



the rule, so Clean Fuels cannot consent to holding its challenge in abeyance yet again. Clean Fuels therefore respectfully requests that the Court sever Clean Fuels' separated food waste challenge from the remainder of the challenges to the rule under review and allow briefing and argument on that issue to continue without further delay.

Petitioners Growth Energy, Producers United, Waste Management, Iogen, the Small Refineries Coalition, the American Petroleum Institute, and American Fuel and Petrochemical Manufacturers have indicated that they do not oppose this motion. EPA has indicated that it opposes.

### **BACKGROUND**

This set of consolidated cases relates to EPA's annual rule setting renewable volume obligations under the Renewable Fuel Standard program for 2020. The majority of the consolidated challenges relate in one way or another to those volume obligations—for example, biofuels petitioners (including Clean Fuels) have challenged that EPA set the volumes too low, and obligated party petitioners have challenged that EPA set the volumes too high.

But challenges to annual volumes are not the only issues presented in these consolidated cases. For, in the rule at issue, EPA also purported to change other aspects of the Renewable Fuel Standard program. Clean Fuels' separated food waste challenge is directed at one of those changes that has nothing to do with annual

volumes. Specifically, Clean Fuels challenges a new recordkeeping requirement that EPA imposed on producers who generate biofuel from separated food waste (like used cooking oils); under this new requirement, in order to generate renewable identification numbers (RINS), those producers must obtain and maintain records with information about where the separated food waste originated, *even though the majority of such producers obtain separated food waste from third-party aggregators.*

As detailed in the biofuels petitioners opening brief, Clean Fuels raises two challenges to EPA's new recordkeeping requirement for separated food waste: (1) EPA failed to comply with notice-and-comment rulemaking requirements (because EPA did not propose *any* such change in the notice of proposed rulemaking that culminated in the rule under review); and (2) EPA's new requirements are arbitrary and capricious (because biofuel producers that rely on aggregators cannot realistically obtain information regarding each individual original generator).

After Clean Fuels filed its opening brief, these consolidated cases were stayed pending the Supreme Court's resolution of *HollyFrontier v. RFA*. After eight months and one additional abeyance, EPA finally filed its response brief, and the case was again held in abeyance in light of EPA's issuance of its proposed rule for the 2021 and 2022 renewable volume obligations. That rule might have implications

for several issues in this case related to the 2020 volumes, but EPA did not propose to address the separated food waste recordkeeping requirement.

## **ARGUMENT**

### **I. The Separated Food Waste Issue Should Be Severed.**

Clean Fuels' members have been waiting for over two years to challenge EPA's procedurally and substantively improper change to the recordkeeping requirements for separated food waste. They cannot wait any longer. Members are struggling to comply with those requirements right now: auditors participating in the RFS Quality Assurance Program are requiring Clean Fuels members to produce records required by the recordkeeping requirements under review. As Clean Fuels explained in its brief, its members lack the information that the new recordkeeping requirements demand. Aggregators treat the information as a trade secret and will not disclose it to their customers. Without means to comply with the new recordkeeping requirements, Clean Fuels members' only choices are to stop generating biofuels from separated food waste or to do so without generating RINs.

To protect its members, Clean Fuels wants to proceed with its challenge to EPA's new recordkeeping requirements. That challenge is unlike other challenges in these consolidated cases because it does not relate to the volumes EPA set for 2020. Indeed, in its response brief, EPA acknowledges that recordkeeping

requirements are separate from the volumes, for EPA there suggests that it will conduct a separate, standalone rulemaking on recordkeeping requirements. (However, EPA has yet taken no steps toward initiating that rulemaking, so Clean Fuels' members remain subject to a procedurally and substantive defective rule.)

The point is, separating Clean Fuels' challenge to the recordkeeping requirements from the remainder of the consolidated cases will not affect any other aspect of these consolidated cases. And that makes Clean Fuels' challenge different from challenges in past RFS cases for which motions to sever have been denied. For example, this Court denied a motion to sever obligated party petitioners' point-of-obligation challenge in the consolidated cases challenging the 2017 RFS rule, after EPA correctly predicted that the petitioners' point-of-obligation challenge was not entirely separate from challenges to the underlying volumes. *See* EPA Br., *Coffeyville Resources Refining et al. v. EPA*, No. 17-1044 (D.C. Cir.) (Dkt. No. 1704206). That will not happen here: Clean Fuels and EPA have almost completed briefing on the recordkeeping issues—only the reply brief must be written and filed—and the Court can see from the briefs that the issue truly is unrelated to the volumes EPA set for 2020. The new requirement relates to the records that biofuel producers must maintain to qualify to generate RINs, not to the volumes that obligated parties must satisfy.

## **II. Proposed Briefing Schedule For The Severed Challenge**

For the reasons discussed above, Clean Fuels respectfully requests that the Court sever its separated food waste challenge and allow the case to resume according to the following schedule:

- Reply Brief                      March 28
- Deferred Appendix              April 4
- Final Briefs                      April 11

The opening and response briefs, already filed, are consolidated briefs addressing a range of issues, most of which Clean Fuels and EPA agree can be held in abeyance. After severing Clean Fuels' challenge to the recordkeeping requirements, Clean Fuels expects that it can work with EPA to identify the portions of the opening and response briefs that relate to Clean Fuels' challenge, so that only those portions need to be finalized by April 11. In this way, severing Clean Fuels' challenge will impose no costs on the other parties in these consolidated cases.

## **III. In The Alternative, The Court Should Make Clear That Clean Fuels Can Seek A Stay Pending Review Even If Its Challenge Is Held In Abeyance.**

If Clean Fuels' challenge is not severed and this case is held in abeyance until at least June 2022, Clean Fuels' members will likely suffer irreparable harm arising out of the new recordkeeping requirements. Accordingly, Clean Fuels respectfully requests that, if the Court declines to sever the challenge, the Court order holding these consolidated cases in abeyance makes clear that abeyance does not preclude

Clean Fuels or any other petitioners from seeking a stay of portions of the rule under review, pending this Court's final resolution of the consolidated cases.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(2)(A) because it contains 1,227 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion was prepared in Microsoft Word using 14-point Times New Roman font.

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