

ORAL ARGUMENT NOT YET SCHEDULED

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

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RFS POWER COALITION,)	
)	
	Petitioner,)	
)	No. 20-1046
v.)	(and consolidated cases)
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
	Respondents.)	
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**EPA’S OPPOSITION TO MOTION FOR REMAND WITHOUT
VACATUR UNTIL APRIL 7, 2022**

Respondents (“EPA”) oppose the motion by certain biofuels petitioners (“biofuels movants”) to impose a deadline on EPA to complete its reconsideration rulemaking. Mot. for Remand Without Vacatur Until Apr. 7, 2022 (Jan. 10, 2022), Doc. No. 1929915 (“Biofuels Mot.”). The Court should grant EPA’s request for voluntary remand without vacatur of certain parts of the 2020 Rule, but it should do so without taking the extraordinary step of imposing a deadline for EPA’s actions on remand. EPA intends to complete its reconsideration in a timely manner. Imposing a deadline to remedy a hypothetical future delay by EPA would be both inappropriate and unnecessary.

BACKGROUND

These consolidated petitions challenge EPA's rule determining the annual percentage standards for the Renewable Fuel Standard program for the 2020 calendar year. Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7016 (Feb. 6, 2020) ("2020 Rule").

On December 7, 2021, the EPA Administrator signed a notice of proposed rulemaking to revise parts of the 2020 Rule. 86 Fed. Reg. 72,436 (Dec. 21, 2021); *see also* EPA Br. A005-163 (Dec. 8, 2021), Doc. No. 1925941 (prepublication version of notice indicating signature date). Specifically, EPA proposes to revise the volume requirements in the 2020 Rule for three renewable fuel types and to revise the percentage standards in the 2020 Rule for all four renewable fuel types. 86 Fed. Reg. at 72,436-39. As part of the rulemaking, EPA is also soliciting public comment on two additional issues raised by Petitioners in this litigation: the accounting of exempted small refinery volumes in the percentage standard formula and the inclusion of cellulosic carryover RINs in the "projected volume available" for purposes of the cellulosic waiver. *Id.* at 72,455-56, 72,463.

The rulemaking proposal is not solely limited to reconsideration of the 2020 Rule. EPA also proposes to establish the 2021 and 2022 volumes and standards; to address this Court's remand in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), of the rule setting the 2016 RFS standards; and to make various other changes to the RFS program. 86 Fed. Reg. at 72,436–40.

On December 8, 2021, EPA filed its merits brief in this case. EPA responded to challenges by certain Petitioners to two long-settled RFS framework regulations; sought dismissal of one challenge where the sole Petitioner raising the challenge had failed to demonstrate standing; sought denial of one petition where that Petitioner had failed to brief any issues; and otherwise requested voluntary remand without vacatur of the challenged parts of the 2020 Rule. EPA Br. 16–18, 38. In support of its voluntary remand request, EPA relied on its recently signed rulemaking proposal and explained that its intent to reconsider the 2020 Rule was based on significant and unanticipated intervening events. *Id.* at 27–38. Those events were the COVID-19 pandemic, which significantly affected the transportation fuel market in 2020, and recent judicial decisions that potentially affected the number of small

refineries that would be exempted from 2020 requirements. 86 Fed. Reg. at 72,438, 72,448–50.

Different parties have raised competing proposals for how this case should proceed in light of EPA’s voluntary remand request. Certain Refiners have asked that this case be held in abeyance until February 7, 2022, with motions to govern further proceedings due February 22, 2022. Mot. to Hold Cases in Abeyance (Jan. 7, 2022), Doc. No. 1929726 (“Refiners Mot.”). Biofuels movants oppose that abeyance request and instead request that the Court remand the 2020 Rule without vacatur with an April 7, 2022 deadline for EPA to finalize its rulemaking proposal. Biofuels Mot. 2, 9. Both motions are currently pending, and the Court has suspended the remainder of the briefing schedule. Order (Jan. 11, 2022), Doc. No. 1930098.

ARGUMENT

EPA’s view is that the approach articulated in its December brief remains the proper path forward: The Court should address certain issues raised that can be addressed notwithstanding the rulemaking proposal: the improper challenges to two RFS framework regulations, the lack of standing by the sole Petitioner raising one of the challenges,

and one Petitioner's failure to brief any issues. Otherwise, the Court should grant EPA's request for voluntary remand without vacatur of the challenged parts of the 2020 Rule.

In granting EPA's voluntary remand request, the Court should not impose a deadline, as biofuels movants request. EPA intends to complete its reconsideration in a timely manner. Dunham Decl.¹ ¶¶ 6, 20–38. Imposing a deadline at this time, based solely on the possibility of future delays by EPA, is both improper and unnecessary.

Even when a remand is based on a merits adjudication that an agency action was arbitrary or capricious, courts generally do not and should not impose deadlines on the agency's action on remand. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (“[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”). The Clean Air Act does not authorize courts to direct how and when agencies respond on remand, and neither does the Administrative Procedure Act. Thus, absent “substantial justification,” courts may not dictate the “time dimension” of an agency's action on

¹ The declaration of Sarah Dunham is attached to this filing.

remand. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 544–45 (1978). Doing so risks judicial intrusion “into the domain which Congress has set aside exclusively for the administrative agency.” *Id.* at 545; *see also Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627, 629 (D.C. Cir. 1987) (explaining that, in recognition of “the court’s proper role within the constitutional system,” courts override agency discretion to set its own timetables “only in the most egregious cases”). The same is true where a remand is based on an agency’s voluntary request and not a merits determination.

This case does not present anything resembling an egregious situation that warrants departure from the Court’s ordinary approach. In *Public Citizen*, the Court set a deadline only after the agency had failed to act for years despite earlier court-ordered deadlines. 823 F.2d at 628–29. So too in *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988). *See also In re Pub. Emps. for Env’t Resp.*, 957 F.3d 267, 275 (D.C. Cir. 2020) (nineteen years). In contrast, EPA signed the 2020 Rule on December 19, 2019, just weeks after the statutory deadline. 85 Fed. Reg. at 7069; 42 U.S.C. § 7545(o)(3)(B)(i). EPA proposed to reconsider the 2020 Rule only after significant and

unanticipated events occurred subsequent to EPA's signature of the 2020 Rule. *See* 86 Fed. Reg. at 72,438, 72,448–50; EPA Br. 27–38. EPA signed the reconsideration rulemaking proposal in December 2021, and it held a public hearing on January 4, 2022. Dunham Decl. ¶ 16. The public comment period is currently still open. 86 Fed. Reg. at 72,436 (requiring comments to be submitted by Feb. 4, 2022). There has been no unreasonable delay thus far in EPA's reconsideration rulemaking. *Cf. Int'l Union, United Mine Workers of Am. v. Dep't of Lab. & Mine Safety & Health Admin.*, 554 F.3d 150, 155 (D.C. Cir. 2009) (declining to impose deadline on remand because “the modifications required by this opinion, obviously, have not yet been delayed”).

Biofuels movants nonetheless speculate that “[o]n remand, EPA *could* drag its feet indefinitely.” Biofuels Mot. 7 (emphasis added). However, “the possibility of unreasonable delay in the future . . . does not justify burdening the [agency] with a court-ordered schedule for managing its docket.” *In re Am. Fed'n of Gov't Emps., AFL-CIO*, 837 F.2d 503, 507 (D.C. Cir. 1988). The Court cannot and should not remedy a hypothetical future delay by the agency by imposing a deadline ahead of time. There is no reason in this case to believe that EPA will delay in

completing its reconsideration rulemaking, and the Court should not presume such delay.

After all, there is no indication that EPA's reconsideration of the 2020 Rule is made in bad faith to circumvent judicial review. A voluntary remand request is particularly appropriate when, as here, the agency's intent to reconsider is based on intervening events. EPA Br. 35–36. In fact, certain other Petitioners have already recognized that “EPA's Proposed Rule does *not* appear to be a ‘veiled attempt to evade review.’” Refiners Mot. 9 n.4 (emphasis added).

Biofuels movants make a vague reference to unspecified “severe harms” that the 2020 standards continue to cause. Biofuels Mot. 7. However, as EPA notes in the rulemaking proposal: “Since 2020 has already passed, this rulemaking has no ability to affect actual production, imports, and use of renewable fuel in 2020.” 86 Fed. Reg. at 72,448; *see also* EPA Br. 37 (“Because 2020 has already passed, leaving the standards in place cannot possibly affect the transportation fuel market in that year.”). Biofuels movants need not take any action to comply with the 2020 standards in the interim since they are not obligated parties. Moreover, even for obligated parties, EPA has already

proposed to extend the compliance deadline and anticipates finalizing that extension by the end of this month. Dunham Decl. ¶ 17; *see also* EPA Br. 37–38. Biofuels movants do not explain how imposing a deadline on the agency’s reconsideration rulemaking would remedy any harm to which they may be subject.

Simply put, there are no exceptional circumstances in this case that might justify a deadline as part of a remand order. Ordering a deadline as part of this remand would only serve to cause litigants to seek a court-ordered deadline in every ordinary remand situation. Doing so would open the door to the Court having to regularly adjudicate competing arguments about the appropriate timeframe for agency action and having to regularly intrude on agency decisions about how to balance competing priorities with limited resources.

Besides, Petitioners have adequate remedies if EPA were to delay in the future. As the Court reminded the litigants when declining to set a deadline on remand in *North Carolina v. EPA*, mandamus remains an available remedy if EPA fails to act on remand. 550 F.3d 1176, 1178 (D.C. Cir. 2008); *see also Nat. Res. Def. Council v. EPA*, 706 F.3d 428, 437 n.10 (D.C. Cir. 2013) (same). Biofuels movants argue that

prospective relief is nonetheless warranted because of the high standard for obtaining mandamus relief. Biofuels Mot. 7 n.1. But the mandamus standard is high for good reason. “[R]espect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency’s choice of priorities.” *In re Barr Lab’ys, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). For that reason, mandamus is a “drastic” remedy, “to be invoked only in extraordinary circumstances.” *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016); *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). Biofuels movants should not be able to circumvent the stringent requirements of mandamus and obtain the same relief in advance, when there has not yet even been any agency delay. Any concerns about hypothetical future agency delay are premature and not ripe for adjudication.

The unpublished order in *Sinclair Wyoming Refining Co. v. EPA* is not to the contrary. Order, No. 19-1196 (Dec. 8, 2021), Doc. No. 1925942. There the Court, upon granting EPA’s motion for voluntary remand without vacatur of thirty-six small refinery exemption decisions, issued a deadline for EPA’s actions on remand. In imposing

that deadline, the Court relied on the ninety-day deadline in 42 U.S.C. § 7545(o)(9)(B)(iii) for EPA to act on a small refinery exemption petition. Here, there is no similar statutory timeframe that could provide a reference point for the amount of time that the agency should be allowed on remand. The statute required that EPA establish the 2020 standards by November 30, 2019, *see* 42 U.S.C. § 7545(o)(3)(B)(i), but that past date does not speak to the length of time that EPA should take to complete a reconsideration rulemaking.

In any event, no deadline is necessary because EPA is handling the reconsideration rulemaking expeditiously. Dunham Decl. ¶¶ 6, 20–38. EPA has already held a public hearing on the proposed rulemaking, at which EPA received numerous comments both in support of and in opposition to EPA’s reconsideration of the 2020 Rule. *Id.* ¶ 30. EPA is anticipating numerous comments to be submitted by the end of the public comment period on February 4, 2022, and it is preparing for the remainder of the steps that follow the end of the public comment period. *Id.* ¶¶ 21, 30. EPA is also intending to request that the Office of Management and Budget expedite its review of the rulemaking under Executive Order 12,866. *Id.* ¶ 21(g).

In the alternative, if the Court were to set a deadline for finalizing its reconsideration of the volumes and standards in the 2020 Rule, it should not be before June 3, 2022.² The reconsideration of the 2020 Rule implicates complex legal, policy, and technical considerations, and it will have significant impacts on the supply and use of transportation fuel. *Id.* ¶ 20. Based in part on the comments that EPA has already received at the public hearing held earlier this month, EPA is expecting a large volume of public comments that it must review and consider. *Id.*

² Any such deadline cannot be for EPA “to conclude the rulemaking entitled ‘Renewable Fuel Standard (RFS) Program: RFS Annual Rules,’ 86 Fed. Reg. 72,436, and issue an associated final rule,” as biofuels movants request. Biofuels Mot. 9. That proposal addressed various other issues aside from the reconsideration of 2020 volumes and standards (such as the 2021 and 2022 volumes and standards), and there is no basis for the Court to order a deadline for EPA to complete its rulemaking as to those other issues. At most, any deadline should be only for EPA to conclude its reconsideration of the 2020 volumes and standards.

Such a deadline should also not apply to EPA’s reconsideration of the separated food-waste recordkeeping provision challenged by National Biodiesel Board. EPA intends to reconsider that provision, EPA Br. 33–34, A001–04, but EPA’s December 2021 notice of proposed rulemaking did not address that provision. Because EPA has not yet issued a proposal related to that provision, EPA will need more time beyond June 3, 2022 to complete its reconsideration of that provision. Dunham Decl. ¶¶ 18 n.2, 38 n.4.

¶¶ 20, 30. In addition to review of the comments, various steps are required before EPA can finalize the rule. *Id.* ¶ 21.

EPA presently estimates that it can complete those steps and sign the final rule by no earlier than June 3, 2022. *Id.* ¶¶ 6, 20, 38. That date would be 119 days after the close of the public comment period and 164 days after the publication of the proposal. *Id.* ¶ 22. That would be only slightly longer than EPA took to finalize recent RFS annual rules, *id.* ¶¶ 24–26, which is an ambitious timeframe because this rulemaking is significantly more complicated than those prior rules, *id.* ¶ 27. That is because in this rulemaking, EPA is exercising its “reset” authority under 42 U.S.C. § 7545(o)(7)(F) for the first time — thus implicating novel legal, policy, and technical issues — and addressing four years of renewable standards in one rule. *Id.* ¶¶ 27–29. Additional complexity arises because due to the factors that govern EPA’s exercise of the reset authority, the volumes and standards for 2020 to 2022 are highly intertwined. *Id.* ¶¶ 13, 29. Additionally, the same EPA staff working on this rulemaking are also working on other RFS actions subject to court-ordered and statutory deadlines. *Id.* ¶¶ 31–33.

Biofuels movants assert, without any supporting rationale, that their requested deadline of April 7, 2022 would provide EPA “ample time” to conclude the rulemaking. Biofuels Mot. 8. Not so. EPA does not expect to be able to complete the reconsideration rulemaking by that date without significantly compromising the soundness of the rule. Dunham Decl. ¶¶ 20, 35, 37. It does not serve the Court’s, the public’s, or Petitioners’ interests if EPA were to have to rush out a rule without adequate time to consider and respond to public comments and provide a reasoned explanation for its decision. *See id.* ¶ 37.

The sole rationale offered by biofuels movants for an April 7, 2022 deadline is that the Court has ordered EPA to complete its reconsideration of remanded small refinery exemption decisions by that date. Order, No. 19-1196 (Dec. 8, 2021), Doc. No. 1925942. But although EPA’s small refinery policy will be relevant to its reconsideration of the 2020 Rule, *see* EPA Br. 29–31, there will be numerous other legal, policy, and technical considerations involved as well. Dunham Decl. ¶ 20. There is no sensible reason why EPA’s reconsideration of the 2020 Rule should have to be completed on the same date that EPA concludes the remand of those small refinery exemption decisions.

In sum, the Court should not take the extraordinary measure of imposing a deadline for EPA's actions on remand. Doing so would be to inappropriately and unnecessarily provide an advance remedy for hypothetical future delay by the agency. EPA is handling the reconsideration rulemaking expeditiously. If the Court were nonetheless to impose a deadline, the Court should not adopt biofuels movants' arbitrarily short proposed deadline. Biofuels movants have failed to demonstrate any meaningful harm that would occur unless EPA's action were to be completed by that date. Instead, the deadline for EPA's actions on remand (other than addressing the food waste issue, which requires more time) should be no earlier than June 3, 2022.

CONCLUSION

The Court should deny biofuels movants' request to impose a deadline on EPA's action on remand.

Respectfully submitted,

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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) because it contains 2,990 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 in Century Schoolbook fourteen-point font.

/s/ Tsuki Hoshijima

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2022, 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