ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

EPA'S REPLY IN SUPPORT OF
MOTION TO HOLD CASE IN ABEYANCE

The Supreme Court's grant of certiorari in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, No. 20-472 (U.S.), justifies abeyance in this case. EPA should have an opportunity to consider whether the *HollyFrontier* decision — expected by July of this year — warrants reconsideration of any part of the 2020 Rule before EPA files its merits brief and the other parties expend additional litigation resources. Further, even if *HollyFrontier* does not end up resulting in reconsideration of the 2020 Rule, the efficiency benefits of abeyance outweigh any potential harm from the limited delay.

ARGUMENT

I. *HollyFrontier* is directly relevant to the main issue that Petitioners have raised in this litigation.

At issue in the pending *HollyFrontier* case in the Supreme Court is the scope of EPA's authority to grant small refinery exemptions under the RFS program. Mot. 7.[1] In the part of the 2020 Rule that is the main focus of the opening briefs filed by both Petitioner groups, EPA calculated the 2020 RFS percentage standards using a projection of the small refineries that would be exempt in 2020. *Id.* at 7–8. That projection was premised on EPA's understanding — at that time — of its legal authority to grant small refinery exemptions. *See* 85 Fed. Reg. 7016, 7049–53 (Feb. 6, 2020).

In the decision under review in *HollyFrontier*, the Tenth Circuit held that EPA has far more limited authority to grant small refinery exemptions than EPA's understanding at the time it promulgated the 2020 Rule. *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1244–49 (10th Cir. 2020). Since the filing of this motion for abeyance, EPA has

[1] EPA's motion (Doc. 1884292) is cited as "Mot." The three responses are cited as "Growth Energy Opp." (Doc. 1885948), "AFPM Opp." (Doc No. 1886069), and "NBB Opp." (Doc. No. 1886086).

announced that after careful consideration, it has changed its view and now agrees with the Tenth Circuit's interpretation of its authority. https://www.epa.gov/renewable-fuel-standard-program/epa-signals-new-position-small-refinery-exemptions.

If the Supreme Court were to agree with the Tenth Circuit and EPA's view of EPA's legal authority to grant exemptions, then EPA would have to decide whether that decision warrants reconsideration of any part of the 2020 Rule. Such reconsideration could significantly narrow the issues before this Court.

None of the Petitioners dispute that the Obligated Parties' brief raises the exact same legal issue that the Supreme Court will decide in *HollyFrontier*. Mot. 8–9 (citing Obligated Parties Br. 33–37). Nor could they, since the American Petroleum Institute relies directly on the Tenth Circuit's decision that is under review in *HollyFrontier*. *Id.* Petitioners nonetheless oppose abeyance on the basis that they also raise other arguments against EPA's approach in the 2020 Rule to accounting for small refinery exemptions. But it is indisputable that the 2020 Rule's approach to accounting for small refinery exemptions is the

main focus of both opening briefs, Mot. 8, and a decision in *HollyFrontier* may affect Petitioners' other arguments as well.

For instance, Biofuels Petitioners argue that the 2020 Rule should have accounted for small refinery exemptions granted in prior years; yet, they also argue that "*HollyFrontier* could have the effect of invalidating" many of those same exemptions. Growth Energy Opp. 2; NBB Opp. 2 (adopting Growth Energy's arguments). Biofuels Petitioners thus acknowledge that even though they are not raising the identical statutory interpretation question as *HollyFrontier*, the outcome of *HollyFrontier* could still directly affect the arguments that they are making in this case.

In sum, parties have raised the exact legal question that the Supreme Court is deciding in *HollyFrontier*, and the outcome of *HollyFrontier* could affect other arguments raised in this case. Thus, abeyance of this case is warranted.

II. Petitioners understate the efficiency benefits of abeyance and overstate the potential delay.

Petitioners fail to recognize that the decision in *HollyFrontier* may eliminate altogether the need for this Court to decide the main issues in this case. *Supra* p.3; Mot. 12. The parties should not expend any further

resources on briefing this case until EPA has an opportunity to consider the effect of the *HollyFrontier* decision on the 2020 Rule and determines whether reconsideration is warranted.

Regardless of any reconsideration, abeyance would still have significant efficiency benefits. That is because deferring any further briefing until after *HollyFrontier* would avoid the need for significant supplemental briefing. Petitioners' suggestion of handling *HollyFrontier* through 350-word Rule 28(j) letters is implausible given the potential impact of *HollyFrontier* on this case. AFPM betrays its own argument by arguing that *HollyFrontier* might be adequately addressed through a Rule 28(j) letter, but then turning around and suggesting that the impact of *HollyFrontier* could be significant enough to warrant revising and re-filing the entire opening briefs. AFPM Opp. 8. It would be a waste of the Court's and the parties' resources to conduct extensive, duplicative supplemental briefing that re-briefs significant portions of this case after *HollyFrontier*.

Further, any potential delay caused by abeyance is not as significant as Petitioners argue. None of the Petitioners dispute that the Supreme Court is anticipated to decide *HollyFrontier* by early July. Nor

do they dispute that even under the current briefing schedule, oral argument in this case cannot be expected until the fall of 2021. Mot. 10.

Because they do not engage with these facts, Petitioners overstate the potential drawbacks of abeyance. They argue that granting EPA's motion would keep this case from being decided before the November 30, 2021 deadline for EPA to determine the 2022 renewable fuel obligation. NBB Br. 4–5; AFPM Br. 7–8; *see* 42 U.S.C. § 7545(*o*)(9)(B)(i). But their admission that "even under the current schedule, this Court may not decide this case by November" is an understatement. NBB Opp. 4. Under the current schedule, which allows for oral argument this September at the earliest, it is not reasonable to expect that this case would be decided by November — let alone by a date early enough for EPA to meaningfully consider the decision before taking final action to determine percentage standards in November of this year.

EPA acknowledges that as a general matter, it has an interest in obtaining judicial decisions on RFS annual rules in time to inform future RFS rulemaking. Nonetheless, abeyance is justified where the Supreme Court has granted certiorari on a case that has direct relevance to the pending case, the Supreme Court's decision has the

potential to result in reconsideration that significantly narrows the issues before the Court, and the potential delay is likely limited to several months.

The timing of this abeyance motion is not unfair to Petitioners. AFPM Br. 5–6. EPA filed this motion promptly just over a week after Petitioners filed their opening briefs. Prior to that, EPA could not independently evaluate the extent to which the 2020 Rule's approach to accounting for small refinery exemptions would be the central focus of both opening briefs. There is no merit to the argument that EPA had adequate warning of the need for abeyance from rulemaking comments or preliminary issue statements. Many issues raised in rulemaking comments are not raised in litigation, and the issue statements are non-binding and lacked detail. Mot. 13 n.1.

Finally, none of the Petitioners dispute that holding this case in abeyance pending *HollyFrontier* has the additional benefit of allowing more time for the Court to potentially decide the challenges to EPA's 2019 RFS rule in *Growth Energy*, No. 19-1023. Mot. 13–14. That case raised issues about EPA's approach to accounting for small refinery exemptions when calculating the 2019 percentage standards, and a

decision in that case could also narrow the issues that the Court needs to decide in this case.

CONCLUSION

The Court should order this case to be held in abeyance pending decision in *HollyFrontier*, with motions to govern further proceedings due thirty days after the decision.

Respectfully submitted,

JEAN E. WILLIAMS
Acting Assistant Attorney General

/s/ Tsuki Hoshijima
TSUKI HOSHIJIMA
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3468
tsuki.hoshijima@usdoj.gov

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 1,303 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 February 25, 2021, 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