

these cases to EPA without vacating the current 2020 Renewable Fuel Standard (“RFS”) Rule (the “2020 Rule”).² The Biofuels Parties request a remand subject to a court-imposed deadline for further action by EPA; EPA requests a remand without any deadline for further agency action. In the Obligated Party Petitioners’ view, an immediate remand without vacatur (with or without a court-imposed deadline for further agency action) would be premature and potentially prejudicial. Rather, a relatively short period of abeyance, followed by motions to govern further proceedings, is the most appropriate procedural course.

As previously outlined, *see* Abeyance Mot. 3–6, EPA’s brief requests a remand without vacatur in light of various pending agency actions that are likely to bear on the 2020 RFS Rule and this litigation. *See* ECF No. 1925941 (“EPA Br.”). Those include: a recently issued notice of proposed rulemaking that, if finalized, would fundamentally revise the 2020 RFS Rule (the “Proposed RFS Rule”); another rulemaking that EPA expects to complete by January 31 and that would push back the 2020 RFS compliance deadline until after the finalization of the Proposed RFS Rule (the “Compliance-Deadline Rulemaking”); and a proposed decision that would deny all small refinery exemptions (“Proposed SRE Denial”). *Id.* at 27–38. However, EPA’s brief also urges the Court to continue adjudicating, on a piecemeal

² *See* Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7016 (Feb. 6, 2020).

basis, several issues currently before the Court. *See id.* at 3–4, 20–27, 33–34 (addressing whether EPA erred in failing to consider the RFS “point of obligation” and the treatment of RINs for exported renewable fuels in the 2020 Rule, as well as challenges to the 2020 Rule’s recordkeeping requirements for separated food waste).

Certain Biofuels Parties, in turn, have since filed a separate motion for remand without vacatur. *See* ECF No. 1929915 (“Biofuels Mot.”). Unlike EPA, which proposed no deadline, they have requested that the Court require finalization of the Proposed RFS Rule by April 7, 2022, and that the parties file motions to govern “within 21 days of when EPA issues that rule.” *Id.* at 1–2.

All parties agree that briefing should be halted pending further action by EPA. Indeed, this Court recently issued an order suspending all briefing deadlines. *See* ECF No. 1930098. In addition, there appears to be substantial but not complete agreement among the parties on three additional points. *First*, all parties except EPA appear to agree that the Court should avoid piecemeal review of different provisions of the 2020 Rule. *Second*, all parties except EPA appear to agree that if the Court remands the 2020 Rule without vacatur, the remand should be subject to a court-imposed deadline for EPA action—and likewise should involve remand of the 2020

Rule in its entirety.³ As the Biofuels Parties note, an open-ended remand without vacatur would permit EPA to “drag its feet indefinitely while the unlawful 2020 RFS standards remain in place,” effectively frustrating judicial review. Biofuels Mot. at 7. And *third*, only the Biofuels Parties object to holding these cases in abeyance for a limited period of time, to be followed by motions to govern further proceedings. *See* Abeyance Mot. 1 (stating parties’ positions).

In the Obligated Party Petitioners’ view, a temporary period of abeyance is the most appropriate procedural course under the circumstances. EPA based its remand request in part on the claim that no parties would be prejudiced *because* the Compliance-Deadline Rulemaking would soon be finalized. *See* EPA Br. 37–38. That finalization has not yet occurred, and therefore it is appropriate for this Court to retain jurisdiction until the agency has acted in accordance with its stated intentions. Abeyance carries other benefits as well. It would allow the parties additional time to confer, and would place the Court in a position—just over one

³ The Obligated Party Petitioners express no view on the April 7, 2022 deadline proposed by the Biofuels Parties. A deadline for completing the new round of rulemaking proceedings should balance two primary factors: (1) affording EPA adequate time to fully consider the complex and interrelated issues presented by the Proposed RFS Rule and the Proposed SRE Denial, while (2) ensuring that EPA will act “by a time certain.” *American Public Gas Ass’n v. U.S. Dept. of Energy*, No. 20-1068, slip op. at 21 (D.C. Cir. Jan. 18, 2022) (identifying pragmatic benefits and potential problems posed by remand without vacatur, and remanding challenged rule without vacatur for 90 days, at which time rule “will automatically be vacated”).

month from now—to make a more fully informed decision regarding this litigation’s future course. The Obligated Party Petitioners’ abeyance motion would prejudice no one, and the motion’s only opponents (the Biofuels Parties) have not identified any cognizable prejudice to their interests that would result from a brief pause in the proceedings. This Court should grant the Obligated Party Petitioners’ motion.

ARGUMENT

I. A Brief Period of Abeyance Would Avoid Potential Prejudice to Obligated Parties.

The Obligated Party Petitioners have explained that no prejudice is likely to result from holding these cases in abeyance for a relatively brief period of time. *See* Abeyance Mot. 8–9. EPA does not oppose this request. And the Biofuels Parties do not articulate how it would be harmful to their interests.

In contrast, there *is* potential prejudice to obligated parties from an immediate remand without vacatur. Such a remand would occur before the Court and the parties have an opportunity to learn whether EPA follows through on its plan to extend the compliance deadline. Failure to extend the deadline would require the Obligated Party Petitioners to demonstrate compliance with a rule that will, in all likelihood, soon become obsolete. That is not an “irrelevant” consideration, Biofuels Mot. 6, for obligated parties, since demonstrating compliance is hardly a costless process. Demonstrating compliance is a substantial step that involves retiring RINs in accordance with complex RFS standards; it would be no small matter to have to

complete that process twice. *See* 40 C.F.R. § 80.1427. Requiring obligated parties to demonstrate compliance while EPA is in the process of changing the relevant obligations would also be at odds with the statute, which requires EPA to give obligated parties definite notice of their obligations prior to the deadline for complying with them. *See* 42 U.S.C. § 7545(o)(3)(B) (requiring that EPA promulgate RFS standards for a given year by November 30 of the preceding year).⁴

Indeed, EPA’s remand request was premised in part on the fact that there would be “no prejudice to any party” because the agency planned to finalize the Compliance-Deadline Rule “in advance of January 31, 2022,” such that no “obligated party [would] need to demonstrate compliance with the existing 2020 standards during the pendency of the remand.” EPA Br. 37–38. If it turned out to be otherwise, however, obligated parties *would* be prejudiced by a remand. *See, e.g., Devia v. Nuclear Regul. Comm’n*, 492 F.3d 421, 427 (D.C. Cir. 2007) (recognizing that requirement “to engage in, or to refrain from, any conduct” may be a form of “hardship” in abeyance context (quoting *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003))).

⁴ This Court has in the past adjudicated challenges to final RFS standards after the relevant compliance deadline has passed. *See* Biofuels Mot. at 7. But the Court has never said that obligated parties should be required to demonstrate compliance with annual RFS standards after EPA has proposed substantial modifications to those standards, and when EPA itself has recognized that it is appropriate to postpone the compliance demonstration deadline until after that reconsideration is completed.

Moreover, EPA explained in its recent proposal that forcing compliance with the outmoded 2020 Rule would have broader adverse consequences, such as forcing a draw-down of the RIN bank, which could “lead to significant negative impacts on the fuels market and the ongoing implementation of the RFS program.” 86 Fed. Reg. at 72,449.

Although EPA has stated that it plans to finalize the Compliance-Deadline Rule, a short abeyance period would ensure that EPA acts in accordance with that plan before this Court takes further action. If EPA were to fail to carry out its stated intention, that failure could affect this Court’s assessment of the likelihood that EPA will adopt its proposed changes to the 2020 Rule in a timely fashion.

Remand without vacatur carries the potential for other sorts of prejudice as well. Under EPA’s proposal—a remand without vacatur *and* without a deadline—the agency could delay the new rulemaking indefinitely or fail to complete the rulemaking altogether, thereby frustrating judicial review. *See American Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (noting potential for “a savvy agency” to “perpetually dodge review”); *Biofuels Mot. 7 & n.1*; *American Public Gas Ass’n*, No. 20-1068, slip op. at 21 (explaining that “open-ended remand without vacatur” can lead to “problem[s],” including prolonged “agency inaction”). And even assuming EPA were to finalize the Proposed RFS Rule as planned, there would be questions regarding whether and to what extent provisions from the current 2020

Rule—if left unmodified or not reconsidered at all—would be subject to judicial review under the usual standards for judicial review of agency rules. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (providing that a petition for review challenging “any control or prohibition under [the RFS Program] . . . shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register”); *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (explaining that section 7607(b)(1)’s filing deadline is jurisdictional and immunizes EPA policies from review in subsequent rules). The Court should not take action that could limit or undermine the parties’ ability to obtain complete, unobstructed judicial review of the regulations that govern their conduct. These concerns, too, counsel in favor of abeyance. *See* Abeyance Mot. at 9 n.5 (noting that abeyance would allow the Court to consolidate the current cases with petitions for review of any new RFS regulations for 2020, or to dismiss the current cases, as appropriate).

II. Abeyance Would Provide Additional Time for the Parties to Consider the Appropriate Course for this Litigation.

Courts frequently hold proceedings in abeyance where an anticipated agency action is likely to narrow or resolve relevant issues. *See* Abeyance Mot. at 7–8 (collecting cases). Those are the very circumstances presented here: the Proposed RFS Rule is likely to narrow—if not moot altogether—many of the issues raised in this litigation. Abeyance is thus a natural fit.

The Biofuels Parties maintain that holding the matter in abeyance through February 7 (or February 22, the Obligated Party Petitioners' proposed deadline for motions to govern) would be "unhelpful" because the parties will have "no additional relevant information beyond what the parties know now." Biofuels Mot. at 6. But that is incorrect. EPA has stated that it intends to complete the Compliance-Deadline Rulemaking by January 31. If that rulemaking is *not* complete by that date—or if EPA changes course and opts not to finalize a change in the 2020 compliance deadline—that development may inform this Court's judgment as to the wisdom of remand (or at least its terms). Moreover, by February 22 the parties and this Court will have access to other information that bears on the likely timing of further EPA actions. Comments are due February 4 for the Proposed RFS Rule, *see* 86 Fed. Reg. 72,436 (Dec. 21, 2021), and February 7 for the Proposed SRE Denial, *see* 86 Fed. Reg. 70,999 (Dec. 14, 2021). These comments may inform the parties' views and this Court's assessment regarding the best future course.

Abeyance would also allow the parties additional time to confer and potentially reach agreement on a subsequent motion to govern. On December 29, the parties filed a joint motion (which this Court granted) to extend the briefing schedule by two weeks "to afford the parties time to try to reach agreement on how this case should proceed" in light of the recent developments. ECF No. 1928564. The next week, Obligated Party Petitioners emailed all parties to this litigation with

a draft motion for abeyance and an outline of their rationale for that proposal. Despite follow-up, the Biofuels Parties did not respond to that email—and instead filed their separate opposition motion after Petitioners’ motion was on file.⁵ A brief period of abeyance would have the additional benefit of affording the parties an adequate opportunity to confer.

If the Court concludes that remand is warranted, it should remand the 2020 Rule in its entirety. As explained in the Abeyance Motion, remanding only a portion of the 2020 Rule, as EPA has requested, would result in piecemeal, duplicative, and potentially unnecessary briefing and dedication of judicial resources. *See* Abeyance Mot. at 9. Proceeding with further briefing and resolution of any aspect of the pending litigation before EPA finalizes the Proposed Rule would be inefficient; the Court would be considering issues that will likely be mooted when the Proposed Rule is finalized. The Obligated Party Petitioners respectfully request that the Court adopt a solution that will suspend the litigation as a whole pending further EPA action.

⁵ The Biofuels Parties did not confer with the Obligated Party Petitioners before filing their motion for remand, but rather presumed that Obligated Party Petitioners would “not support” Biofuels Parties’ request “as evidenced by [the Obligated Party Petitioners’] motion for abeyance.” Biofuels Mot. at 2.

CONCLUSION

For the foregoing reasons and those discussed in the Obligated Party Petitioners' Abeyance Motion, 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. Alternatively, if the Biofuels Parties' motion is granted, the Court should remand the 2020 Rule in its entirety.

Respectfully submitted,

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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 2,426 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 18, 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