**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| GROWTH ENERGY, et al.,<br><br>Petitioners,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,<br><br>Respondents. | Case No. 19-1023<br>(consolidated with Nos. 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038, 19-1039) |

**MOTION OF MONROE ENERGY, LLC**
**FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Monroe Energy, LLC ("Monroe") respectfully moves for leave to intervene in the above-captioned consolidated cases on behalf of respondents United States Environmental Protection Agency and Administrator Andrew Wheeler (collectively, "EPA").[1] The petitions for review in this case involve EPA's final rule, *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule").

[1] Monroe is the petitioner in No. 19-1032.

Monroe owns a refinery and is an obligated party under the Renewable Fuel Standard ("RFS") program, and therefore has a substantial interest in the outcome of each of these cases. This motion is timely because it is being filed within 30 days of the date that Growth Energy, petitioner in the lead case, No. 19-1023, filed its petition for review of the 2019 Rule on February 4, 2019. Fed. R. App. P. 15(d); D.C. Cir. R. 15(b).

Counsel for Monroe is authorized to state that petitioners American Fuel & Petrochemical Manufacturers, Valero, and Small Retailers Coalition consent to Monroe's motion, petitioners Growth Energy, National Wildlife Federation, Healthy Gulf, and Sierra Club do not object to Monroe's motion, petitioner National Biodiesel Board does not oppose Monroe's motion, and petitioners RFS Power Coalition and Producers of Renewables United for Integrity Truth and Transparency and respondent EPA take no position on Monroe's motion.

## BACKGROUND

These cases involve the RFS program, which regulates the amount of renewable fuel that is blended with gasoline in the United States. Congress created the RFS program as part of the Clean Air Act in the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, and expanded the program in the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492. The RFS program sets annual volume obligations for four types of renewable fuel: total renewable fuel,

advanced biofuel, cellulosic biofuel, and biomass-based diesel. 42 U.S.C. § 7545(o)(1), (o)(2)(B). Each year, EPA determines the RFS volume requirements for the next calendar year for each category of fuel. *Id.* § 7454(o)(3)(B)(i). These regulations establish annual standards, expressed as a "percentage of transportation fuel sold or introduced into commerce in the United States." *Id.* § 7545(o)(3)(B)(ii)(II).

EPA has the general authority to waive any of the volume requirements for a given year "in whole or in part" based on a determination that implementing the applicable volume requirement(s) "would severely harm the economy or environment of a State, region, or the United States" or that "there is an inadequate domestic supply." 42 U.S.C. § 7545(o)(7)(A)(i), (ii). Additionally, EPA "shall reduce" the cellulosic biofuel volume for a given calendar year if "the projected volume of cellulosic biofuel production is less than" the minimum statutory volume; EPA may then "also reduce the applicable volume of renewable fuel and advanced biofuels requirement . . . by the same or a lesser volume." *Id.* § 7545(o)(7)(D)(i).

Obligated parties must meet these annual requirements for each of the four renewable-fuel categories each year. Their renewable volume obligations are determined by multiplying the volume of non-renewable gasoline and diesel an obligated party produces or imports in a calendar year by the applicable percentage standards

established by EPA for that year. 42 U.S.C. § 7545(o)(3)(B)(i). Obligated parties that fail to meet these obligations face daily civil penalties. 40 C.F.R. § 80.1463.

EPA keeps track of obligated parties' compliance with their renewable volume obligations by assigning unique Renewable Identification Numbers ("RINs") to each volume of renewable fuel that is produced. 40 C.F.R. § 80.1427. Obligated parties must "retir[e]" a sufficient number of RINs each year to demonstrate their compliance with the RFS program. *Id.* Obligated parties may acquire RINs by producing renewable fuels, or by purchasing RINs from other parties.

Monroe owns a refinery in southeastern Pennsylvania and is an obligated party under the RFS program. As an obligated party, Monroe commits extensive time and resources to compliance with the RFS program. Because Monroe does not produce its own renewable fuels, it must satisfy its RFS obligations by purchasing RINs from other parties. In some years, Monroe spends more on RINs than it paid for its refinery in 2012; and in 2017, Monroe's RFS compliance costs exceeded every category of expenses other than its purchase of crude oil.

In the 2019 Rule, EPA established the annual percentage standards for the RFS program for 2019. Monroe participated in the administrative proceedings that preceded the 2019 Rule by submitting a comment letter that supported EPA's proposal to exercise its cellulosic waiver authority, and that also urged EPA to exercise its general waiver authority based on both severe economic harm and inadequate

domestic supply. *See* Comments of Monroe Energy, LLC, *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 32,024 (Aug. 17, 2018), Docket ID No. EPA–HQ–OAR–2018–0167, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0622; *see also* 42 U.S.C. § 7545(o)(7)(A).

After EPA issued its final rule, Monroe filed a petition for review in this Court, in which it intends to challenge EPA's decision not to exercise its general waiver authority in the 2019 Rule. *Monroe Energy, LLC v. EPA*, No. 19-1032 (D.C. Cir. Feb. 8, 2019). This Court has consolidated Monroe's petition with the other petitions that have been filed regarding the 2019 Rule. *See* Order, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. Feb. 13, 2019). Monroe expects that one or more petitioners will challenge EPA's exercise of its cellulosic waiver authority in setting the 2019 RFS standards as well as other aspects of the 2019 Rule that Monroe supports. Accordingly, Monroe now seeks leave to intervene in support of respondents.

## ARGUMENT

Intervention is appropriate because the motion is timely, Monroe has a direct and significant interest in the outcome of this litigation, which may alter its obligations under the RFS program, and its interests are not adequately represented by the other parties. Additionally, Monroe possesses Article III standing.

## I. Monroe Meets The Standard For Intervention

A party seeking leave to intervene must, "within 30 days after the petition for review is filed," set forth in a motion "a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). For intervention to be appropriate, "the application to intervene must be timely," "the applicant must demonstrate a legally protected interest in the action" that the action "threaten[s] to impair," and "no party to the action can be an adequate representative of the applicant's interests." *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013) (internal quotation marks omitted).

### A. Monroe's Motion Is Timely

This motion is timely because it is filed within 30 days of petitioner Growth Energy's petition for review—the first petition challenging the 2019 Rule—which was filed on February 4, 2019. Fed. R. App. P. 15(d); D.C. Cir. R. 15(b). The Court has not yet set a briefing schedule in any of the consolidated cases. Granting Monroe's motion to intervene therefore will not delay the proceedings or prejudice other parties to those cases. *See Amador Cty., Cal. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905 (D.C. Cir. 2014) (timeliness requirement "is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties").

### B. Monroe Has A Legally Protected Interest In These Cases That May Be Impaired Absent Intervention

A party seeking to intervene must demonstrate it has a "legally protectable" interest by showing that it stands to "gain or lose by the direct legal operation and effect of the judgment." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980). This test serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

Monroe has a significant interest in the outcome of these consolidated cases that may be impaired absent intervention; indeed, Monroe has already filed a petition for review of the 2019 Rule to protect its interests. As a refiner, Monroe is an obligated party under the 2019 Rule. It must obtain and retire a sufficient number of RINs to satisfy the volume requirements established by EPA. Any alteration to the RFS volume requirements will directly affect Monroe's operating costs and compliance obligations. For example, Monroe expects that some petitioners will challenge EPA's exercise of its cellulosic waiver authority to reduce the RFS volume requirements. If such a challenge should be successful, Monroe will be subject to additional compliance costs under the 2019 Rule. *See Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014) ("The more rigorous the fuel standards, the more RINs Monroe Energy will have to purchase."). As an obligated party, Monroe therefore has a legally protected interest in these cases.

This Court has consistently granted motions to intervene where, as here, a regulated party petitions for review of an annual RFS final rule and also seeks to intervene to support other aspects of that rule. *See, e.g.*, Order, *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258 (D.C. Cir. Apr. 5, 2018) (granting intervention in challenges to 2018 RFS final rule); Order, *Coffeyville Res. Ref. & Mktg. LLC v. EPA*, No. 17-1044 (D.C. Cir. Nov. 28, 2017) (granting intervention in challenges to 2017 RFS final rule); Order, *Am. for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. May 5, 2016) (granting intervention in challenges to 2014-2016 RFS final rule). It should do the same here.

### C. Monroe's Interests Will Not Be Adequately Represented Absent Intervention

Monroe's substantial interests in the outcome of these cases are not adequately represented by the existing parties. The burden to demonstrate inadequate representation by other parties is "not onerous," and a would-be intervenor need show only "that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). As a governmental regulator, EPA is obligated to represent "the general public interest" and will therefore be unable to represent the interests of Monroe, an obligated party, in opposing efforts to increase the 2019 RFS volume requirements. *Id.* at 192-93. Indeed, this Court has "often concluded that governmental entities do

not adequately represent the interests of aspiring intervenors." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 314 (D.C. Cir. 2015) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)). Monroe should thus be permitted to participate in these consolidated cases to represent its own interests regarding the 2019 RFS volume requirements.

## II. Monroe Has Article III Standing

Parties seeking to intervene must also demonstrate Article III standing. *Crossroads Grassroots*, 788 F.3d at 316. As a regulated entity that satisfies the intervention standards, Monroe has standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). Any increase to the annual renewable fuel obligations as a result of this litigation will subject Monroe to additional compliance obligations. Similarly, if this Court upholds EPA's decision not to exercise its general waiver authority, Monroe will be subject to the costs of complying with the existing volume requirements established by the 2019 Rule. Those injuries to Monroe are "concrete and particularized," "actual or imminent," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), traceable to the 2019 RFS volume requirements at issue in these cases, and redressable by a ruling from this Court regarding the propriety of those volume requirements, *see Crossroads Grassroots*, 788 F.3d at 316. In fact, this Court has already held that Monroe has Article III standing to participate in review of the RFS fuel standards. *See Monroe Energy*, 750 F.3d at 915 ("Because

the financial burden of purchasing RINs is a cognizable injury-in-fact, and it is fairly traceable to the [RFS] fuel standards and remediable by vacatur of the Final Rule, we hold that Monroe Energy has Article III standing to challenge the Final Rule.") (citation omitted). Monroe therefore satisfies each of the requirements of Article III standing.

## CONCLUSION

Because Monroe meets the standard for intervention and possesses Article III standing, this Court should grant Monroe leave to intervene in each of the consolidated cases.

Dated: March 6, 2019

Respectfully submitted,

/s/ *Eugene Scalia*

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, petitioner Monroe Energy, LLC states as follows:

Monroe Energy, LLC is a refiner of petroleum products and is wholly owned by Delta Air Lines, Inc., a publicly traded company.

Dated: March 6, 2019

/s/ *Eugene Scalia*

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## CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(1)(4) and 28(a)(1)(A), Monroe states that the parties to these consolidated cases are:

Petitioners: Growth Energy; RFS Power Coalition; Monroe Energy, LLC; Small Retailers Coalition; National Biodiesel Board; Producers of Renewables United for Integrity Truth and Transparency; American Fuel & Petrochemical Manufacturers; Valero Energy Corp.; National Wildlife Federation; Healthy Gulf; and Sierra Club

Respondents: United States Environmental Protection Agency; Andrew Wheeler

Intervenors: American Fuel & Petrochemical Manufacturers

Amici Curiae: None

Dated: March 6, 2019

/s/ *Eugene Scalia*
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## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,057 words, excluding those parts exempted by Rule 32(f).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

/s/ *Eugene Scalia*
Eugene Scalia

**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2019, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Eugene Scalia*
Eugene Scalia