

ORAL ARGUMENT NOT YET SCHEDULED

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

RENEWABLE FUELS ASSOCIATION,
AMERICAN COALITION FOR
ETHANOL,
GROWTH ENERGY,
NATIONAL BIODIESEL BOARD,
NATIONAL CORN GROWERS
ASSOCIATION, and
NATIONAL FARMERS UNION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No.: 19-1220

**PETITIONERS' OPPOSITION FOR CONSOLIDATION WITH CASE
NOS. 19-1196 AND 19-1216, AND PETITIONERS' REPLY IN FURTHER
SUPPORT OF THEIR MOTION TO HOLD CASE IN ABEYANCE**

Petitioners Renewable Fuels Association, American Coalition for Ethanol, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union (collectively, the "Coalition") oppose the motion by Respondent United States Environmental Protection Agency ("EPA") to consolidate this case with Case Nos. 19-1196 (and consolidated case) and 19-1216

at this time. This Court should not consider consolidation until the question of venue is resolved in these other cases, where it is in dispute. Given that venue is not in dispute in this proceeding, the Court should place this action in abeyance until such time as the issue of venue in these other cases is resolved either in this Court or other regional circuit courts.

ARGUMENT

I. Consolidation Is Unwarranted at This Time Because, Unlike the Other Cases Proposed for Consolidation, There Is No Threshold Venue Question in Dispute that Petitioners Must Brief for Their Case to Proceed.

EPA requests that the Court consolidate this case with other pending petitions for review and order all parties—including Petitioners—to submit briefing on whether this Court is the exclusive venue for these cases. EPA Mot. 3, ECF No. 1815707. But it is inappropriate to consolidate this case, where venue is not in dispute, with other active cases that have a threshold dispute regarding where the case should be heard – a distinction EPA recognizes. EPA Mot. 8. Forcing the Coalition to also brief venue would be a waste of the parties’ and the Court’s time and would not, as EPA suggests, promote judicial efficiency.¹

¹ This issue has already been briefed as part of EPA’s efforts to dismiss litigation in the Tenth Circuit. *See* EPA Mot. to Dismiss, *Sinclair Wyo. Refining Co. v. EPA*, No. 19-9562 (10th Cir. filed Sept. 19, 2019), ECF No. 10680004; Resp., *Sinclair Wyo. Refining Co. v. EPA*, No. 19-9562 (10th Cir. filed Sept. 25, 2019), ECF No. 10684845; EPA Reply, *Sinclair Wyo. Refining Co. v. EPA*, No. 19-

Moreover, consolidating briefing would not necessarily simplify the Court's disposition of venue, at least at this stage. The Coalition challenges the August 9, 2019 Idsal Memorandum Decision ("2018 Decision") to the extent it *granted* 31 small refinery exemptions for compliance year 2018, whereas the petitioners in the other cases challenge their individual *denials* of exemptions. The cases presumably would have different administrative records (as the Coalition's case would not include the denials being challenged in Case Nos. 19-1196 and 19-1216). And venue is undisputed among the parties to this proceeding for reasons unique to the Coalition's petition.

More importantly, even if this Court, the Tenth Circuit, or any other court of appeals were to hold that the proper venue for a petition challenging a particular small refinery's denial of a requested exemption is in the regional circuit court where the small refinery is located, that decision would not alter the appropriateness of venue in this Court *as to the Coalition's petition*. See *Dalton Trucking*, 808 F.3d at 880 ("And a party's failure to object to venue may waive the issue."); *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 571 (D.C. Cir. 2015) (D.C. Circuit, not Tenth Circuit, decided petition for review of individualized decision

9562 (10th Cir. filed Oct. 15, 2019), ECF No. 10687292; EPA Mot. to Dismiss, *Big West Oil LLC v. EPA*, No. 19-9576 (10th Cir. filed Oct. 7, 2019), ECF No. 10685112; Resp., *Big West Oil LLC v. EPA*, No. 19-9576 (10th Cir. filed Oct. 22, 2019), ECF No. 10689162.

document brought by Wyoming refinery as there was no dispute regarding venue). Moreover, the issue of consolidation becomes moot if venue in the other cases that EPA seeks to consolidate with this case is laid in regional circuit courts.

Because the various cases challenging denials of exemptions raise distinct legal issues and their venue remains uncertain, it would be inappropriate, or at least premature, to consolidate those cases with this case. Consequently, this case should remain separate from the other suits challenging the 2018 Decision at least until the parties and the Court know which cases will proceed in the D.C. Circuit and thus can evaluate more confidently whether there are any overlapping issues that warrant consolidation.²

II. Resolution of the Venue Question in Case Nos. 19-1196 and 19-1216 Provides Further Justification to Hold in Abeyance Case No. 19-1220

The Coalition requested a stay of proceedings in Case No. 19-1220 pending resolution of issues of statutory construction that have been briefed in two other cases, *see* Pet'rs' Mot. for Stay 3, ECF No. 1814491. The fully-briefed case *Renewable Fuels Association v. EPA*, No. 18-9533 (10th Cir.) that the Coalition cited as a basis for the stay remains pending before the Tenth Circuit, and the threshold venue question in the other petitions that EPA has since raised provides additional justification for a stay in this case.

² Indeed, the Coalition finds itself in the odd position of responding to a motion to consolidate with a sealed case (No. 19-1216) about which it knows nothing.

The Coalition agrees with EPA that the Court should defer the certified index and merits briefing deadlines in this action. *See* EPA Mot. 17. The Coalition also agrees with EPA to the extent that the Court need not withhold a decision on venue in the other petitions while this case is stayed. However, rather than consolidate this case with the other cases, as EPA proposed, the Court should grant the Coalition's motion to hold this case in abeyance, which would allow EPA and the petitioners in those other cases to submit consolidated briefing on their respective venue questions. If the Court subsequently confirms that the D.C. Circuit is the proper venue for either or both of those cases (Case Nos. 19-1196 and 19-1216 (and any other consolidated cases)), this Court can consider at that time whether it is appropriate to lift the stay in this action and consolidate it with the other cases.

The Coalition's framework not only avoids unnecessary briefing on venue—an issue not disputed in in this case—but also addresses EPA's preference to proceed immediately with briefing to resolve any disputes over venue. In addition, holding this case in abeyance pending the earlier of (i) the resolution of the Tenth Circuit *Renewable Fuels Association et al.* case (18-9533) or (ii) the resolution of the venue question in the other proceedings (Case Nos. 19-1196 and 19-1216) will ensure that briefing on the merits of the Coalition's petition will not begin until the resolution of one or more of those other proceedings. And if such a resolution is

not reached in a timely manner, this Court also retains its inherent authority to consider rapidly changed circumstances and to tailor an appropriate remedy.

CONCLUSION

For the above-stated reasons, the Coalition respectfully requests that this Court 1) not consolidate this case with Case Nos. 19-1196 and 19-1216 before venue for those other cases is resolved, and 2) enter an order holding in abeyance all further judicial proceedings in this case pending the earlier of the resolution of the Tenth Circuit *Renewable Fuels Association et al.* case (18-9533) or the resolution of the venue question in Case Nos. 19-1196 and 19-1216.

Date: November 21, 2019

Respectfully submitted,

/s/ Matthew W. Morrison

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF
APPELLATE PROCEDURE 27(d) AND 32(a)**

I hereby certify that this document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,183 words, excluding the parts exempted under Fed. R. App. 32(f), according to the count of Microsoft Word.

I further certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

Date: November 21, 2019

Respectfully submitted,

/s/ Matthew W. Morrison

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CERTIFICATE OF SERVICE

I certify that on November 21, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: November 21, 2019

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