

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

Consolidated Docket Nos. 13-1265 & 13-1267

MONROE ENERGY, L.L.C.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY

Respondent.

*On Petition for Review from
the United States Environmental Protection Agency*

**PETITIONER MONROE ENERGY L.L.C.'S
EMERGENCY MOTION FOR EXPEDITED REVIEW**

David W. DeBruin
Marc A. Goldman
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
Tel.: (202) 639-6000
Fax: (202) 639-6066
Email: ddebruin@jenner.com
mgoldman@jenner.com
mprice@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 4

 A. Statutory and Regulatory Framework..... 4

 B. The 2013 Rule..... 9

ARGUMENT 12

I. EPA’s Refusal to Adjust Volume Requirements Was Arbitrary and
Capricious..... 12

 A. EPA Failed to Offer Any Reason For Imposing a Volume
 Percentage Requirement Greater Than the Amount the
 Economy Could Consume..... 12

 B. EPA Had Discretion to Avoid This Absurd Outcome..... 17

II. EPA’s Refusal to Adjust Volume Requirements Is Causing Monroe
Irreparable Injury..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES*

CASES

* <i>American Petroleum Institute v. EPA</i> , 706 F.3d 474 (D.C. Cir. 2013)	14, 16, 17, 19
<i>American Water Works Ass’n v. EPA</i> , 40 F.3d 1266 (D.C. Cir. 1994)	18
<i>Buffalo Crushed Stone, Inc. v. Surface Transportation Board</i> , 194 F.3d 125 (D.C. Cir. 1999)	18
<i>Fox Television Stations, Inc. v. FCC</i> , 280 F.3d 1027 (D.C. Cir.), modified on reh’g, 293 F.3d 537 (D.C. Cir. 2002)	3
<i>Motor Vehicle Manufacturers Ass’n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.</i> , 463 U.S. 29 (1983).....	13, 15
<i>Train v. Colorado Public Interest Research Group, Inc.</i> , 426 U.S. 1 (1976)	18

STATUTES

42 U.S.C. § 7545(d)(1).....	20
42 U.S.C. § 7545(o)(2)(A).....	4
42 U.S.C. § 7545(o)(2)(B)(i)(I)	4
42 U.S.C. § 7545(o)(2)(B)(i)(II)	4
42 U.S.C. § 7545(o)(2)(B)(i)(III).....	4, 17
42 U.S.C. § 7545(o)(2)(B)(i)(IV)	4
42 U.S.C. § 7545(o)(3)(A).....	5
42 U.S.C. § 7545(o)(3)(B)(i)	5
42 U.S.C. § 7545(o)(3)(B)(ii)(I)	5
42 U.S.C. § 7545(o)(3)(B)(ii)(II).....	5

* Authorities upon which we chiefly rely are marked with asterisk.

42 U.S.C. § 7545(o)(3)(B)(ii)(III).....	5
42 U.S.C. § 7545(o)(7)(A)(ii)	18
42 U.S.C. § 7545(o)(7)(D)(i)	17
42 U.S.C. § 7607(b)(1).....	3
42 U.S.C. § 7607(d)(7)(B)	3
40 C.F.R. § 19.4	20

OTHER AUTHORITIES

<i>D.C. Circuit Handbook of Practice & Internal Procedure</i> (Dec. 1, 2011).....	12
Delta Air Lines, Inc., Form 10-Q (for the period ending June 30, 2013) (filed Aug. 1, 2013), available at http://phx.corporate-ir.net/phoenix.zhtml?c=71481&p=irol-sec&control_selectgroup=Quarterly%20Filings...	19, 20
EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)	9, 18
EPA, Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 9282 (Feb. 7, 2013)	9
*EPA, Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794 (Aug. 15, 2013)	1, 10, 11, 13, 14, 15, 16, 17, 18
*EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900 (May 1, 2007)	6, 7, 9, 12, 13, 19
*EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010).....	5, 6, 8, 17
G. Morgenson & R. Gebeloff, <i>Wall St. Exploits Ethanol Credits, and Prices Spike</i> , N.Y. Times, Sept. 15, 2013, at A1	11

INTRODUCTION

Petitioner Monroe Energy, L.L.C. (“Monroe”) respectfully requests that the Court expedite consideration of its petition for review of the Final Rule of the Environmental Protection Agency (“EPA”) establishing “renewable fuel standards” for 2013. *See* EPA, Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794 (Aug. 15, 2013) (“2013 Rule”).

Monroe is a refiner that produces petroleum products including gasoline and diesel blendstock. The 2013 Rule requires refiners to demonstrate that finished gasoline and diesel sold in the United States contains a certain minimum volume of renewable fuel (such as ethanol) . However, refiners like Monroe do not produce finished gasoline and diesel; they produce blendstock. “Blenders” then blend that blendstock with renewable fuel to produce finished gasoline and diesel.

Refiners meet their compliance obligation through the submission of credits called “Renewable Identification Numbers” (“RINs”) that are generated by blenders. Each RIN represents a blender’s use of one gallon of renewable fuel, and the blender is free to sell the RINs it generates to anyone it wishes – including not only obligated parties like Monroe, but also hedge funds, pipeline owners, and speculators. While some refiners have their own blending capabilities, refiners like Monroe do not. Thus, they depend upon the actions of third parties (blenders), as well as a properly functioning secondary market in RINs, in order to comply with

the 2013 Rule.

By EPA's own acknowledgement, the 2013 Rule imposes a renewable fuel volume requirement in excess of the amount that blenders are actually able to blend or consumers able to use, given the technological limitations of most vehicles on the road today. In other words, EPA has required Monroe and other refiners to demonstrate, through the submission of RINs, that blenders have blended a greater volume of renewable fuel into the refiners' petroleum products than blenders either can or will actually blend. The result of this absurd requirement has been to create a scarcity of RINs, resulting in skyrocketing RIN prices and the probability that at least some obligated parties will be unable to comply with the 2013 Rule.

Expedited review by this Court is needed because the deadline for obligated parties like Monroe to demonstrate their compliance by submitting RINs is June 30, 2014. Thus, Monroe will be forced to spend tens of millions of dollars over the next several months acquiring RINs at artificially inflated prices. That is money Monroe will never get back, even if it ultimately prevails on the merits of this petition for review. Monroe's other option is to risk non-compliance, but that exposes Monroe to potentially ruinous fines even greater than the price of RINs.

Petitioner requires a decision by this Court sufficiently in advance of the June 30, 2013, compliance deadline to allow it to acquire RINs in a market in

which prices have not been distorted by arbitrary and capricious rulemaking. It would be particularly unfair if Monroe were unable to obtain a decision in time, because EPA issued its rule in August 2013, fully *eight and a half months* after its statutory deadline of November 30, 2012. EPA should not be permitted to violate statutory deadlines for its rulemaking, imposing retroactive obligations on parties, while also foreclosing regulated parties' practical ability to obtain judicial review.

Accordingly, Petitioner proposes the following briefing schedule:

Petitioner's brief:	November 4, 2013
Respondent's brief:	December 9, 2013
Petitioner's reply:	December 23, 2013
Argument:	January 2014
Decision:	By April 15, 2014, to allow Petitioner time to comply following the Court's decision. ¹

Counsel for Monroe consulted with the Department of Justice, and it opposes this motion. Counsel for Monroe also consulted with counsel for the American

¹ Petitioner intends to file a petition for waiver and a petition for reconsideration with the agency. Neither affects the finality of the rule for purposes of judicial review. *See* 42 U.S.C. § 7607(b)(1); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039-40 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). EPA will need to rule on these petitions by mid-January 2014. If EPA grants either petition, this case may become moot. That is why Petitioner does not seek oral argument until January 2014. Petitioner has not sought an administrative stay. Under the Clean Air Act, the agency can issue an administrative stay for three months while reconsideration is pending, *see* 42 U.S.C. § 7607(d)(7)(B). Because an administrative stay could not suspend the June 2014 deadline for compliance, it is not an adequate substitute for expedited review by this Court.

Petroleum Institute (“API”), which is petitioner in consolidated case No. 13-1267.

API has not yet taken a position on this motion.

STATEMENT OF FACTS

A. Statutory and Regulatory Framework.

Statutory Volume Requirements. Under the Renewable Fuel Standard (“RFS”), first enacted in 2005 and expanded in 2007, Congress has directed EPA to issue regulations ensuring that the “gasoline sold or introduced into commerce in the United States . . . on an annual average basis” contains at least a certain volume of different types of renewable fuel. 42 U.S.C. § 7545(o)(2)(A). The minimum required volume for each type of renewable fuel is set forth in the statute and increases over time. For calendar year 2013, for example, the total volume of renewable fuel that must be sold or introduced into commerce is 16.55 billion gallons. *Id.* § 7545(o)(2)(B)(i)(I). Of that total, Congress mandated that at least 2.75 billion gallons would consist of “advanced biofuel,” such as sugarcane ethanol, *id.* § 7545(o)(2)(B)(i)(II); and of that 2.75 billion gallons, at least 1 billion gallons would consist of cellulosic biofuel, for example, fuel made from switchgrass, *see id.* § 7545(o)(2)(B)(i)(III), and at least some other minimum amount of biomass-based diesel fuel. *Id.* § 7545(o)(2)(B)(i)(IV). Congress anticipated that the remainder of the 16.55 billion-gallon total renewable fuel requirement would be satisfied mainly with corn-based ethanol.

Congress directed EPA to convert those overall volume requirements into an obligation that could be imposed on “refineries, blenders, and importers, as appropriate.” 42 U.S.C. § 7545(o)(3)(B)(ii)(I). To do so, each fall EPA obtains from the Energy Information Administration (“EIA”) a projection of the total gasoline and diesel expected to be consumed in the coming calendar year. *Id.* § 7545(o)(3)(A). EPA then divides the statutory volume requirements for each type of renewable fuel by the total amount of gasoline and diesel fuel projected to be consumed. It thereby determines the “volume percentage of transportation fuel sold or introduced into commerce in the United States” consisting of each type of renewable fuel. *Id.* § 7545(o)(3)(B)(i), (ii)(II)-(III). EPA is required to issue regulations by November 30 each year setting the volume percentage requirement that will be in effect the following calendar year. *Id.* § 7545(o)(3)(B)(i).

Tradable Credit Program. EPA has chosen to impose on refiners and importers (but not blenders) the obligation to ensure that transportation fuel sold in the United States contains the required volume percentage of each type of renewable fuel – even though many refiners and importers do not have any contact with renewable fuels. *See* EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,721 (Mar. 26, 2010) (“2010 Rule”). Refiners and importers produce or import gasoline or diesel blendstock, a petroleum product. Blenders take the blendstock and blend it with

renewable fuels in order to produce finished gasoline or diesel that can be sold to consumers.

In order to demonstrate that finished gasoline or diesel blended by others contains a certain volume percentage of renewable fuel, refiners and importers are required to procure RINs, which are a type of credit. *See* 2010 Rule, 75 Fed. Reg. at 14,684. RINs are created by blenders when the blenders blend renewable fuel into blendstock to create finished gasoline or diesel. Each RIN represents one gallon of renewable fuel that has been blended. For example, if the volume percentage for renewable fuels were 5%, refiners and importers would need to obtain 5 RINs for every 100 gallons of blendstock they produce or import. Thus, “refiners and importers . . . are dependent on the actions of others for the means of compliance.” EPA, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,937 (May 1, 2007) (“2007 Rule”).

EPA has explained that the purpose of a RIN is merely to document compliance by demonstrating that a gallon of renewable fuel has been consumed. *E.g.*, 2007 Rule, 72 Fed. Reg. at 23,929. Nevertheless, the blender that creates a RIN is not required to transfer the RIN to the refiner from which it obtained blendstock; instead, it is free to sell the RIN on the open market to any willing buyer – including investment banks or speculators. While some refiners are affiliated with blenders (“integrated refiners”) and can obtain the RINs they need

from their affiliate, others – including Monroe – must obtain RINs by purchasing them on the secondary market. According to EPA, a tradable credit program of this kind would “preserve[] the natural market forces and blending practices that will keep renewable fuel costs to a minimum.” *Id.*; *see also id.* at 23,933 (explaining that the trading system “allows the renewable fuels market to continue operating according to natural market forces”).

For virtually the entire period since the enactment of the statute, RIN prices have been close to zero. The amount of renewable fuel required to be consumed had always been less than the economy was capable of consuming, and a gallon of ethanol has typically been cheaper than a gallon of blendstock. Thus, blenders had an incentive to use more ethanol than was required, and in the process they created many more RINs than were needed for compliance.

Under EPA’s rules, a portion of these excess RINs could be “banked” or “carried over” for use in the year following the one in which they were created; this provides parties with “some flexibility in the event of market disruptions.” 72 Fed. Reg. at 23,935. For example, if a drought reduced ethanol production in a given year, increasing ethanol prices above blendstock prices, blenders could choose to use less ethanol than the required volume percentage. But obligated parties would still be able to meet their compliance obligation by relying on banked RINs. *See id.*

The ability to bank RINs for use in the following year creates incentives for blenders affiliated with refiners to hold some of their excess RINs for potential future use, rather than sell them on the market to obligated parties who need them in the present year. In 2010, EPA noted that “obligated parties who have excess RINs have been observed to retain rather than sell them to ensure they have a sufficient number for the next year’s compliance. This was most likely to occur with major integrated refiners.” 75 Fed. Reg. at 14,722. EPA recognized that independent refiners without “direct access to RINs . . . could potentially find it difficult to acquire a sufficient number for compliance despite the fact that the total nationwide volume of renewable fuel meets or exceeds the standard. The result might be a higher price for RINs (and fuel) in the marketplace than would be expected under a more liquid RIN market.” *Id.* That potential scenario had never been realized, however, because blenders were producing so many excess RINs that, even after integrated refiners banked all the RINs they could, there were still many more RINs available. Nevertheless, EPA pledged that it would “continue to evaluate the functionality of the RIN market” and stated that if it “determine[d] that the RIN market is not operating as intended, driving up prices for obligated parties and fuel prices for consumers,” it would “consider revisiting” its decision to make refiners and importers, rather than blenders, the obligated parties. *Id.*

B. The 2013 Rule.

EPA was statutorily obligated to issue final volume percentage requirements for 2013 by November 30, 2012. However, it did not even issue a Notice of Proposed Rulemaking (“2013 NPRM”) until February 7, 2013. *See* 78 Fed. Reg. 9282. EPA specifically requested comments on whether parties would be able to comply with the statutory volume requirements in 2013 in light of what is known as the “E10 blendwall.” The overwhelming majority of automobile engines in this country are capable of consuming gasoline containing up to 10 percent ethanol – a blend known as E10 – or diesel fuel containing up to 5 percent ethanol – a blend known as B5. There is only a limited market for gasoline containing a percentage of ethanol higher than 10 percent (blends known as E15 and E85). Given these constraints, there is a ceiling on the amount of ethanol that can be blended into gasoline or diesel. This ceiling is known as the “blendwall,” and it limits the total amount of ethanol that the American economy is capable of consuming.

When Congress enacted the statute, it did not anticipate that the blendwall would be reached, because it assumed that total gasoline consumption in the United States would continue to increase, even as the renewable fuel standard required the consumption of increasing quantities of renewable fuels. *See, e.g.*, 2007 Rule, 72 Fed. Reg. at 23,903 (noting that, “[g]iven ever-increasing demand for petroleum-based products in the transportation sector,” Congress intended to

“replac[e] part of this demand with renewable energy.”). In 2007, gasoline consumption was 142 billion gallons per year, and was projected to rise to 150 billion gallons by 2013. *See* Comments of Am. Fuel & Petrochemical Mfrs., April 8, 2013, at 3. Yet gasoline consumption this year is now expected to be only 133 billion gallons. 2013 Rule, 78 Fed. Reg. at 49,826. As a result of that substantial decline in gasoline consumption, the statute’s volume percentage requirements have increased at a much faster rate than Congress anticipated.

In the 2013 Rule, EPA acknowledged that the blendwall had been hit. According to its own analysis, imposing the statutory volume requirements – which in 2013 call for the consumption of a total of 16.55 billion gallons of renewable fuel – would necessitate the consumption of 14.5 billion gallons of ethanol. Yet the maximum amount of E10 fuel that could be consumed in 2013 is only 13.1 billion gallons. *See id.* at 49,822 (“[W]e note that the 14.5 bill gal of ethanol that might need to be consumed in 2013 . . . is only 1.4 bill gal above the E10 blendwall.”). In other words, the statute required the consumption of 1.4 billion gallons more ethanol than blenders could use in producing E10; and obligated parties were thus required to submit 1.4 billion RINs more than blenders were capable of creating. Moreover, as EPA acknowledged, the problem would only grow worse in 2014, as the statutory volume requirements continue to increase. *Id.* at 49,823. Yet EPA chose not to alter the renewable fuel volume

requirements for 2013, because, in its view, parties could rely on banked 2012 RINs to meet their compliance requirements for 2013. *See id.* at 49,821-22.

The result of EPA's refusal to alter the renewable fuel volume requirements has been a dramatic spike in RIN prices. RIN prices were approximately 5 cents per RIN in early January 2013. By March 2013, they had risen to approximately 70 cents per RIN, and they continued to increase after the comment period closed. *Id.* at 49,822 & n.73. (While they have since fallen from their peak, they remain more than eight times higher than their historical levels.) This should be unsurprising: EPA's rule creates a scarcity of RINs, by requiring obligated parties to acquire a larger quantity of RINs in 2013 than blenders can create. Moreover, parties remain uncertain what steps EPA will take to address the blendwall in its rule for 2014. In the face of that uncertainty, they have strong incentives to retain as many 2013 RINs as they can for potential use or sale in 2014, rather than selling those RINs now to obligated parties who need them for compliance in 2013. Speculators have also reportedly sought to benefit from that uncertainty by acquiring and hoarding RINs in anticipation of even higher prices in 2014. *See G. Morgenson & R. Gebeloff, Wall St. Exploits Ethanol Credits, and Prices Spike, N.Y. Times, Sept. 15, 2013, at A1.* As a result, independent refiners like Monroe, who have no choice but to acquire RINs on the market, have seen their costs soar. A mid-size refiner like Monroe could be forced to spend in excess of \$100 million

on compliance for 2013 alone. (Meanwhile, competing integrated refiners will pay nothing, because they can obtain RINs from their affiliated blenders for free.)

ARGUMENT

Expedited review is appropriate when the party requesting expedition shows that “delay will cause irreparable injury and that the decision under review is subject to substantial challenge.” *D.C. Circuit Handbook of Practice & Internal Procedure* 33 (Dec. 1, 2011). Both requirements are satisfied here.

I. EPA’s Refusal to Adjust Volume Requirements Was Arbitrary and Capricious.

A. EPA Failed to Offer Any Reason For Imposing a Volume Percentage Requirement Greater Than the Amount the Economy Could Consume.

The 2013 Rule absurdly requires refiners to acquire RINs demonstrating the consumption of more than a billion gallons of ethanol in excess of what the economy is actually capable of consuming. That outcome cannot be squared with statutory intent, let alone with common sense. As EPA itself explained when implementing the RIN program, Congress intended to allow a tradable credit system in order to “preserve[] the natural market forces and blending practices that will keep renewable fuel costs to a minimum.” 2007 Rule, 72 Fed. Reg. at 23,929. The 2013 Rule, however, imposes a regulatory mandate that simply cannot be squared with that purpose. Far from “preserv[ing] the natural market forces,” *id.*, the 2013 Rule overrides those forces by mandating the consumption of ethanol in

quantities that the market cannot bear, thereby creating a scarcity in RINs and creating opportunities for speculators artificially to inflate prices still further. And, far from “keep[ing] renewable fuel costs to a minimum,” *id.*, EPA’s mandate has made compliance financially unsustainable. As EPA acknowledged, the cost of purchasing RINs increased 14-fold between January 2013 and March 2013, and then increased still further. 2013 Rule, 78 Fed. Reg. at 49,822.

Nowhere did EPA even attempt to explain how the 2013 Rule’s volume percentage requirements can be justified in light of these market conditions. Indeed, EPA essentially acknowledged that no statutory purpose is served by imposing volume requirements in excess of what can actually be consumed. In 2014, just like 2013, the market will not be able to consume enough ethanol and other renewable fuels to meet the total renewable fuel standard. *Id.* at 49,823. And EPA indicated that, in 2014, it would “propose to establish volume requirements that are reasonably attainable in light of these considerations.” *Id.* Yet EPA did not explain why, if it makes sense to reduce volume requirements in 2014, it does not also make sense to do so in 2013, when by its own analysis the statutory volume requirements are also not reasonably attainable. That failure was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and

capriciously when it fails to “articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”)²

Instead of providing some affirmative justification for imposing an absurd and unattainable requirement, EPA instead reasoned that imposing the full statutory volume requirement in 2013 will not cause harm, because “there are over 2.6 bill carryover RINs available, . . . more than enough . . . to permit compliance” with the 2013 requirements. 2013 Rule, 78 Fed. Reg. at 49,821. According to EPA, although “the 14.5 bill gal of ethanol that might need to be consumed in 2013 is . . . 1.4 bill gal above the E10 blendwall,” that amount is “significantly less than the number of available carryover RINs available. Thus only about half of the carryover RINs in existence would need to be made available in order for the full

² To the extent that one could interpret the unattainable 2013 Rule as designed to encourage the consumption of high-ethanol blends like E85, *see* 78 Fed. Reg. at 49,821, that too would be arbitrary and capricious. As EPA notes, E85 consumption can only increase “provided there is adequate availability of infrastructure for distribution of E85, availability of [flexible fuel vehicles], [and] consumer awareness of the availability of E85.” *Id.* EPA never made any finding that those conditions exist. Indeed, EPA itself acknowledges that “the ability of the market to consume ethanol in higher blends such as E85 is constrained as a result of infrastructure- and market-related factors,” *id.* at 49,823, and that E85 consumption will grow only “over time.” *Id.* at 49,821. The inability of the 2013 Rule by itself to induce any significant investments in infrastructure is underscored by EPA’s choice to impose the statutory obligation on refiners rather than blenders, or others who are in a position to make those structural changes. EPA has “applie[d] the pressure to one industry (the refiners) . . . yet it is another . . . that enjoys the requisite expertise, plant, capital and ultimate opportunity for profit. Apart from their role as captive customers, the refiners are in no position to ensure, or even contribute to” demand for the production of E85 or other high-ethanol fuel blends. *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013).

statutory volume requirements . . . to be met in 2013.” *Id.* at 49,822.

That reasoning is flawed in several respects. First, the fact that compliance is theoretically possible cannot be used to justify the obligation in the first place. That is especially so when forcing refiners like Monroe to spend tens of millions of dollars on carryover RINs serves no statutory purpose. The purpose of RINs is to document that finished gasoline and diesel contain the required volume percentage of ethanol. Yet carryover RINs represent renewable fuel that has already been consumed in the past. Requiring parties to expend huge sums to purchase carryover RINs cannot change the reality that the required volume percentage is in excess of what the economy can absorb. EPA never explained why, in these circumstances, it still made sense to impose the full statutory volume requirement. By focusing solely on the total number of carryover RINs in existence, without considering what purpose is served by requiring their purchase at prices many times higher than historical levels, EPA failed to consider a crucially important part of the problem. That, too, is the hallmark of arbitrary agency action. *See State Farm*, 463 U.S. at 43 (agency acted illegally when it “entirely failed to consider an important aspect of the problem”).

Second, EPA erroneously relied on the fact that RINs have been carried over from 2012, without accounting for the reality that parties will carry over some portion of the RINs they generate in 2013 for compliance in 2014. EPA

recognized this possibility, acknowledging that “in some cases carryover RINs from 2012 may not be available to an individual obligated party that needs them. There are indications from some stakeholders that those who own carryover RINs may opt to not sell them, instead carrying them over to help assure compliance with their own obligations in a future year.” 2013 Rule, 78 Fed. Reg. at 49,822. Moreover, EPA admitted that “[t]here is no way to determine what fraction of carryover RINs may” be hoarded rather than sold. *Id.* But it failed to consider the consequences: if parties who have access to 2013 RINs (like those affiliated with blenders) carry over 20 percent of their 2013 RINs for potential use in 2014, as they are permitted to do, there will not be a sufficient number of RINs available for those who rely on the secondary market, like Monroe. And that is so even if every single RIN carried over from 2012 is made available for sale. Indeed, the market will be billions of RINs short.

As numerous parties explained in comments, parties have in fact been banking RINs rather than making them available for sale. The industry does not trust that EPA will impose reasonably attainable volume requirements in 2014, because the agency has a track record of overestimating the economy’s ability to produce and consume renewable fuels. *See, e.g., Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 479 (D.C. Cir. 2013). Therefore, parties have been using their banked RINs for their own 2013 compliance, and banking 2013 RINs for potential use in

2014, on the expectation that the scarcity in RINs will continue – resulting in a shortage in the total supply of RINs available for compliance in 2013.

Presented with evidence of a huge spike in RIN prices, EPA should have recognized that fewer RINs were being made available for sale than its cocktail-napkin calculations suggested. In fact, EPA itself has previously noted that spiking RIN prices would be evidence “that the RIN market is not operating as intended.” 2010 Rule, 75 Fed. Reg. at 14,722. Yet EPA undertook no further investigation, and instead merely repeated its unsupported assertion that “there will be sufficient RINs available to obligated parties to satisfy their . . . obligations in 2013 despite the challenge represented by the blendwall.” 2013 Rule, 78 Fed. Reg. at 49,822. The agency’s *ipse dixit* cannot stand in place of reasoned analysis.

B. EPA Had Discretion to Avoid This Absurd Outcome.

EPA’s inaction cannot be justified on the ground that the agency had no choice but to implement Congress’s directive. *First*, EPA enjoys discretion to reduce the total renewable fuel requirements – and thus the volume percentage requirements – when the production of cellulosic biofuel falls short of Congress’s expectations. *See* 42 U.S.C. § 7545(o)(7)(D)(i); *Am. Petroleum Inst.*, 706 F.3d at 476. Although the statute calls for the consumption of one *billion* gallons of cellulosic biofuel in 2013, *see* 42 U.S.C. § 7545(o)(2)(B)(i)(III), EPA determined that only 6 *million* gallons of cellulosic biofuel would be produced this year. 2013

Rule, 78 Fed. Reg. at 49,798. Thus, under § 7545(o)(7)(D)(i), EPA had discretion to reduce the total renewable fuel requirement by 994 million gallons, which would have substantially eased – although not entirely eliminated – the E10 blendwall problem. Yet EPA chose not to exercise that discretion. *See id.* at 49,810.

Second, EPA suggested that it would “propose adjustments to the 2014 volume requirements,” asserting that “the statute provides EPA with the authorities and tools needed to make appropriate adjustments in the national volume requirements to address these challenges.” *Id.*, 78 Fed. Reg. at 49,823.³ Yet it chose not to utilize those “authorities and tools,” *id.*, in 2013.

Third, the well-established “absurdity canon” allows an agency to depart from the plain language of the statute in order to avoid an absurd outcome that Congress could not possibly have intended. *See, e.g., Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 23-24 (1976); *Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129-30 (D.C. Cir. 1999); *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994). EPA itself has recently relied on this very doctrine to provide it flexibility to avoid absurd outcomes. *See EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,543-44 (June 3, 2010). Here, Congress intended to

³ Although EPA did not specify what “authorities and tools” it had in mind, EPA does enjoy the authority to reduce national volume requirements “based on a determination by the Administrator . . . that there is an inadequate domestic supply.” 42 U.S.C. § 7545(o)(7)(A)(ii).

encourage the production of renewable fuels by providing potential investors the certainty they needed to expand production. *See* 2007 Rule, 72 Fed. Reg. at 23,903. But it would have been absurd for Congress to require consumption of renewable fuel that could not physically be consumed – let alone to threaten refiners with penalties as a result of the economy’s inability to consume that fuel. *Cf. Am. Petroleum Inst.*, 706 F.3d at 479 (recognizing that, in passing § 7545(o), Congress did not intend to put obligated parties “in an impossible position, or at least a highly punitive one” in which they face penalties due to structural conditions beyond their control).

II. EPA’s Refusal to Adjust Volume Requirements Is Causing Monroe Irreparable Injury.

When EPA issued the 2013 Rule eight and half months after its statutory deadline, it extended the compliance deadline only by four months, until June 30, 2014. This deadline places refiners like Monroe in a Hobson’s choice. Purchasing RINs on the market at the current elevated price in order to cover the compliance obligation under the 2013 Rule places an enormous financial burden on the company. For example, just in the second quarter of 2013, Monroe recognized an expense of approximately \$50 million associated with its compliance obligation.⁴ Each day, Monroe continues to incur these compliance obligations. As its parent

⁴ Delta Air Lines, Inc., Form 10-Q (for the period ending June 30, 2013), at 19 (filed Aug. 1, 2013), available at http://phx.corporate-ir.net/phoenix.zhtml?c=71481&p=irol-sec&control_selectgroup=Quarterly%20Filings.

has disclosed to the SEC, “Purchasing RINs . . . at the current market price or higher prices would have a material impact on [Monroe’s] results of operations and cash flows for the full year.” Form 10-Q, *supra* note 4, at 19. And money spent purchasing RINs at elevated prices in advance of the June 30, 2014 compliance deadline is money that Monroe will never be able to recover, even if it prevails on this petition for review. The alternative is to risk non-compliance – but that carries potentially ruinous financial penalties equal to the market price of RINs plus \$37,500 per day of violation. *See* 42 U.S.C. § 7545(d)(1); 40 C.F.R. § 19.4. Thus, Monroe urgently needs a decision by this Court sufficiently in advance of the compliance deadline so that it can avoid being forced to obtain RINs at elevated prices infected by EPA’s arbitrary and capricious rulemaking.

The need for expedited review is underscored by EPA’s extreme tardiness in issuing its rule. Congress required it to act by November 30, 2012, which would have allowed parties sufficient time to seek judicial review in advance of the compliance deadline. Yet EPA issued its rule in August 2013, fully eight and a half months late, imposing retroactive obligations on parties and essentially foreclosing judicial review except on an expedited schedule.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its motion to expedite.

Dated: October 10, 2013

Respectfully submitted,

/s/ David W. DeBruin

David W. DeBruin
Marc A. Goldman
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
Phone: (202) 639-6015
Fax: (202) 639-6066
Email: ddebruin@jenner.com
mgoldman@jenner.com
mprice@jenner.com

Counsel for Monroe Energy L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of October, 2013, a copy of the foregoing **Petitioner Monroe Energy L.L.C.'s Emergency Motion for Expedited Review** was served electronically through the Court's CM/ECF system on:

Robert Allen Long, Jr., Esq.
Kristen Elizabeth Eichensehr, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Harry Moy Ng, Esq.
American Petroleum Institute
1220 L Street, NW
Suite 900
Washington, DC 20005-4070

Jessica O'Donnell, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
601 D Street, NW, Suite 8000
Washington, D.C. 20004

Dated: October 10, 2013

/s/ David W. DeBruin
David W. DeBruin