

ORAL ARGUMENT NOT YET SCHEDULED

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

)	
RFS POWER COALITION,)	
)	
Petitioner,)	
)	No. 20-1046
v.)	(and consolidated cases)
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	
)	

**EPA’S OPPOSITION TO RFS POWER COALITION’S RENEWED
MOTION TO SEVER AND HOLD CASE IN ABEYANCE**

Respondents U.S. Environmental Protection Agency et al. (“EPA”) oppose Petitioner RFS Power Coalition’s (“RFS Power’s”) June 1, 2020 renewed motion to sever and hold in abeyance its petition for review of EPA’s rulemaking (“Mot.”). RFS Power does not provide a persuasive justification for departing from this Court’s usual practice of deciding consolidated petitions at the same time. RFS Power should litigate its claim at the same time as the other petitioners, since it would be inefficient and would delay resolution of this case if the Court and EPA were to have to revisit the administrative record for a second time.

BACKGROUND

I. Statutory and Regulatory Framework

The Renewable Fuel Standard program in the Clean Air Act requires certain amounts of renewable fuel to be introduced into the United States transportation fuel supply each year. *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 568 (D.C. Cir. 2019) (per curiam). As relevant to this motion, cellulosic biofuel is one of the four categories of renewable fuels for which the Clean Air Act establishes annual volume targets. 42 U.S.C. § 7545(o)(2)(B)(i). Cellulosic biofuel is a subset of the advanced biofuel category, which itself is a subset of the total renewable fuel category. *Id.* § 7545(o)(1)(B), (E), (J).

Congress authorized EPA to reduce the statutory target volumes in limited circumstances. Under the mandatory component of the “cellulosic waiver provision,” if EPA’s projection of cellulosic biofuel production is lower than the statutory volume, then EPA must reduce the applicable volume to the projected volume available. *Id.*

§ 7545(o)(7)(D)(i); *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013). If EPA lowers the cellulosic biofuel volume, EPA may also exercise the discretionary component of the cellulosic waiver to lower

the applicable volumes for advanced biofuel and total renewable fuel “by the same or a lesser volume.” 42 U.S.C. § 7545(o)(7)(D)(i)

II. Procedural Background

RFS Power’s petition is one of twelve consolidated petitions challenging EPA’s rule setting the 2020 standards that determine obligated parties’ renewable fuel obligations under the Renewable Fuel Standard program (“2020 Rule”).¹ In another set of consolidated petitions before this Court, various petitioners (including RFS Power) are also currently challenging the prior year’s rule in which EPA set the 2019 standards (“2019 Rule”).² *Growth Energy v. EPA*, No. 19-1023 and consolidated cases.

In its challenge to the 2019 Rule, RFS Power argued that EPA improperly failed to include renewable electricity in its projection of cellulosic biofuel production, making unlawful EPA’s exercise of both the mandatory and discretionary cellulosic waiver authorities. Final Br.

¹ *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7,016 (Feb. 6, 2020).

² *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018).

for *Pets. Growth Energy et al.* at 31–41, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. Mar. 5, 2020), ECF No. 1832048. In this petition, RFS Power has identified one issue in its non-binding statement of issues: whether the 2020 Rule is unlawful because of “Respondents’ failure to consider the existence of electricity transportation fuel production when determining applicable volumes of renewable fuel.” Non-Binding Statement of Issues, *RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. May 6, 2020), ECF No. 1841619.

RFS Power previously filed a motion to consolidate this petition with the 2019 Rule litigation. RFS Power’s Mot. to Consolidate, *RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. Mar. 2, 2020), ECF No. 1831291. As alternative relief, RFS Power asked the Court to hold this petition in abeyance pending resolution of the 2019 Rule litigation. *Id.* The Court denied that motion. Order, *RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. Mar. 18, 2020), ECF No. 1834177.

RFS moved for reconsideration, and the Court denied that motion without prejudice to renewal of the motion to hold in abeyance upon certification of the administrative record for the 2020 Rule. Order, *RFS*

Power Coal. v. EPA, No. 20-1046 (D.C. Cir. Apr. 2, 2020), ECF No. 1836550.

ARGUMENT

The Court's usual practice is to consolidate "all petitions for review of agency orders entered in the same administrative proceeding." D.C. Cir. Handbook at 24. *Cf.* 28 U.S.C. § 2112(a). "In order to achieve the most efficient use of the Court's resources, as well as to maintain consistency in its decisions," the Court generally issues "a single briefing schedule" for consolidated petitions and decides the cases "at the same time." D.C. Cir. Handbook at 24.

RFS Power does not provide a persuasive justification for departing from that usual practice. The basic premise of RFS Power's motion is that, as to the renewable electricity issue that it intends to raise, the record for the 2020 Rule is "substantially identical" to the record for the 2019 Rule and it does not make sense to decide the same issue twice. That premise is false. And even if that premise were true, RFS Power's motion is still unjustified.

The administrative records for the 2020 and 2019 Rules are not substantially identical with respect to this issue. For example, the 2020

Rule's response to comments cites EPA's discussion in the "2016 REGS proposal" of the regulatory and technical issues that must be resolved prior to evaluation of renewable electricity facility registration requests. See 2020 RTC at 31 (citing 81 Fed. Reg. 80,890 (Nov. 16, 2016)).³ The 2020 Rule's response to comments then discusses some of the regulatory and technical issues identified in the 2016 REGS proposal and explains why EPA has not yet resolved those issues. *Id.* at 31–32. By contrast, in its reply brief in its challenge to the 2019 Rule, RFS Power criticized EPA because "the administrative record for the 2019 rule did not rely on or even cite the 2016 [REGS proposal] notice." Reply Brief for Petitioners Growth Energy, et al. at 17, *Growth Energy v. EPA*, No. 19-1023, ECF No. 1832054 (D.C. Cir. Mar. 5, 2020). RFS Power cannot plausibly fault EPA for failing to cite the 2016 REGS proposal in the 2019 Rule and then, in the next breath, claim that the 2020 Rule, which cites this document, is substantially identical.⁴

³ Available at <<https://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2020-and-biomass-based-diesel-volume>>.

⁴ There are other potentially material differences in the records. For example, the 2020 Rule's response to comments contains language, not found in the 2019 Rule's response to comments, that explains how EPA's cellulosic biofuel production projection with regard to renewable

RFS Power does not even mention this difference in the administrative records. Instead, RFS Power baldly asserts that the administrative records are “substantially identical.” Mot. at 5. But RFS Power is well aware of this difference because EPA identified this difference in its opposition to RFS Power’s prior motion. EPA’s Opp. to RFS Power Coalition’s Mot. to Consolidate, *RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. Mar. 12, 2020), ECF No. 1833292. Further, government counsel reminded RFS Power of that prior filing when conferring on this motion.⁵

RFS Power’s reply in support of its prior motion tried to paper over this difference between the administrative records by asserting, without articulating any basis, that the relevance of the 2016 REGS proposal “has already been fully briefed in the 2019 case.” RFS Power’s Reply in Support of Mot. to Consolidate at 3, *RFS Power Coal. v. EPA*, No. 20-1046, ECF No. 1834360 (D.C. Cir. Mar. 19, 2020). But RFS Power cannot simply declare that the issue has already been fully

electricity is consistent with its “long-standing approach” to projecting the availability of cellulosic biofuel. 2020 RTC at 31 & n.53.

⁵ That communication belies RFS Power’s accusation that government counsel failed to confer in good faith or to respond substantively to RFS Power’s attempt to confer. Mot. at 6.

briefed because it cannot lock EPA into making the same arguments it raised in defense of the 2019 Rule. The 2020 Rule is a separate rule with a separate administrative record. Although EPA certainly may choose to advance the same arguments it advanced in defense of the 2019 Rule, it is free to chart a different course and pursue other arguments. RFS Power has no authority to dictate the arguments that EPA will assert to defend against its challenge to the 2020 Rule. For that reason, RFS Power's motion should not be granted even if the administrative records were identical.⁶

Granting RFS Power's motion would mean that once the challenges to the 2019 Rule are decided, the Court would then have to resolve a potential dispute over whether that decision is controlling for the 2020 Rule.⁷ That could require an additional round of briefing that

⁶ RFS Power also ignores that there are other potentially interested parties that may have further arguments to raise on this issue. RFS Power seeks an increase in the renewable fuel volume standards that EPA set in the 2020 Rule, which would increase the burden on the parties obligated to comply with the renewable fuel standards. Some of those obligated parties have been granted intervention. Order, *RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. May 22, 2020), ECF No. 1843937.

⁷ There is no guarantee that the decision on the 2019 Rule will be controlling for the 2020 Rule, and it is entirely possible that the parties will disagree on that question. In fact, RFS Power does not even provide

requires the Court and EPA to revisit the record for the 2020 Rule, perhaps well after completion of briefing on the other eleven petitions challenging the 2020 Rule. Requiring the Court and EPA to revisit the same administrative record twice would be inefficient and burdensome, which is why the Court's usual practice is to resolve all petitions challenging the same action on the same schedule. Moreover, RFS Power's challenge potentially implicates the compliance obligations of the obligated parties for the cellulosic biofuel, advanced biofuel, and total renewable fuel categories. Thus, having to conduct a second round of briefing on RFS Power's petition could leave the validity of significant portions of the 2020 Rule unsettled for a longer period of time than if RFS Power had litigated its claim on the same schedule as the other petitioners.

RFS Power's primary justification for its motion is that it "simply cannot afford to brief the same legal issues a second time in successive

any assurance that it would accept an adverse decision on the 2019 Rule as a controlling decision against it for the 2020 Rule. By arguing that the decision on the 2019 Rule "would control, or at least be highly relevant to," its challenge to the 2020 Rule, RFS Power leaves itself an opening to take another shot at the 2020 Rule if the Court rejects its challenge to the 2019 Rule. Mot. at 7.

proceedings.” Mot. at 7. But if there really is no substantial difference between the two records, then it would be a negligible burden on RFS Power to re-raise its 2019 Rule arguments in the 2020 Rule litigation. Because EPA must issue annual rules that establish renewable fuel standards, there is generally some overlap between litigation over one year’s rulemaking and the next. Petitioners that have raised similar challenges to successive rulemakings have typically imported the arguments from their previous brief into their current brief (often with more brevity) and directed the Court to the pending case that already raises this argument. *See, e.g.*, NBB Final Opening Br. at 28, *Am. Fuel & Petrochem. Mfrs. v. EPA*, No. 17-1258 (D.C. Cir. Jan. 4, 2019), ECF No. 1767114 (noting that the issue raised there had been raised in the prior year’s challenge, *Alon*, and thus might be resolved by that case, but setting forth NBB’s argument). RFS Power could take a similar approach with minimal burden.

Finally, while RFS Power states that no other petitioner has identified the renewable electricity issue in its non-binding statement of issues, RFS Power fails to mention that other petitioners have raised challenges concerning the 2020 cellulosic volume that were not raised in

the 2019 Rule litigation. *See* WM's Nonbinding Statement of Issues, No. 20-1109 (D.C. Cir. May 8, 2020), ECF No. 1842009; Iogen's Nonbinding Statement of Issues, No. 20-1111 (D.C. Cir. May 7, 2020), ECF No. 1841821. Because those petitioners have not yet filed their opening briefs, it is not possible to know whether the outcome of judicial review on those claims may affect RFS Power's argument that EPA was required to include renewable electricity in determining the cellulosic volume. But the best way to avoid the possibility of inconsistent rulings is to follow the Court's normal practice and resolve all challenges relating to the 2020 cellulosic volume at the same time.

CONCLUSION

Accordingly, the Court should deny RFS Power's renewed motion to sever and hold its petition in abeyance.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing filing complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 2,133 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word 2016 in Century Schoolbook fourteen-point font.

/s/ Tsuki Hoshijima

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Tsuki Hoshijima