

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

)	
RFS POWER COALITION et al.,)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. 20-1046 (and
)	consolidated cases)
)	
ENVIRONMENTAL PROTECTION AGENCY,)	
)	
<i>Respondent.</i>)	
)	

PETITIONERS’ JOINT MOTION TO HOLD CASES IN ABEYANCE

Petitioners American Petroleum Institute, Valero Energy Corporation, and American Fuel & Petrochemical Manufacturers (collectively, “Petitioners”) respectfully request that these consolidated cases be held in abeyance until February 7, 2022, and that the parties be directed to file motions to govern further proceedings by February 22, 2022. Petitioners are authorized to state that Respondent Environmental Protection Agency (“EPA”) and Petitioner Small Refineries Coalition¹ do not oppose the motion, and that Petitioner National Biodiesel Board takes no position on the motion. Although counsel for Petitioners contacted the remaining parties regarding the motion on December 21, 2021 and January 3, 2022, the remaining parties have not stated their positions on the motion.

¹ The Small Refineries Coalition consists of the Petitioners in No. 20-1106.

An additional period of abeyance is warranted because EPA has issued a notice of proposed rulemaking in which the agency proposes to make significant revisions to the final rule at issue in these cases, and to reconsider provisions of the rule that have been challenged by Petitioners. EPA has also proposed to extend the deadline for obligated parties to demonstrate compliance with the rule until after EPA has completed its reconsideration of the Rule.

At an earlier stage of this litigation, the Court granted EPA's request to hold these cases in abeyance pending the Supreme Court's decision in *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021). *See* ECF No. 1892343. Following the Supreme Court's decision in *HollyFrontier*, this Court granted a limited extension of the abeyance period, *see* ECF No. 1910760, but subsequently denied EPA's request for a further extension of the abeyance period and set a briefing schedule, *see* ECF No. 1916973. EPA's request for a further extension of the abeyance period was based on its representations that it had submitted a draft notice of proposed rulemaking that related, in part, to matters raised in this litigation. *See* ECF No. 1913524. Petitioners opposed EPA's request on various grounds, including that the text of the notice was unavailable to the parties or the Court, and that the relationship between the notice and this litigation was unclear. *See* ECF No. 1913532.

EPA has now issued (1) a notice of proposed rulemaking that directly addresses major aspects of the challenged rule and key issues in this litigation, as well as (2) a related proposal to extend the compliance deadlines for the 2020 program year. In light of EPA's proposed actions, Petitioners request that these cases be held in abeyance until February 7, 2022 (i.e., 60 days from the December 7, 2021 issuance of the notice of proposed rulemaking that would revise the challenged rule). That step would allow time for EPA to complete the compliance-deadline rulemaking proceeding, while also preserving the parties' ability to request other relief once the compliance-deadline rulemaking is completed. If the Court grants the requested abeyance, Petitioners further request that the parties be directed to file motions to govern further proceedings by February 22, 2022.

BACKGROUND

These cases concern a final rule issued by EPA regarding implementation of the Renewable Fuel Standard ("RFS") program for calendar year 2020. *See* 85 Fed. Reg. 7,016 (Feb. 6, 2020) (the "2020 Rule").

On December 7, 2021, EPA released a notice of proposed rulemaking that proposes, among other things, to revise the 2020 standards and volume requirements.

See 86 Fed. Reg. 72,436 (Dec. 21, 2021) (the “Proposed Rule”).² In addition, the Proposed Rule states that EPA intends to reconsider, and seeks comment on, multiple provisions of the 2020 Rule that have been challenged in this litigation, including whether and how to account for exempted small refinery volumes in the percentage standard formula and inclusion of cellulosic biofuel carryover credits in the “projected volume available” for purposes of the cellulosic waiver. *See id.* at 72,455–56, 72,463.

In a separate action, EPA has proposed to further extend the compliance deadline for the 2020 Rule to a date subsequent to the finalization of the 2021 RFS standards. *See* 86 Fed. Reg. 67,419 (Nov. 26, 2021). Specifically, the deadline would be extended “for all obligated parties from January 31, 2022, to the next quarterly reporting deadline after the 2019 compliance reporting deadline for small refineries.” *Id.* at 67,422. The 2019 compliance deadline for small refineries would in turn be extended “to the next quarterly reporting deadline that is after the effective date of the 2021 RFS percentage standards.” *Id.* at 67,421. EPA requested comments on the proposed compliance deadline changes on or before January 3, 2022, *see id.* at 67,419, and has represented that the agency “anticipates finalizing

² As compared to the 2020 Rule at issue in this litigation, EPA’s Proposed Rule would invoke different statutory authority, employ different methodology, and reach a different result regarding the volumes of renewable fuel to be required for the 2020 compliance year. *See, e.g.*, 86 Fed. Reg. at 72,436-438.

that rule in advance of January 31, 2022,” Br. of Respondent EPA, ECF No. 1925941, at 37.

Also on December 7, 2021, EPA issued a proposed decision that would deny all pending small refinery exemption petitions pending before the agency, including 28 petitions for the 2020 compliance year.³ EPA sought comments “on all aspects of this proposed denial” by February 7, 2022. 86 Fed. Reg. 70,999, 71,000 (Dec. 14, 2021).

On December 8, 2021, EPA filed a brief in this litigation advising the Court of these developments and requesting remand without vacatur of the 2020 Rule. *See* ECF No. 1925941. EPA contends that a remand is justified because its decision to reconsider the 2020 Rule “is based in substantial part on significant and unanticipated intervening events, namely the COVID-19 pandemic and judicial decisions that bear on the scope of EPA’s authority to grant small refinery exemptions.” *Id.* at 18. In addition, EPA asserts that remand without vacatur would not prejudice any party because the agency has proposed to revise the 2020 Rule and to delay the compliance deadline until the Proposed Rule is finalized. *See id.* at 37. Despite requesting a voluntary remand, EPA’s brief also urges the Court to proceed

³ The proposed denial is attached to EPA’s Initial Brief, *see* ECF No. 1925941, and is available at: <https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions>.

to adjudicate whether EPA erred in failing to consider two issues in the 2020 Rule (the RFS “point of obligation” and the treatment of RINs for exported renewable fuels), as well as merits challenges to the 2020 Rule’s recordkeeping requirements for separated food waste. *See id.* at 3, 20–27, 33–34.

On December 29, 2021, several parties (including American Petroleum Institute) filed an unopposed motion to extend by two weeks the briefing deadlines in these cases. *See* ECF No. 1928564. The purpose of the motion was “to afford the parties time to try to reach agreement on how th[ese] case[s] should proceed in light of recent developments affecting the [challenged] rule.” *Id.* at 1. The Court granted the motion by order issued December 29, 2021, with the result that additional briefing is not due until (at the earliest) January 19, 2022. *See* ECF No. 1928623.

ARGUMENT

On October 6, 2021, this Court denied an earlier motion by EPA to continue holding these cases in abeyance. *See* ECF No. 1916973. In opposing EPA’s motion, Petitioners noted that EPA’s request was based only on EPA’s vague representations that it had submitted a draft notice of proposed rulemaking for regulatory review, and that the draft notice “relate[d] in part to matters raised in this litigation.” ECF No. 1913532 at 5. Because the text of the draft notice was not available to the parties or the Court, its relationship to the issues in this litigation was unclear. Indeed, at that point, EPA did not “explain how the possible rulemaking relate[d] to these

cases” or “which issues” the potential rulemaking would address. *Id.* In addition, there was no deadline for EPA to issue a notice of proposed rulemaking, and no assurance that it would reconsider the 2020 Rule at all. *See id.* at 5–6.

In Petitioners’ view, EPA’s recent actions have altered the situation in a way that warrants holding these cases in abeyance for an additional period. *First*, EPA has now issued a notice of proposed rulemaking in which the agency expresses its intent to make significant changes to the 2020 Rule and to reconsider multiple provisions of the Rule that Petitioners challenge in this litigation. *Second*, EPA has proposed to further extend the 2020 Rule’s compliance deadline until after EPA completes its reconsideration of the Rule. As a result of these developments, the 2020 Rule is likely to be altered substantially, and many of the issues in this litigation are likely to be substantially affected or mooted by EPA’s action. However, the immediate effect of EPA’s proposed action remains unclear, because the 2020 Rule and the January 31, 2022 deadline for demonstrating compliance with that Rule both remain in effect.

Given these changed circumstances, holding this litigation in abeyance for an additional period would conserve the Court’s and the parties’ resources. Courts often hold proceedings in abeyance where further agency action is likely to narrow or resolve the relevant issues. *See, e.g., American Petroleum Institute v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (holding case in abeyance in light of related,

proposed rulemaking on grounds that “permitting the administrative process to reach its end” could “solidify or simplify the factual context and narrow the legal issues at play, allowing for more intelligent resolution of any remaining claims”); *Devia v. Nuclear Regul. Comm’n*, 492 F.3d 421, 426 (D.C. Cir. 2007) (holding case in abeyance to “avoid[] . . . the expenditure of judicial resources” and “the issuance of what could effectively become an advisory opinion”); *Blumenthal v. FERC*, No. 03-1066, 2003 WL 21803316 (D.C. Cir. July 31, 2003) (holding cases in abeyance where challenged agency action “could be moot” or “the issues on appeal could be affected,” resulting in “an unnecessary expenditure of judicial resources”).

No significant “hardship” is likely to “result from delaying review.” *American Petroleum Institute*, 683 F.3d at 389. EPA’s proposed extension of the 2020 compliance deadline, assuming it is adopted, would mitigate any burden associated with the requested abeyance. *See Devia*, 492 F.3d at 427 (abeyance appropriate where parties were “not required to engage in, or to refrain from, any conduct” during the abeyance period (quoting *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003))). Furthermore, limiting the abeyance to a period ending February 7, 2022 and requiring motions to govern by February 22, 2022 would promote prompt action by EPA, preserve Petitioners’ right to judicial review

of the rule that ends up governing them for 2020, and protect against the “risk of agency abuse.” *American Petroleum Institute*, 683 F.3d at 388.⁴

To the extent EPA seeks to continue isolated portions of this litigation while remanding the remainder of the 2020 Rule, that result is neither logical nor efficient. This Court generally avoids piecemeal review of agency rules. *See, e.g., Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984) (noting that piecemeal review of agency rules is “inefficient” and may undermine the “integrity of the administrative process”). Proceeding to litigate some issues while remanding others would unnecessarily fracture and further complicate the case, particularly when the issues remaining in this Court likely will be superseded by EPA’s changed approach to the 2020 obligations. Continuing to litigate isolated elements of the 2020 Rule while EPA reconsiders that Rule would likely produce *two* sets of 2020 RFS litigation proceedings.⁵ Instead, deferring further briefing on all the issues is the best procedural response to the new situation EPA’s recent actions have created.

⁴ This Court has recognized that “a savvy agency could perpetually dodge review” by “initiating a new proposed rulemaking that would amend the [challenged] rule in a significant way.” *American Petroleum Institute*, 683 F.3d at 388. Here, EPA’s Proposed Rule does not appear to be a “veiled attempt to evade review.” *Id.* at 388–89. At this point, however, EPA has *proposed* but has not yet *finalized* a further extension of the January 31, 2022 deadline for demonstrating compliance with the 2020 Rule.

⁵ By contrast, holding the proceedings in abeyance would allow these RFS 2020 cases ultimately to be dismissed or consolidated with challenges to any final rule that results from the Proposed Rule—a further gain for judicial efficiency.

CONCLUSION

For the foregoing reasons, these cases should be held in abeyance until February 7, 2022, and the parties should be directed to file motions to govern further proceedings by February 22, 2022.

Respectfully submitted,

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January 7, 2022

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,099 words, excluding the portions of the motion exempted by Rule 27(a)(2)(B). This motion complies with the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Kevin King

Kevin King

CERTIFICATE OF SERVICE

I certify that on January 7, 2022, I caused the foregoing motion to be filed using the Court's CM/ECF system, which will automatically serve notice of the filing on registered users of that system.

/s/ Kevin King _____

Kevin King