

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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)	
RFS POWER COALITION, <i>et al.</i>)	
)	
	<i>Petitioners,</i>)	
)	
v.)	No. 20-1046 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
	<i>Respondent.</i>)	
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**REPLY IN SUPPORT OF MOTION TO SEVER AND TO GOVERN
FURTHER PROCEEDINGS**

EPA argues that Clean Fuels’ food-waste challenge should be held in abeyance because it is “standard practice” to consider consolidated cases together and because the parties have proposed holding every other issue in this case in abeyance. But this case is anything but standard. It has been waylaid by a series of abeyances for two and a half years, with no end in sight. Those abeyances may be warranted for many issues in the case, but they are unnecessary and outright harmful for Clean Fuels’ food-waste challenge. Not only is there no reason to wait; there is every reason to move forward—the recordkeeping requirements that Clean Fuels

challenges have left its members unable to generate a particularly green, low-carbon biofuel, which hurts Clean Fuels' members and the RFS program.

None of EPA's arguments against severing Clean Fuels' challenge holds water.

First, EPA's claim that its 2020 rule merely "clarified" pre-existing requirements is unsupported and unsupportable; before the 2020 rule, companies that produced biofuel from food waste did not maintain the records that EPA suddenly demanded they maintain. For present purposes, EPA's claim about pre-2020 requirements and practice actually *supports* Clean Fuels' motion to sever. For, EPA's assertion that the 2020 rule clarified pre-existing requirements is just a repackaging of EPA's defense to Clean Fuels' challenge on the merits. EPA, in other words, asks the Court to deny severance on the ground that EPA will eventually win on the merits. But that's one-sided: EPA cannot fairly present its merits arguments to the Court while opposing Clean Fuels' procedural effort to have the Court review the entire dispute.

Second, EPA's promise to take comment on the food waste issue this fall does not obviate Clean Fuels' challenge. While Clean Fuels appreciates the agency's commitment to work on the problem prospectively, a new notice-and-comment rulemaking proceeding seems highly unlikely to provide Clean Fuels' members the

relief Clean Fuels seeks in this case—including vacatur of the *current* recordkeeping requirements.

Third, EPA’s claim that the food waste issue is unimportant because it was a small part of the biofuel petitioners’ joint brief is silly. The number of words dedicated to one issue in a multi-party brief says nothing about how important that issue is to the one party pursuing it.

For those reasons and the reasons discussed below, the Court should sever Clean Fuels’ challenge to the food waste recordkeeping provisions in the 2020 Rule and resolve it as quickly as possible.

ARGUMENT

I. The Abeyances in this Case Necessitate Severance.

Citing the D.C. Circuit Handbook, EPA argues that Clean Fuels’ challenge should be held along with the other petitions in the consolidated proceeding because such cases “generally follow a single briefing schedule.” EPA Opp. 6. The Handbook says “generally” for a reason: sometimes, consolidated proceedings should proceed on different schedules. This is exactly such a case.

What makes this case unusual is that it has been subject to *six different abeyances*, not just one abeyance that has been renewed over and over. In all likelihood, abeyances in this case will keep going and going. Because the RFS requires EPA to promulgate annual rules, which are almost inevitably challenged,

there is always another regulation or litigation that could affect some or many of the issues presented in these consolidated cases. EPA has moved for a 90-day extension in light of its 2022 rule, and history suggests that EPA will ask for another extension after that time elapses. Indeed, the rationale of the 90-day request for abeyance would appear to apply equally to an abeyance pending a resolution of challenges to the 2022 Rule. And after that, EPA might seek further abeyance based on its proposal for 2023, the final rule for 2023, or litigation over the rule for 2023.

That endless cycle of abeyances is carrying Clean Fuels' food-waste challenge along for the ride. Unlike other issues in this case, EPA did not discuss food waste anywhere in the 2022 Rule, and there is nothing about that rule that impacts Clean Fuels' challenge. If not for the existence of other petitions challenging different aspects of the 2020 rule, Clean Fuels' challenge would have been adjudicated at least a year ago. The Court should not allow a ripe, justiciable, and important question to sit unresolved indefinitely merely because it happens to be part of a larger case with unrelated issues for which abeyance may be warranted.

II. The Food Waste Recordkeeping Provisions of the 2020 Rule Were Not a “Clarification.”

To minimize the urgency of Clean Fuels' challenge, EPA claims that the food waste recordkeeping provisions in its 2020 rule were “merely a clarification” of its prior regulations and should therefore not be causing any discrete harm to Clean Fuels' members. As an initial matter, that EPA tries to oppose severance on merits

grounds simply underscores that the Court needs to reach the merits sooner rather than later.

EPA's claim also is belied by both the text of EPA's regulations and the past practices of EPA, third-party auditors, and the biofuel industry.

Starting with the text, EPA's 2020 Rule cannot possibly be deemed a mere "clarification." EPA amended the Code of Federal Regulations by *adding an entirely new* set of recordkeeping requirements applicable only to producers that generate fuel from food waste. *See* 40 C.F.R. § 80.1545(g). Those producers now must maintain "documents demonstrating the location of any establishment(s) from which the waste stream consisting solely of separated yard waste, separated food waste, or biogenic waste oils/fats/greases is collected." *Id.* Before this regulation existed, producers using food waste were subject only to the general requirement that all domestic biofuel producers "identify where the feedstocks were produced and are sufficient to verify that feedstocks used are renewable biomass." 40 C.F.R. § 80.1545(d). That general requirement allowed biofuel producers to maintain records of the location of aggregators and the general area from which those aggregators collect, rather than a list of tens or hundreds of individual restaurants or other feedstock sources.

And that is what everyone did. Since the inception of the program in 2010, biofuel producers maintained their records with the understanding that they did not

need to have a record of each source address from which an aggregator collected fuel. The auditors that verified biofuel producers' compliance practices as part of the Quality Assurance Program ("QAP") agreed—they examined producers' recordkeeping practices and determined that they were in compliance with all EPA regulations and guidance. Ex. A ¶ 6 (Shenk Decl.). And EPA itself had communicated to biofuel producers that simply listing a general area from which an aggregator collected biofuel was acceptable under EPA's related registration requirements in 40 C.F.R. § 80.1450 for facilities using separated food waste. *See EPA, Registration Requirements for Renewable Fuel Producers: Separated Food Waste Guidance* (July 2015), available at <https://www.epa.gov/sites/default/files/2015-09/documents/rfs-sfwp-pres-2015-07.pdf>.

Now, QAP providers have declined to provide certification for biofuel producers that use separated food waste, and they have identified the 2020 Rule as the reason they cannot provide that certification. Ex. A ¶ 7 (Shenk Decl.). EPA's claim that "the complained-of QAP certification requirements will stand regardless of the outcome of Clean Fuels' challenge," EPA Opp. 9, is demonstrably incorrect.

III. EPA's Proposal to Take Comment on Food Waste in the Fall Does Not Eliminate the Need for Expedious Resolution of this Case.

EPA's commitment to take comment on how to resolve the food waste issue this fall is a positive development, and Clean Fuels appreciate the agency's (belated)

recognition that the recordkeeping requirements are a problem. That said, a future rulemaking that might change the recordkeeping requirements prospectively does not remotely render Clean Fuels' challenge, pending for more than two years, "premature." EPA Opp. 8.

Clean Fuels' challenge cannot wait for this forthcoming rulemaking. EPA has not proposed any timeline for the rulemaking and, of course, has not committed to change its regulations at all. A rulemaking in the fall will not provide complete relief to Clean Fuels and its members because Clean Fuels seeks vacatur of the now-in-effect food-waste portion of the 2020 rule. Clean Fuels' members are currently dealing with the repercussions of EPA's 2020 Rule, which renders many of them unable to generate biofuel from used cooking oil or any other food waste, and they will be affected every day until the situation changes. This Court can provide Clean Fuels' members the retrospective relief they need by vacating the portion of the 2020 rule that adopted the new recordkeeping requirement.

IV. The Critical Importance of the Food Waste Issue to Clean Fuels' Members Matters More than the Word Count in Biofuel Petitioners' Joint Opening Brief.

EPA again points out that the food-waste issue did not take up a large portion of biofuel petitioners' opening brief, as if that demonstrates the issue's unimportance. EPA Opp. 1. But the word count of a multi-party brief has nothing to do with the importance of the issue to Clean Fuels' members. This Court set an

overall word count for an opening brief that included five different biofuels petitioners. Some of the issues in the brief were raised by all of the biofuels petitioners, and some were raised by a subsets and individual petitioners. Separated food waste recordkeeping was raised *only* by Clean Fuels, as it uniquely impacts producers of biodiesel and renewable diesel (the issue is not material to ethanol and cellulosic biofuel producers). As a result, relatively more space was dedicated to issues on which all or some groups had an interest.

The separated food waste issue also did not require as many words to explain as other topics because it is strikingly simple. First, Clean Fuels argued that EPA violated the Administrative Procedure Act by finalizing a change in the separated food waste recordkeeping requirements without including anything about that issue in the proposed rule. There was no need to parse the proposed rule's language or analyze whether the final rule could be considered a "logical outgrowth" of the proposal when the proposed rule said *nothing* on the topic. *See Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). Second, Clean Fuels argued that EPA's regulatory change was arbitrary because it failed to consider that biomass-based diesel producers cannot obtain the records of third-party aggregators. That issue is just as straightforward—it is functionally impossible for biomass-based diesel producers to maintain the records EPA wants when they don't have those records

and have no recourse to force the third-party aggregators who do have them to turn them over.

CONCLUSION

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

Dated: July 12, 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)(A) because it contains 1,779 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 July 12, 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