

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 TO SEVER AND
TO GOVERN FURTHER PROCEEDINGS**

Respondents U.S. Environmental Protection Agency et al. (“EPA”) oppose the motion by Petitioner Clean Fuels Alliance America (“Clean Fuels”)¹ to sever its 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. The parties in these consolidated cases agree on an approach to govern further proceedings for all other issues raised in these consolidated cases, which is that they should

¹ Clean Fuels was formerly known as National Biodiesel Board, and the parties refer to its former name in prior briefing. See Notice of Name Change (Jan. 20, 2022), Doc. No. 1931589.

remain in abeyance until June 24, 2022, at which time EPA expects to have finalized the 2021 and 2022 renewable fuel standards. The only exception to this broad agreement is Clean Fuels' request to sever its challenge related to EPA's separated food waste recordkeeping requirement and proceed immediately on that issue alone. But this narrow issue—to which Clean Fuels devoted fewer than 500 words of the biofuels petitioners' opening brief—does not justify departure from the well-settled practice of deciding consolidated cases on a single track.

BACKGROUND

These consolidated petitions challenge EPA's rule that, among other things, determined 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"). Petitioners raise a number of challenges to that rule, including challenges to the renewable fuel volumes and percentage standards, the revised percentage standard formula, EPA's interpretation of the relationship between the cellulosic waiver

authority and cellulosic carryover RINs, and the regulation concerning separated food waste recordkeeping.

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 proposed to review the renewable fuel volumes and percentage standards established in the 2020 Rule. 86 Fed. Reg. at 72,436–39. EPA also solicited public comment on the revised percentage standard formula in the 2020 Rule, as well as its interpretation of the relationship between the cellulosic waiver authority and cellulosic carryover RINs. *Id.* at 72,455–56, 72,463. The proposed rule did not address the separated food waste recordkeeping regulation challenged by Clean Fuels.

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 denial of Clean Fuels' challenge to the separated food waste regulation for lack of standing; sought denial of another 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, Doc.

No. 1925941. In support of its voluntary remand request, EPA relied on its recently signed rulemaking proposal. It also stated its intention to issue a notice seeking public comment on the food waste recordkeeping issue. *Id.* at 33–34. EPA further noted in its merits brief that the purportedly new recordkeeping requirement is merely a clarification of a requirement that has existed in the regulations since 2010. *Id.* at 32–33, n.13.

The parties filed competing proposals for how these cases should proceed in light of EPA’s voluntary remand request. Upon consideration of these proposals, the Court ordered that the consolidated cases be held in abeyance and directed the parties to file motions to govern future proceedings by February 22, 2022. Order (Feb. 8, 2022), Dkt. No. 1934323. On February 22, 2022, EPA filed a motion seeking further abeyance of these cases until June 24, 2022, at which point EPA expects to have finalized the 2021 and 2022 renewable fuel standards and the parties will have conferred on the next steps for this litigation. Motion to Hold Cases in Abeyance (Feb. 22, 2022), Dkt. No. 1936128 at 4. No

party opposed this motion except Clean Fuels, whose limited opposition concerns only the food waste requirement.

ARGUMENT

When cases are consolidated, as here, “they are treated as one appeal for most purposes.” D.C. Cir. Handbook at 24. They “generally follow a single briefing schedule, they are assigned for hearing on the same day before the same panel, argument time is allotted to the cases as a group, and they are decided at the same time.” *Id.* This approach is used “[i]n order to achieve the most efficient use of the Court’s resources” and “to maintain consistency in its decisions.” *Id.*

Clean Fuels’ challenge to EPA’s separated food waste recordkeeping regulation does not warrant deviation from this standard practice. The issue is only one of many challenges raised in these petitions for review, and a relatively minor one. In their opening brief, biofuels petitioners gave it little attention as compared to their other challenges. Indeed, the entirety of Clean Fuels’ argument on this issue was presented in a mere three paragraphs totaling one page and four lines. Biofuels Br. at 39-40.

Clean Fuels correctly notes that many of the other challenges may be impacted by EPA's final action on the December 2021 rulemaking proposal. While the proposed rule does not address the separated food waste issue, the forthcoming final rule will substantially affect the consolidated proceedings as a whole. Until EPA takes final action, the parties cannot know which of the Petitioners' other challenges to the 2020 Rule will be mooted and how litigation should continue on any remaining issues. Once the 2021 and 2022 rule is finalized, the parties will be able to determine what challenges require further action from the Court and can confer on the appropriate next steps for any and all unresolved issues.

Additionally, EPA explained in its merits brief that it intends to address Clean Fuels' challenge to the separated food waste regulation by taking public comment on the challenged requirement. Thus, Clean Fuels' challenge to this aspect of the 2020 Rule could be resolved by further administrative process. It makes sense, then, to continue to hold the food waste issue in abeyance alongside the other challenges to the rule while EPA reconsiders it. Accordingly, it would be premature to proceed with litigation on the food waste issue at this time; judicial

economy counsels in favor of holding all issues in abeyance until it is clear which issues will require further proceedings.

Alternatively, if the Court grants Clean Fuels' motion, severing this one issue and proceeding to briefing, EPA requests that the Court limit the length of Clean Fuels' reply brief in rough proportion to the space spent on this issue in their opening brief. After all, it would not be fair for Clean Fuels to be able to devote the length of an entire reply brief to an issue that received scant attention in its opening brief. The biofuel petitioners' opening brief devoted approximately 500² words of 8611 total words to the issue, or less than 5%. The Court previously granted Biofuels petitioners 4550 words for their reply brief on all of the issues. Order (Oct. 26, 2020), Doc. No. 1868039. Proportionally, then, Clean Fuels' reply brief should be limited to no more than a few pages.

Finally, EPA opposes Clean Fuels' alternative request for leave to seek a stay of portions of the rule pending the Court's final resolution of these cases. As an initial matter, Clean Fuels never tried to seek a stay

² This total includes 37 words in the Statement of Issues, 125 words in the Statement of the Case, and 59 words in the Summary of the Argument. Clean Fuels spent only 225 words addressing this issue in its argument.

pending review at the procedural motions deadline in May 2020. Order (March 23, 2020), Doc. No. 1834709; D.C. Cir. Handbook at 28 (stating that procedural motions include stay motions). The Court should not permit it to do so now.

Furthermore, the alternative approach suggested by Clean Fuels is the least efficient means of resolving its separated food waste challenge. Clean Fuels has already briefed its challenge to the food waste issue, and EPA has already responded. If the Court is inclined to consider the separated food waste issue in any way prior to June, then it should direct the parties to complete the merits briefing that is underway rather than permit Clean Fuels an opportunity to initiate an entirely new round of briefing on this issue. There is no basis to grant the alternative relief sought by Clean Fuels.

CONCLUSION

The Court should deny Clean Fuels' motion to sever its food waste challenge or, in the alternative, limit the length of its reply brief on this issue. The Court should further deny Clean Fuels' alternative request for leave to seek a stay pending the Court's final resolution of these cases. Rather, the food waste issue should remain consolidated and held

in abeyance with all other challenges raised to the 2020 Rule, with motions to govern further proceedings due June 24, 2022.

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 1518 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/ Caitlin McCusker

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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/ Caitlin McCusker