in the second quarter of 2020 alone,[46] and multiple analysts project the fourth quarter of 2020 to be the worst of the year for "every U.S. independent refiner."[47] These losses led to "closures and conversions" throughout the United States, with many of those closures expected to be permanent.[48] By one estimate, United States refiners have shut down nearly 1.2 million barrels per day in refining capacity.[49]

In light of current economic conditions, the 2019 and 2020 RFS requirements have had a particularly devastating impact on PADD 1 refiners. Monroe recorded an operating loss of a staggering $216 million in 2020, which was driven primarily by $172 million in RFS compliance costs—a $114 million increase year over year—and a reduction in revenue caused by the

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[44] U.S. Energy Info. Admin., *EIA Expects U.S. Crude Oil Production to Remain Relatively Flat Through 2021*, EIA.gov (Nov. 17, 2020), https://www.eia.gov/todayinenergy/detail.php?id=45916.

[45] U.S. Energy Info. Admin., *This Week In Petroleum* (Feb. 10, 2021), https://www.eia.gov/petroleum/weekly/.

[46] Everett Wheeler, *Refiner Profits to Fall Sequentially in Q3 as 'COVID-Related Carnage' Lingers*, S&P Global Mkt. Intel. (Oct. 21, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/refiner-profits-to-fall-sequentially-in-q3-as-covid-related-carnage-lingers-60852453.

[47] Laura Sanicola, *U.S. Oil Refiners Set for Worst Earnings Quarter of the Pandemic*, Reuters (Jan. 25, 2021), https://www.reuters.com/article/us-usa-refining-results/u-s-oil-refiners-set-for-worst-earnings-quarter-of-the-pandemic-idUSKBN29U0F0.

[48] Amanda Luhavalja, *Some US Refinery Shutdowns Could be Permanent as Margins Stay 'in the Gutter'*, S&P Global Mkt. Intel. (Dec. 14, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/some-us-refinery-shutdowns-could-be-permanent-as-margins-stay-in-the-gutter-61311006; *see also* Barbara J. Powell, *New Jersey Refinery Becomes Latest Casualty of Collapse in Fuel Demand*, Bloomberg (Oct. 28, 2020), https://www.bloomberg.com/news/articles/2020-10-28/n-j-refinery-becomes-latest-casualty-of-collapse-in-fuel-demand (reporting various refinery closures in California, Wyoming, North Dakota, and New Jersey).

[49] Luhavalja, *supra* note 48.

pandemic's depression of demand for its refined products. Further adding to the loss of refining capacity in PADD 1, PBF Energy—which operates two of the four largest surviving East Coast refineries[50]—announced that it would shut down most refining units and eliminate 250 jobs at its Paulsboro, New Jersey refinery by the end of 2020, reducing its East Coast refining capacity by 85,000 barrels per day.[51] The closure of PES and PBF Energy's East Coast capacity reduction have eliminated a combined total of 420,000 barrels per day of refining capacity in PADD 1. The region's total refining capacity now stands at approximately 803,500 barrels per day, a 34 percent reduction in the 1,223,500 barrel-per-day capacity that was available just three years ago.[52]

When refineries struggle or close, the rest of the economy suffers because the direct and indirect impacts of layoffs from refineries are "substantial."[53] Each southeastern Pennsylvania refinery job has a multiplier effect of 18.3 jobs in southeastern Pennsylvania, 22 jobs statewide, and 61 jobs across the nation.[54] Monroe and PES alone supported over 35,000 indirect jobs in southeastern Pennsylvania.[55] Thus, the PES fire and subsequent closure—which resulted in the direct loss of more than 1,000 jobs—also imperiled tens of thousands of additional jobs. One study has estimated that, for every 100 PES employees who are out of work for one year, the Philadelphia area would lose 585 jobs, almost $60 million in labor income, more than $627 million in output,

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[50] *See* Pirrong Study at Exhibit 7.

[51] Laura Sanicola, *PBF Energy to Shut Fuel-Producing Units at Paulsboro, New Jersey Refinery: Letter*, Reuters (Oct. 28, 2020), https://www.reuters.com/article/us-pbf-energy-paulsboro/pbf-energy-to-shut-fuel-producing-units-at-paulsboro-new-jersey-refinery-letter-idUSKBN27E00P; *PBF Energy (PBF) Q3 2020 Earnings Call Transcript*, Motley Fool (Oct. 30, 2020), https://www.fool.com/earnings/call-transcripts/2020/10/30/pbf-energy-pbf-q3-2020-earnings-call-transcript/.

[52] Pirrong Study at Exhibit 7.

[53] Center for Workforce Information & Analysis, *supra* note 5, Appendix C at 1.

[54] Monroe Comment Letter on 2019 Standards at 18.

[55] *Id.* at 18–19.

and $12 million in state and local taxes.[56] The Commonwealth of Pennsylvania would lose 1,333 jobs, $128 million in labor income, $797 million in output, and $21 million in state and local taxes.[57] The Central Atlantic region, in turn, would lose 1,483 jobs, $140 million in labor income, $826 million in output, and $23 million in state and local taxes.[58] And the U.S. economy, in the aggregate, would lose 2,669 jobs, $227 million in labor income, $1 billion in economic output, and $45 million in state and local taxes.[59] This alone constitutes "a substantial negative economic impact on the local and regional economy."[60]

The onerous compliance obligations that the RFS program imposes on Monroe and other refiners make it extremely challenging for refiners to operate profitably, imperiling the livelihoods of their employees and creating damaging economic ripple effects throughout the entire Northeast region. The 2019 and 2020 RFS obligations have only compounded the region's recent economic troubles and exacerbated the unprecedented effects of the pandemic. In so doing, the RFS program has been inflicting, and will continue to inflict, severe economic harm on the PADD 1 region that warrants the use of EPA's general waiver authority.

EPA should therefore exercise its authority to grant a severe-economic-harm waiver for both 2019 and 2020 that reduces the advanced biofuel volume to 3.84 billion gallons and the total renewable fuel volume to 17.68 billion gallons. This reduction would bring the implied ethanol

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[56] David E. Dismukes & Gregory B. Upton, Jr., Acadian Consulting Group, *Economic Impact and Re-Employment Assessment of PES Philadelphia Refining Complex* 20 (Aug. 31, 2017) (resubmitted as part of these comments and attached as Exhibit B).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Pirrong Study at 18.

inclusion rate to 9.7%,[61] a percentage level reasonably below the blend wall (the volume of ethanol that can be blended into gasoline as E10).[62] The blend wall is significant because when the volume requirements for ethanol pass this threshold, RIN prices increase and become volatile.[63] These effects occur because the mandated volume artificially inflates the demand for ethanol, which is otherwise constrained by the amount that current infrastructure can handle.[64] This drives ethanol demand higher than ethanol production, forcing refiners to purchase additional types of biofuel RINs to meet the general mandate and increasing the price that refiners pay for RINs on the secondary market or making prices more volatile.[65]

Dr. Pirrong documented the effects of breaching the blend wall, observing that "RIN prices increased substantially" after the gap between the supplied ethanol and the conventional portion of the renewable fuel requirement grew larger.[66] Based on these effects, Dr. Pirrong calculated the difference between Monroe's proposed 2019 standards (which would have set the implied ethanol inclusion rate just below the blend wall) and EPA's proposed standards (which would push the inclusion rate higher than the blend wall) would "represent[] a 12.3 percent decline in PADD 1 refinery margins," a difference of $1.6 billion in lost refiner profits, and a difference of $248

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[61] This calculation is based on a gasoline volume of 142.68 billion gallons, the projected volume used by EPA to calculate the 2020 standards. 85 Fed. Reg. at 7053. This rate would also fall just below the blend wall at a gasoline volume of 142.62 billion gallons, the projected volume used to calculate the 2019 standards. *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704, 63,740 (Dec. 11, 2018).

[62] EIA projected that ethanol content in gasoline would reach 10.08% in 2020, suggesting that the blend wall currently rests near that percentage. Letter from Linda Capuano, Administrator, U.S. Energy Info. Admin., to Andrew Wheeler, Administrator, U.S. Env't Prot. Agency (Oct. 9, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0136-2078.

[63] Pirrong Study at 8 & Exhibits 2–4.

[64] *Id.* at 7–8.

[65] *Id.*

[66] *Id.* at 8.

million in lost profits for Monroe alone.[67] As discussed above, these effects have now come to pass.

For all of these reasons, EPA should use its waiver authority to reduce the volume requirement to below the blend wall.

II. REFINERS DO NOT PERFECTLY PASS THROUGH RIN COSTS TO CONSUMERS.

For years, EPA has waved off all complaints about the severe economic harm that the RFS program is imposing on refineries by insisting that RFS compliance costs are fully and quickly passed through to consumers. In EPA's 2017 denial of the petitions regarding the point of obligation, the agency relied on a study concluding that "the ability of the merchant refiners to recover the cost of RINs was complete (not statistically different than 100%) and occurred quickly (within 2 business days)."[68] In the 2019 rulemaking, EPA repeated this theory that obligated parties' "RFS compliance costs" are "passed through to consumers in the marketplace" and therefore "do[ ] not represent a net cost to obligated parties."[69] And in the 2020 rulemaking, EPA adhered to this position, claiming that commenters "provided no new credible evidence to indicate that they do not or cannot recover the cost of RINs."[70] Commenters have consistently pointed out

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[67] *Id.* at 13–14.

[68] *Denial of Petitions for Rulemaking To Change the RFS Point of Obligation* 25 (Nov. 22, 2017) (EPA-HQ-OAR-2018-0167-0065) (citing Christopher R. Knittel, Ben S. Meiselman & James H. Stock, *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard* (Nov. 2016); Christopher R. Knittel, Ben S. Meiselman & James H. Stock, *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard: Analysis of Post-March 2015 Data* (Nov. 23, 2016)).

[69] *Renewable Fuel Standard Program - Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments* 14 & n.15, EPA-420-R-18-019 (Nov. 2018), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100VU6V.pdf [hereinafter 2019 Response to Comments].

[70] *Renewable Fuel Standard Program - Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments* 11, EPA-420-R-19-018 (Dec. 2019), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100YAPQ.pdf.

the flaws in this pass-through theory and the studies on which EPA has relied,[71] but EPA has steadfastly refused to reconsider its theory.

More recent studies, however—including some by the very scholars whom EPA has cited—confirm that refiners do not achieve anything close to perfect pass-through of RIN costs to consumers, particularly in the PADD 1 region. For example, a 2017 study by, among others, Prof. James H. Stock (an author of the Knittel studies on which EPA has relied, *see supra* note 68), found that pass-through in the PADD 1 region is "significantly" incomplete, with pass-through rates of only 38%–50%.[72] And a later paper confirmed that work, agreeing that there is "incomplete pass-through in PADD 1."[73] EPA has not yet grappled with these recent studies, nor has it considered the ways in which PADD 1 refiners in particular struggle to pass through their RFS compliance costs.

The serious economic harm being inflicted by the RFS program is further confirmed by EPA's practice in recent years of issuing scores of hardship exemptions to small refineries—far more than ever before. Over the past three years, EPA granted 85 exemptions from the RFS

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[71] For example, EPA has relied on its 2015 Burkholder Study. 2019 Response to Comments at 14 n.15 (citing Dallas Burkholder, U.S. Env't Prot. Agency, Off. Transp. Air Quality, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* (May 14, 2015) (EPA–HQ–OAR–2015–0111)). But "a later study" by Charles River Associates ("CRA") in 2016 "shows that pass-through rates were lower for domestic products in 2015 and 2016." Pirrong Study at 27 & n.49 (citing CRA, *Re-examining the Passthrough of RIN Prices to the Prices of Obligated Fuels* 8-9 (Oct. 2016)). And a 2017 CRA study explained that later studies by Knittel *et al.*, *supra* note 68, omitted two variables (Brent-crude-based spreads) that were included in an earlier study, which resulted in a "distorted view of passthrough" and "calls into question the existence of other omitted variables." CRA, *Review of Updated Pass-Through Analysis of Knittel, Meiselman and Stock* 3 (Feb. 2017) ("2017 CRA Study"). The 2017 CRA Study also found that Knittel improperly included a fuel-price spread (New York Harbor CBOB – Rotterdam EBOB), which misleadingly weighted the findings in favor of pass-through. *Id.* at 4. And the 2017 CRA Study raised questions about serious flaws in how Knittel "pooled" information to calculate pass-through. *Id.* at 4–5. Moreover, the Pirrong Study itself further emphasized that, "even with a high RIN price pass-through rate, refiners' profits can be adversely affected in a way that may affect their survival," particularly in PADD 1. *Id.*

[72] Pouliot, Smith & Stock, *supra* note 7, at 21.

[73] Burkhardt, *supra* note 7, at 430, 434.

program to small refineries[74] based on the "disproportionate economic hardship"[75] that program compliance would inflict. Among the principal factors that EPA considers in evaluating these petitions are "RIN prices, and the cost of compliance through RIN purchases."[76]

Two federal courts have recognized that EPA's focus on RIN prices in evaluating small-refinery exemptions is at odds with the pass-through theory it has adopted in refusing to grant a severe-economic-harm waiver. The Fourth Circuit recognized in *Ergon-West Virginia, Inc. v. EPA* that EPA's approach to small-refinery exemptions "appears inconsistent" with EPA's position that RFS compliance costs do not burden obligated parties because they are passed through to consumers.[77] More recently, in *Renewable Fuels Association*, the Tenth Circuit found an "unexplained inconsistency" between EPA's invocation of the pass-through theory in other contexts and its granting of the small-refinery exemptions challenged in the case.[78] The court concluded that, in granting the small-refinery exemptions, EPA must have "ignored" or "deviat[ed]" from its pass-through theory.[79] The fact that RFS compliance costs have imposed economic hardship on scores of small refineries—thereby necessitating an RFS exemption—makes clear that those costs are not being entirely recouped by pass-through to customers.

These waiver petitions present EPA with an opportunity to revisit its pass-through theory in light of the most recent studies and analyses demonstrating that RIN pass-through is far from

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[74] *See* EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliancehelp/rfs-small-refinery-exemptions.

[75] 42 U.S.C. § 7545(o)(9)(B)(i).

[76] EPA, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemptions Requests* 2 (Dec. 6, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/rfssmall-refinery-2016-12-06.pdf.

[77] 896 F.3d 600, 613 (4th Cir. 2018).

[78] 948 F.3d at 1255.

[79] *Id.* at 1254–57.

complete or immediate, particularly in the PADD 1 region. These studies in turn further support the conclusion that the RFS program is inflicting severe economic harm on the PADD 1 region.

III. A WAIVER IS APPROPRIATE WHENEVER, IN EPA'S JUDGMENT, THE EVIDENCE INDICATES THAT THE VOLUME REQUIREMENTS WOULD CAUSE SEVERE ECONOMIC HARM.

In the past, EPA has indicated that, before exercising its severe-economic-harm waiver authority, the agency must have "a generally high degree of confidence that severe harm would occur from implementation of the RFS."[80] The evidence of severe economic harm to the PADD 1 region more than meets that threshold. But, as Monroe argued in its comments on the 2019 and 2020 volumes,[81] EPA should not evaluate whether to grant a severe-economic-harm waiver using a "generally high degree of confidence" standard because that standard is inconsistent with the Energy Independence and Security Act of 2007 ("EISA") that established the RFS program. EPA should instead grant a severe-economic-harm waiver whenever, in EPA's judgment, the evidence indicates that the RFS volume requirements would severely harm the economy. This standard would better conform to the statute and the cases that have interpreted it.

EPA is not bound by its prior interpretation of EISA's severe-economic-harm waiver provision, which has no footing in the plain terms of the statute.[82] EPA does not apply a heightened standard in issuing waivers to small refineries "for the reason of disproportionate economic hardship," and it should adopt a consistent standard for evaluating general severe economic

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[80] *Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard*, 73 Fed. Reg. 47,168, 47,171–72 (Aug. 13, 2008) (denial of petition for waiver); *accord Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard*, 77 Fed. Reg. 70,752, 70,754 (Nov. 27, 2012) (same).

[81] *See* Monroe Comment Letter on 2019 Standards at 2–8; Monroe Comment Letter on 2020 Standards at 6–8.

[82] Monroe Comment Letter on 2019 Standards at 3 (citing 2019 Response to Comments at 22).

harm.[83] This approach also conforms to the D.C. Circuit's instruction that when exercising its cellulosic waiver authority, EPA must take a "neutral aim at accuracy."[84] Indeed, the D.C. Circuit rejected "EPA's decision to adopt a methodology in which the risk of overestimation is set deliberately to outweigh the risk of underestimation" to drive the purported general purpose of the RFS program.[85] Instead, the court held, EPA should interpret the statute "plainly to call for a prediction of what will *actually* happen."[86] EPA should apply this same neutral standard to its general waiver authority.

IV. THE RFS PROGRAM NEED NOT BE THE SOLE CAUSE OF ECONOMIC HARM TO WARRANT A WAIVER.

EPA has interpreted the severe-economic-harm waiver provision to mean that the agency cannot exercise its waiver authority unless it is shown that the RFS program would be the *sole* cause of severe harm to the economy.[87] But this conclusion does not comport with economic reality. Economic conditions rarely arise from a single factor.[88] When examining the economy of a state or region, economic outcomes are almost always the result of numerous factors that are difficult to disentangle. Assigning weight to each factor or determining which factor was the tipping point that caused the economic harm is an impossible task.

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[83] 42 U.S.C. § 7545(o)(9)(B)(i); *see also Sinclair Wyo. Refining Co. v. EPA*, 874 F.3d 1159 (10th Cir. 2017) (vacating denial of exemption); *Lion Oil Co. v. EPA*, 792 F.3d 978 (8th Cir. 2015) (denying petition for review of exemption); *Hermes Consol., LLC v. EPA*, 787 F.3d 568 (D.C. Cir. 2015) (vacating denial of exemption).

[84] *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013).

[85] *Id.* at 479.

[86] *Id*.

[87] 73 Fed. Reg. at 47,170–71.

[88] *See, e.g.*, John Lindauer, *Macroeconomics* 534 (4th ed. 2012) ("[I]t is often difficult to identify the precise cause of a[n economic] problem because multiple causes can be occurring at the same time."); *cf.* Peter J. Moniel, *Macroeconomics in Emerging Markets* 685 (2d ed. 2011) ("There is no single cause of currency crises.").

In adopting a contrary interpretation, EPA has essentially nullified its severe-economic-harm waiver authority by setting a standard that cannot be satisfied—an outcome that violates settled principles of statutory interpretation.[89] The statutory text should instead be read to grant EPA the discretion to use its general waiver authority whenever the RFS program's volume requirements would be a significant factor in causing severe economic harm, even if those volume requirements operate in combination with other economic factors existing at the time to bring about that harm.

EPA's reliance on the lack of the word "contribute" to refer to the connection between the RFS program and "severe economic harm"[90] is unconvincing. EPA contrasted the absence of the word "contribute" in EISA's severe-economic-harm waiver provision with the "numerous examples" in other parts of the Clean Air Act having to do with pollution, where parties are often able to isolate causation.[91] That is starkly different from the economic context, where such isolation is nearly impossible.

Accordingly, EPA should not draw any inferences based on the absence of the word "contribute" in Section 211(o)(7)(A), because there is no meaningful distinction between a significant contribution and causation in the economic setting. Instead, EPA should adhere to the

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[89] *See Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (holding that statutes should not be interpreted in a way that causes a provision to have "no consequence").

[90] 73 Fed. Reg. at 47,171.

[91] *See, e.g.*, 42 U.S.C. § 7403(c)(3)(A) ("emissions . . . that contribute to urban air pollution"); *id.* § 7410(a)(2)(D)(i)(I) ("any source . . . which will . . . contribute significantly to nonattainment in . . . ambient air quality standard"); *id.* § 7412(m)(1)(C) ("contribution of atmospheric pollutants to total pollution loadings"); *id.* § 7412(m)(1)(D) ("contribution of such deposition to violations of water quality standards"); *id.* § 7412(m)(3) ("discharges that contribute to such emissions"); *id.* § 7474(e) ("emitting facility . . . will cause or contribute to a cumulative change in air quality"); *id.* § 7492(c)(1)(A) ("transport of air pollutants . . . significantly contributes to visibility impairment"); *id.* § 7503(a)(1)(B) ("major stationary source will not cause or contribute to emissions levels"); *id.* § 7511a(g)(4)(A) ("products the use of which contributes to ozone formation"); *id.* § 7512a(c)(1) ("stationary sources contribute significantly to carbon monoxide levels").

plain language of EISA and economic reality by asking whether the RFS program's volume requirements would be a significant factor in causing severe economic harm in combination with other economic factors.[92]

V. COUNTERVAILING BENEFITS FROM THE RFS PROGRAM CANNOT OFFSET THIS SEVERE ECONOMIC HARM BECAUSE THE RFS PROGRAM AS CURRENTLY ADMINISTERED IS NOT MEETING ITS STATUTORY PURPOSE.

In prior comment letters, Monroe has argued that, in determining whether the RFS volume requirements would be a significant factor in causing severe economic harm, the statutory text requires that EPA consider only economic harm to the region at issue and that it disregard any economic benefits that the RFS program might generate in that region or in other areas of the United States.[93] Monroe continues to maintain that its reading of the severe-economic-harm waiver provision is correct. But even if EPA were to examine whether the RFS program has beneficial effects, EPA still should conclude that it would be appropriate to exercise its severe-economic-harm waiver authority because the data demonstrate that the RFS program as currently administered is not living up to its statutory purposes.

A recent study by Energy Ventures Analysis ("EVA") finds that the RFS program is not accomplishing its objectives even as it imposes increased costs.[94] If the RFS program continues its current trajectory, by 2025 consumers will pay $8.7 billion more at the pump than they would if the RFS program were eliminated, yet "the use of biofuels in motor fuels will change very little."[95] In fact, repealing the RFS program would have little economic effect other than to lower

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[92] *See* Monroe Comment Letter on 2019 Standards at 8–11.

[93] *See id.* at 11–12.

[94] *See generally* Energy Ventures Analysis, *supra* note 10.

[95] *Id.* at 4, 14–15.

costs and eliminate the compliance burden on merchant refiners. Nor does the program advance its first stated goal of energy independence: It depends on imported fuel even though the United States is currently and would remain a net exporter of petroleum and other liquid fuels through 2025 if the program were eliminated entirely.[96]

The second goal of the RFS program, reducing greenhouse-gas emissions, has likewise languished. As the U.S. Government Accountability Office recently concluded, "the RFS is unlikely to meet the greenhouse gas emissions reduction goals envisioned for the program through 2022."[97] Advanced biofuels are uneconomical, and the market achieves compliance with the RFS mandates largely by relying on conventional ethanol, which has lower greenhouse-gas reductions than advanced biofuels.[98] "Furthermore, because the RFS has not been responsible for all of the ethanol used . . . since the program took effect, not all greenhouse gas reductions associated with ethanol use have been the result of the RFS."[99]

Current market trends further highlight the obsolescence of the RFS program. Consumption of motor gasoline is decreasing. Projections indicate that consumption will fall from 143.2 billion gallons in 2018 to 117.1 billion gallons in 2030, which means a reduction in the total motor-gasoline volume into which ethanol can be blended.[100] This is due in part to increased fuel

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[96] *Id.* at 5, 19; *see also* U.S. Energy Info. Admin., *The United States Exported a Record Volume of Ethanol in 2018 for Second Consecutive Year*, EIA.gov (Apr. 24, 2019), https://www.eia.gov/todayinenergy/detail.php?id=39212.

[97] U.S. Gov't Accountability Office, GAO-19-47, *Renewable Fuel Standard: Information on Likely Program Effects on Gasoline Prices and Greenhouse Gas Emissions* 19 (2019), https://www.gao.gov/assets/700/698914.pdf.

[98] *Id.*

[99] *Id.* at 20.

[100] Energy Ventures Analysis, *supra* note 10, at 11.

efficiency,[101] and also to the projected increase in sales of electric vehicles, which will exceed the sales of Flexible Fuel Vehicles by 2025.[102]

In sum, the RFS program is ineffective and obsolete. It results in increased costs for consumers and market distortions for merchant refiners. Yet, to date, it has had little impact on the environment and has not supported energy independence for the United States. As the EVA study concludes, "the RFS mandate is no longer relevant as an energy policy."[103] Thus, there are no countervailing benefits stemming from the program—even if such benefits were relevant to the waiver analysis—that would outweigh the severe economic harm it is inflicting on the PADD 1 region and beyond.

CONCLUSION

Monroe respectfully requests that EPA grant the severe-economic-harm waiver petitions.

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Respectfully submitted,

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[101] *Id.* at 14.

[102] *Id.* at 11.

[103] *Id.* at 4.