NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RFS POWER COALITION, *et al.* *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	)	No. 20-1046 (and consolidated cases)

REPLY IN SUPPORT OF MOTION TO SEVER AND TO GOVERN FURTHER PROCEEDINGS

Though many parts of the 2020 Rule under review have been overtaken by events that transpired in the two years this case has been pending, the separated food waste recordkeeping requirements announced in the rule have only become more problematic. Clean Fuels members are unable to obtain the records the requirements oblige them to obtain, jeopardizing their ability to generate RINs, which in turn hinders the RFS's goals.

Almost every petitioner, respondent, and intervenor in this case raises no objection to severing Clean Fuels America Alliance's challenge to these recordkeeping requirements. Only EPA opposes and requests that this critical issue

continue to remain in limbo along with the remainder of the challenges to the 2020 Rule. EPA assumes that an issue should be severed only if it is important, then contends that the recordkeeping requirements are not important because of the relatively few words written about the issue in the biofuels' groups joint opening brief. EPA Resp. 2. EPA's position is ridiculous. The number of words spent on one issue *in a multiparty brief* is no proxy for the issue's importance. If anything, that Clean Fuels didn't use thousands of words to attack EPA's new recordkeeping requirements shows how arbitrary, capricious, and unlawful those requirements are.

Even so, *recent developments* are why Clean Fuels seeks to proceed without further delay: to comply with the challenged requirements, Clean Fuel members must produce records that they cannot obtain by April 1, 2022 or they will be unable to be certified under EPA's Quality Assurance Program ("QAP"). Time is now of the essence. The Court should therefore sever Clean Fuels' challenge.

ARGUMENT

I. Separated Food Waste Recordkeeping Has Become A Critical Issue for Clean Fuels Members.

When the 2020 Rule was issued, the new separated food waste recordkeeping requirements caught the biofuels industry by surprise—because the proposed rule said nothing about it. (Indeed, that's part of Clean Fuels' challenge to the requirement—EPA promulgated it without notice and without taking comments from industry on how impractical the requirements are.) In the two years since EPA

promulgated the Rule, the recordkeeping requirements have become incredibly important to Clean Fuels members. Members who participate the QAP have been told that, by April 1, 2022, they must demonstrate ongoing compliance with the recordkeeping requirement—that is, they must obtain and record addresses of the restaurants and other organizations that supply the separated food waste (specifically used cooking oil) that Clean Fuels members turn into biofuel. Ex. A (Shenk Decl. ¶ 6). The problem is, many biofuel producers do not obtain separated food waste *directly* from original sources but obtain it from third-party aggregators, who are refusing to identify their original sources (on the ground that names and addresses are trade secrets). Because QAP certification is important to a member's ability to sell biomass-based diesel and generate RINs, *id.* ¶ 8, Clean Fuels members who participate in the QAP and operate facilities that obtain used cooking oil from third-party aggregators will likely need to idle or shut down their facilities this year.

EPA doesn't dispute the underlying facts and circumstances that show why adjudicating Clean Fuels' challenge to the separated food waste recordkeeping requirements is so important. Instead, EPA argues that the relatively few words dedicated to separated food waste recordkeeping in biofuel petitioners' joint opening brief somehow shows that the issue is not important. That argument lacks merit. Perhaps because EPA always gets to write its own respondent's brief, it doesn't understand how a joint petitioners' brief is written. This Court assigns a total word

count to a group of petitioners and leaves it to them to allocate words to each issue on their own. Sometimes, a single issue may be critical to the group, but because it is relatively less complex, few words are needed. Sometimes, a single issue may be critical to one petitioner, but because it is critical to *only* one petitioner, relatively few words can be spared for the issue.

That's what happened here. When the five biofuels petitioners prepared their joint opening brief, only Clean Fuels challenged the new recordkeeping requirements (the requirements uniquely impact producers of biodiesel and renewable diesel and have no bearing on ethanol and cellulosic biofuel producers). The issue did not require many words to explain because it is simple. EPA violated the Administrative Procedure Act by finalizing a change in the separated food waste recordkeeping requirements *without notifying the public of the change in the proposed rule*. In addition to being procedurally deficient, the change is substantively deficient because EPA (having taken no comments to learn how biomass-based diesel producers actually obtain feedstock) completely overlooked the real-world impediments to implementing the new recordkeeping requirements (*i.e.*, third-party aggregators claiming the information EPA wants is a trade secret).

Clean Fuels' challenge to the separated food waste recordkeeping requirements *was* important when opening briefs were written, and it has grown in importance since. Lack of importance is not a valid reason for refusing to sever the challenge.

II. Clean Fuels Members Cannot Wait for Further EPA Deliberation.

EPA claims that keeping Clean Fuels' challenge in abeyance for at least three more months—the parties have agreed to file yet another round of motions to govern this case in mid-June—is warranted because the agency is in the process of reconsidering the new recordkeeping requirements. EPA Resp. 6–7. EPA's claim harkens back to a statement in its respondent's brief, where EPA committed to "issue a separate notice seeking comments on" on the issue. EPA Br. 18. That statement is nonbinding and vague beyond measure; it provides no concrete timeline, let alone an assurance that the issue will be reconsidered in the near future. What is clear is that, as of today, EPA has *not* issued a separate notice seeking comments on the recordkeeping requirements, and it is telling that EPA, in its opposition to Clean Fuels' motion to sever, still does not state when it will issue that notice, *if ever*. There is no reason to suspect that EPA will take administrative action before this Court can resolve Clean Fuels' challenge, let alone before mid-June.

Keeping Clean Fuels' challenge in abeyance along with the other challenges to the 2020 Rule will harm Clean Fuels members. As discussed above and in the attached declaration, there is an impending April 1 deadline for members participating in the QAP, by which they must produce the information demanded by the recordkeeping requirements. Maintaining QAP certification is essential for many small biofuel producers—customers often will not purchase their fuel without

it—meaning some Clean Fuels members will likely be unable to operate after April 1. Ex. A (Shenk Decl. ¶ 8). Producers who do not participate in the QAP also must comply with the recordkeeping requirements and are currently considering whether to switch feedstocks (if possible) or idle or shut down their facilities. *Id.* ¶ 9.

Keeping this challenge tethered to the other challenges simply lets EPA continue enforcing procedurally and substantively invalid recordkeeping requirements and gives EPA no incentive to initiate the new rulemaking proceeding it alluded to in its respondent's brief. Severing Clean Fuels' challenge will keep EPA's feet to the fire.

III. Briefing on Separated Food Waste Recordkeeping Should Not be Arbitrarily Constrained.

EPA argues that, if this case is severed, Clean Fuels' reply brief should be "limited to no more than a few pages." EPA Resp. 7. EPA's logic—that Clean Fuels' reply briefing on this issue must use no more than half the words written on this issue in the opening brief—is untenable. If this challenge is not severed, the biofuels petitioners will be free to allocate words to each issue as they see fit.

Still, if the Court severs Clean Fuels' challenge, Clean Fuels anticipates that it does not need more than 7 pages for a reply on its challenge. In that space, Clean Fuels will refute EPA's challenge to Clean Fuels' standing and respond to EPA's defense of the new recordkeeping requirements.

On the merits, the competing positions of Clean Fuels and EPA are fairly straightforward. All told, a 7-page reply brief, plus the excerpted pages already

written on the recordkeeping requirements in the already-filed briefs, equals no more than 20 pages for the Court to review before oral argument. Severing this challenge is not going to saddle the Court with a complex case. And, whichever way the Court resolves the case, it will provide badly needed certainty to Clean Fuels members, who are presently required to obey the recordkeeping requirements under review.

CONCLUSION

For the foregoing reasons, the Court should grant Clean Fuels' motion to sever and enter the briefing schedule identified in the motion.

Dated: March 11, 2022

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)(C) because it contains 1,442 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.

/s/ Bryan M. Killian

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022 I caused the foregoing to be electronically filed with the Clerk of the U.S. Court of Appeals for the D.C. Circuit by using the Court's appellate CM/ECF system and that service will be accomplished by the appellate CM/ECF system.

/s/ Bryan M. Killian