

ORAL ARGUMENT NOT YET SCHEDULED

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

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| RFS POWER COALITION, | |) | |
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| | 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 90 days after the final rule setting the 2021 and 2022 renewable fuel standards is published in the Federal Register. 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 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 a recently signed rulemaking proposal where it proposed to revise parts of the 2020 Rule. 86 Fed. Reg. 72,436 (Dec. 21, 2021). It also stated its intention to issue a notice seeking public comment on the food waste recordkeeping issue. EPA Br. 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.

Following the filing of EPA's brief, 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 expected 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 concerned only the food waste requirement. In a per curiam order issued on March 22, 2022, the Court denied Clean Fuels' motion to sever and granted EPA's motion for abeyance. Order (Mar. 22, 2022), Dkt. No. 1940069. The Court further directed the parties to file motions to govern further proceedings by June 24, 2022. *Id.*

On June 3, 2022, EPA finalized that proposed rulemaking and the EPA Administrator signed a final rule titled Renewable Fuel Standard (RFS) Program: RFS Annual Rules. Available at <https://www.epa.gov/system/files/documents/2022-06/rfs-2022-annual->

rule-frm-2022-06-03.pdf (prepublication version of final rule) (“2022 Rule”); *see also* EPA Br. A005–163 (Dec. 8, 2021), Doc. No. 1925941 (prepublication version of notice indicating signature date). In that final rule, EPA revised the renewable fuel volumes and percentage standards established in the 2020 Rule. EPA also reaffirmed its approach to accounting for exempted small refinery volumes in the percentage standard formula and its exclusion of cellulosic carryover RINs in the “projected volume available” for purposes of the cellulosic waiver. EPA also established the 2021 and 2022 volumes and standards. The proposed rule did not address the separated food waste recordkeeping regulation challenged by Clean Fuels. The 2022 Rule was published in the Federal Register on July 1, 2022. 87 Fed. Reg. 39,600.

On June 24, 2022, EPA filed a motion seeking further abeyance of these cases until 90 days after the final rule setting the 2021 and 2022 renewable fuel standards is published in the Federal Register. Motion to Hold Cases in Abeyance (June 24, 2022), Dkt. No. 1951932. Once again, no party opposed this motion except Clean Fuels, whose limited opposition concerned only the food waste requirement. On the same

day, Clean Fuels filed this motion to sever. Mot. to Sever and Govern Further Proceedings (June 24, 2022), Dkt. No. 1952076.

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 “maintain consistency in its decisions.” *Id.*

As EPA explained in its opposition to Clean Fuels’ earlier motion to sever, Clean Fuels’ challenge to EPA’s separated food waste recordkeeping regulation does not warrant deviation from this standard practice. The issue Clean Fuels proposes for severance 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 occupied 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 are impacted by the 2022 Rule. While that rule does not address the separated food waste issue, it will substantially affect the consolidated proceedings as a whole. The parties are still discussing the extent of that impact and conferring on the need for further proceedings. To facilitate that continued consideration, EPA has requested that the court continue to hold the cases in abeyance until 90 days after the 2022 Rule has been published in the Federal Register at which time the 60-day statutory period for filing petitions for review challenging the 2022 Rule will have closed.²

Additionally, EPA explained in its merits brief that it intends to address Clean Fuels' challenge to the separated food waste regulation by providing a further opportunity for public comment on the challenged requirement. EPA has since determined that it intends to take comment on this regulation when it proposes a rule establishing the 2023 renewable fuel obligations. Bunker Decl. ¶ 5 (attached herein). EPA has proposed a consent decree, pursuant to which it would be

² Because the 2022 Rule was published in the Federal Register on July 1, 2022, motions to govern further proceedings would be due on September 29, 2022 if the Court were to grant EPA's motion.

obligated to sign that notice of proposed rulemaking by September 16, 2022. *Id.* (citing proposed consent decree at 87 Fed. Reg. 31, 233). If for some reason that consent decree were not finalized, EPA nevertheless intends to move forward with its proposal (and with taking comment on the separated food waste issue) promptly. *Id.* It continues to make sense, then, to continue to hold the food waste issue in abeyance alongside the other challenges to the rule as it is very likely that EPA will have issued a request for comment on that very issue by the time EPA has proposed the parties submit motions to govern. 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.

Finally, Clean Fuels' claims of urgency on this issue do not withstand scrutiny. Clean Fuels suggests that the Court should sever their challenge because auditors for EPA's Quality Assurance Program (QAP) will no longer certify producers who do not maintain records demonstrating the source location of their feedstock. Mot. at 3, 10. Clean Fuels suggests that this certification requirement justifies severance, because its members should be able to resolve their

challenge before they are required to “adjust their operations” in response to it. *Id.* at 10. But as EPA noted in its merits brief, despite Clean Fuels portrayal of this recordkeeping requirement as being new, the challenged regulation was a mere clarification of a longstanding requirement. EPA Br. at 32-33, n.13. Because this requirement has existed since 2010, the complained-of QAP certification requirements will stand regardless of the outcome of Clean Fuels’ challenge. The present impact of those requirements, then, is no justification for the Court to sever that issue.

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,

TODD KIM

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U.S. Department of Justice
Environment and Natural Resources
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/s/ Caitlin McCusker

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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 1665 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 July 5, 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

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DECLARATION OF BYRON BUNKER

1. I, Byron Bunker, Director of the Compliance Division of the Office of Transportation and Air Quality, within the Office of Air and Radiation of the United States Environmental Protection Agency (“EPA”) declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information supplied to me by my employees under my supervision.

2. I have served as the Director of the Compliance Division since October 2011. The Compliance Division’s primary function is to

implement and oversee compliance with established regulatory requirements, including the Clean Air Act's Renewable Fuel Standard ("RFS") Program, that relate to transportation fuels and vehicles.

Among the specific tasks performed by the Compliance Division are: providing guidance to the regulated community, issuing certificates of conformity with vehicle and engine emission standards, managing companies' participation in the RFS Program, reviewing company reports and other submissions to monitor compliance, acting on petitions seeking waivers or exemptions from regulatory provisions, and alerting EPA's enforcement office of violations.

3. In EPA's rule entitled "Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes," 85 Fed. Reg. 7016 (Feb. 6, 2020) (the "2020 Rule"), EPA added a provision to its recordkeeping regulations, 40 C.F.R. § 80.1454(j)(1)(ii), that requires renewable fuel producers to maintain records demonstrating the location of any establishment from which a separated food waste stream used as renewable fuel feedstock is collected. EPA's existing regulations already required renewable fuel producers to keep documents identifying where the separated food

waste feedstocks were produced. However, it became apparent to EPA that producers commonly use aggregators to collect separated food waste used as feedstocks. Accordingly, EPA promulgated an additional provision to clarify that, where renewable fuel producers are required to keep records demonstrating the source location of separated food waste feedstock, EPA interprets the term “location” in the relevant regulations to refer to the physical address from which the wastes were obtained, not the physical or company address of an aggregator.

4. I am aware of the petitions for review filed by Petitioners in the above-captioned matter. I understand that Petitioner Clean Fuels (formerly National Biodiesel Board) challenges this regulation based on its assertion that EPA failed to provide it with a meaningful opportunity to comment on the requirement because EPA did not address it in the proposed rule. I am also aware that Petitioner challenges the regulation as arbitrary and capricious.

5. EPA recently signed a final rule entitled “Renewable Fuel Standard (RFS) Program: RFS Annual Rules.” 87 Fed. Reg. 39,600 (July 1, 2022). The rule does not address the separated food waste regulation challenged by Petitioner. Nevertheless, EPA intends to provide further

opportunity for public comment on this recordkeeping provision when it proposes a rule to establish the 2023 renewable fuel obligations. EPA has proposed a consent decree in *Growth Energy v. Regan*, No. 22-cv-1191 (D.D.C.), pursuant to which EPA would sign that notice of proposed rulemaking by September 16, 2022. 87 Fed. Reg. 31, 233 (May 23, 2022). Even if that consent decree were not to be finalized, EPA nevertheless intends to move forward expeditiously to issue the proposed rule and take comment on this issue.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 5, 2022, at Ann Arbor, Michigan.

**Byron
Bunker**

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Byron Bunker
Date: 2022.07.04
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BYRON BUNKER
Director of the Compliance Division
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