

ARGUMENT NOT YET SCHEDULED

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

GROWTH ENERGY, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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) No. 19-1023 and

) consolidated cases

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**EPA’S OPPOSITION TO BIOFUEL PETITIONERS’ MOTION
TO SEVER THE SMALL REFINERY EXEMPTION ISSUE**

These consolidated cases involve challenges to the same EPA final rule, the “2019 Rule,” which establishes renewable fuel volumes and percentage standards for 2019 and biomass-based diesel volumes for 2020. *See* 83 Fed. Reg. 63,704 (Dec. 11, 2018). Among other challenges, certain petitioners supporting the biofuels industry—namely, Growth Energy, the National Biodiesel Board (“NBB”), and Producers of Renewables United for Integrity Truth and Transparency (“Producers United”; collectively with Growth Energy and NBB, the “Biofuels Movants”)—plan to argue that EPA erred in how it accounted for small refinery exemptions in establishing the 2019 percentage standards. *See* Biofuels Motion, Doc. 1777040 at 2-6; Party Issue Statements, Docs. 1777038, 1777044,

1777751.¹ The Biofuels Movants now ask the Court to sever any arguments challenging the 2019 Rule based on how EPA accounts for small refinery exemptions so that they can raise a second-wave challenge to the 2019 Rule after this Court has already addressed it once.

The Court should not deviate from its normal process of consolidating “all petitions for review of agency orders entered in the same administrative proceeding.” *See* D.C. Cir. Handbook § V.A. Severance would disrupt the orderly resolution of all challenges to the 2019 Rule and frustrate judicial economy. The Court should deny the Biofuel Movants’ motion to sever and direct the parties to establish a briefing format and schedule covering all challenges to the 2019 Rule in a single proceeding.

BACKGROUND

The Renewable Fuel Standards Program, under Clean Air Act section 211(o), 42 U.S.C. § 7545(o), requires the increased use over time of “renewable fuel,” which is fuel made from renewable biomass “to replace or reduce the quantity of fossil fuel present in transportation fuel.” 42 U.S.C. § 7545(o)(1)(J). The Act includes annual volume targets for several types of renewable fuel. *See*

¹ EPA disagrees with significant aspects of the Biofuels Movants’ characterization of how EPA treats small refinery exemptions including, but not limited to, their interpretation of the circumstances under which EPA may grant exemptions. These issues go to the merits, however, and are not relevant to this motion.

id. § 7545(o)(2)(B)(i). Each year, EPA must convert these volumes (or lower volumes adjusted through its waiver authorities where appropriate) into annual percentage standards that obligated parties must apply to their own production or import of gasoline or diesel to determine their individual renewable fuel obligations. *Id.* §§ 7545(o)(2)(A)(i), (iii), 7545(o)(3)(B)(i), 7545(o)(7)(D)(i), 7545(o)(7)(A). The 2019 Rule is a final action establishing renewable fuel volumes and percentage standards for 2019 for various types of renewable fuel, as well as a volume requirement for biomass-based diesel for 2020. *See* 83 Fed. Reg. 63,704.

Based on the Biofuels Movants' motion to sever and the parties' non-binding issue statements, EPA expects that the challenges to the 2019 Rule will generally involve (1) arguments by parties involved in biofuel production that EPA set the volumes and percentage standards too low, (2) arguments by obligated parties that EPA set the volumes and percentage standards too high, and (3) arguments by environmental petitioners that EPA should have engaged in consultation under the Endangered Species Act and violated the Clean Air Act.²

The Biofuels Movants, in particular, suggest they will challenge how EPA accounts for exemptions granted to small refineries from their compliance

² The petitioners may also attempt to challenge EPA's implementing regulations. *See* 75 Fed. Reg. 14,670 (Mar. 26, 2010) (regulations codified at 40 C.F.R. part 80 subpart M).

obligations under the renewable fuels program. Under the formula found in 40 C.F.R. § 80.1405(c), EPA ensures that the applicable volumes of renewable fuel are used each year by establishing percentage standards that apply to obligated parties. The percentage standards are calculated by dividing the applicable volume for each renewable fuel type by an estimate of the national volume of gasoline and diesel that will be used that year, with certain adjustments. One of those adjustments is to reduce the denominator by “[t]he amount of [gasoline and diesel] projected to be produced by exempt small refineries and small refiners . . . in any year they are exempt.” *Id.* (definitions of GEⁱ and DEⁱ). When EPA makes such an adjustment, this results in a higher percentage standard, thereby requiring non-exempt obligated parties to acquire more RINs. *See, e.g.*, 80 Fed. Reg. 77,420, 77,511. Consequently, all exemptions granted to small refineries prior to the issuance of the annual rule are accounted for by the formula.

The statute allows small refineries to seek exemptions “at any time.” 42 U.S.C. § 7545(o)(9)(B)(i). EPA must then adjudicate those requests in consultation with the Secretary of Energy based upon the findings of a Department of Energy Study and “other economic factors.” *Id.* (ii). Accordingly, EPA adjudicates small refinery exemption petitions based upon the financial circumstances of the refinery

during the calendar year. *See id.*; Small Refinery Guidance.³ The statute also, however, directs EPA to promulgate annual standards by “[n]ot later than November 30” of the *prior* year. 42 U.S.C. § 7545(o)(3)(B)(ii). As a result of this juxtaposition of statutory directives, EPA may issue exemption decisions for a given compliance year after the annual standards for that year have been promulgated.

The formula in 40 C.F.R. § 80.1405(c) does not account for such after-the-fact exemptions. Among other things, EPA has consistently explained that altering the standards after they have been set to account for such exemptions would not be consistent with the statutory requirement that EPA set the standards “not later than November 30,” and that doing so would inappropriately render the standards a moving target and create regulatory uncertainty. *See, e.g.*, 75 Fed. Reg. 76,790, 76,804; *see also* 78 Fed. Reg. 49,794, 49,825.

The Biofuels Movants suggest that they intend to challenge EPA’s treatment of small refinery exemptions granted after it issues a final rule setting the volume obligations for a particular calendar year. *See generally* Motion to Sever at 7-8; *see also* Party Issue Statements, Docs. 1777038, 1777044, 1777751. NBB and Producers United have already raised this issue in two pending petitions for review

³ Available at <https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf>.

and a variety of entities in the biofuels industry, including Growth Energy and NBB, have filed a petition for administrative reconsideration with EPA addressing this issue alongside a protective petition in this Court. *See* NBB Final Opening Br., *Am. Fuel & Petrochem. Mfgs. v. EPA*, Dkt. No. 17-1258, Doc. 1767114 at 5-8, 13-20 (D.C. Cir. Jan. 4, 2019); Producers United Proof Opening Br., *Producers United v. EPA*, Dkt. No. 18-1202, Doc. 1771663 at 37-55 (D.C. Cir. Feb. 1, 2019); Petition for Review, *Renewable Fuels Ass'n v. EPA*, Dkt. No. 18-1154, Doc. 1735386 at 8 (D.C. Cir. June 4, 2018).

ARGUMENT

There is no compelling reason here to depart from this Court's presumptive practice of consolidating challenges to the same administrative action within the same proceeding. *See* D.C. Cir. Handbook § V.A; *see also, e.g.*, 28 U.S.C. § 2112(a) (standard process for consolidation of multiple challenges to the same agency order filed in multiple courts of appeals). Severing the Biofuel Movants' challenge to how EPA treats small refinery exemptions from the other challenges to the 2019 Rule would not promote judicial efficiency. It would do the opposite.

All Petitioners' arguments in these cases, including those by Biofuel Movants, challenge the validity of the 2019 Rule, and judicial review will be based on the same administrative record. Moreover, the Biofuels Movants' arguments may be interrelated with the other challenges to the 2019 Rule. For example, we

do not know at this time whether the Biofuels Movants may attempt to argue that some aspect of EPA's approach to setting the 2019 volumes and percentage standards supports their arguments that EPA was required to reconsider its long-standing regulations governing how it accounts for small refinery exemptions. Further, it is possible that the outcome of judicial review on one claim could impact the others. For example, if Petitioners were to succeed on any of their other arguments, the 2019 Rule might be remanded on that basis alone. Judicial efficiency would not be served by piecemeal review of the challenges to the 2019 Rule. Moreover, severing the Biofuels Movants' arguments from other challenges to the 2019 Rule would create a need for EPA and the Court to revisit the same administrative record twice.

Nor is it likely that severance would conserve the resources of the parties. The Biofuels Movants' substantive arguments have already been briefed twice. *See, e.g.*, NBB Final Opening Br., *Am. Fuel & Petrochem. Mfgs. v. EPA*, Dkt. No. 17-1258, Doc. 1767114 at 5-8, 13-20 (D.C. Cir. Jan. 4, 2019); Producers United Proof Opening Br., *Producers United v. EPA*, Dkt. No. 18-1202, Doc. 1771663 at 37-55 (D.C. Cir. Feb. 1, 2019). In fact, they were briefed by two of the three petitioners who now intend to raise this same challenge again. By this point, their arguments should be well-developed and there is no inefficiency to the Biofuels Movants presenting them in this consolidated challenge to the 2019 Rule.

Raising these arguments now would be consistent with the practice in the petitions for review filed challenging the 2018 renewable fuel standards. Because the statute requires that EPA issues establishing renewable fuel standards annually, there will necessarily be some overlap between litigation over one year's rulemaking and the next. When the challenges the parties raised to the 2018 standard overlapped with those brought in the previous year, the parties directed the Court to the relevant cases—noting that they might resolve the issue—but presented their arguments again, typically in more abbreviated form. *See, e.g.,* NBB Final Opening Br., *Am. Fuel & Petrochem. Mfgs. v. EPA*, Dkt. No. 17-1258, Doc. 1767114 at 28 (D.C. Cir. Jan. 4, 2019) (noting that the issue raised there had been raised in the previous year's challenge, *Coffeyville*, and thus might be resolved by that case, but setting forth NBB's argument).⁴

There is also a real likelihood that the Court will not address the merits of the Biofuels Movants' arguments in either *American Fuel & Petrochemical Manufacturers v. EPA* or in *Producers United v. EPA*. In the former case, NBB

⁴ The Biofuels Movants incorrectly argue that the Court granted a similar motion in *Coffeyville*, citing an order in which the Court held that case in abeyance pending disposition of challenges to a prior rule. *See* Order, *Coffeyville Res. Refining & Mktg. v. EPA*, Dkt. No. 17-1044, Doc. 1665514 (D.C. Cir. Mar. 10, 2017). But that order did not sever any aspect of the *Coffeyville* case. In fact, the opposite is true: the Court in that case *denied* a motion to sever a one of the challenges to the rule and hear it in a separate proceeding, and addressed all challenges to the 2017 standards rule in a single proceeding. *See* Order, *Coffeyville Res. Refining & Mktg. v. EPA*, Dkt. No. 17-1044, Doc. 1708883 (D.C. Cir. Dec. 14, 2017).

failed to preserve its challenge to EPA's treatment of small refinery exemptions because it did not raise them in the comments before EPA. *See* EPA Final Br., *Am. Fuel & Petrochem. Mfgs. v. EPA*, Dkt. No. 17-1258, Doc. 1767773 at 69-72 (D.C. Cir. Jan. 10, 2019). In the latter case, the petitioners' arguments are, among other things, untimely challenges to EPA's long-settled regulations such that the Court lacks subject matter jurisdiction. *See* EPA Initial Br., *Producers United v. EPA*, Dkt. No. 18-1202, 1775897 at 29-38 (D.C. Cir. Mar. 4, 2019). Severance and an abeyance until these cases are resolved is unlikely to promote judicial economy.

Finally, it would benefit EPA and the parties to resolve judicial review of the 2019 Rule on a reasonable schedule, on all issues, so that EPA can consider the results of that review in formulating further standards. EPA's obligation to promulgate renewable fuel standards is an annual one, *see* 42 U.S.C. § 7545(o)(3), and has generated petitions for review on a yearly basis with no sign of abating. In addition, severing these cases would leave the validity of the 2019 Rule, and therefore the compliance obligations of the obligated parties, unsettled for an unspecified period of time. Carving out bits and pieces of petitioners' challenges to the 2019 Rule to be addressed at some future date increases uncertainty for EPA and the regulated community, both for the particular standards set in the 2019 Rule and the program (including EPA's subsequent rulemakings) more generally.

If the Biofuels Movants believe the 2019 Rule is defective, they should raise their arguments now, in this proceeding.

CONCLUSION

Accordingly, the Court should deny the Biofuels Movants' motion to sever their petitions raising challenges to how EPA accounts for small refinery exemptions.

Dated: March 19, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. 27(d)(2)(A) because it contains 2,085 words according to the count of Microsoft Word, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion was prepared in Microsoft Word with the proportionally-spaced typeface of Times New Roman 14-point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing 19th day of March 2019, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

s/ Benjamin R. Carlisle

BENJAMIN R. CARLISLE