

**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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**NOTICE**

Respondents (“EPA”) submit this notice to the Court of a development related to its brief in opposition to the motion of Petitioner Clean Fuels Alliance America (“Clean Fuels”)<sup>1</sup> to sever its separated food waste recordkeeping challenge from the remainder of the challenges to the rule under review and allow briefing and argument on that issue to continue.

These consolidated petitions challenge EPA’s rule that, among other things, determined the annual percentage standards for the

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<sup>1</sup> 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.

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 recordkeeping regulation concerning separated food waste.

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). EPA finalized

that proposed rulemaking on June 3, 2022. 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”). The final rule was published in the Federal Register on July 1, 2022. 87 Fed. Reg. 39,600. Although the 2022 final rule did not address the separated food waste recordkeeping issue, EPA explained in its request for voluntary remand that it intended to issue a separate notice seeking public comment on this issue. EPA Br. at 33–34.

On June 24, 2022, EPA filed a motion seeking further abeyance of these cases until 90 days after the 2022 final rule was published in the Federal Register.<sup>2</sup> Motion to Hold Cases in Abeyance (June 24, 2022), Dkt. No. 1951932. No party opposed this motion except Clean Fuels, whose limited opposition concerned only the separated 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.

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<sup>2</sup> 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.

In opposing the motion to sever, EPA stated that it intended to address the challenge to the separated food waste regulation by providing a further opportunity for public comment on the challenged regulation. EPA's Opp'n to Mot. to Sever and Govern Further Proceedings 7–8 (July 5, 2022), Dkt. No. 1953329. EPA further stated that it intended to take comment on the challenged regulation when it proposed a rule establishing the 2023 renewable fuel obligations, and that it had proposed a consent decree pursuant to which it would be obligated to sign that notice of proposed rulemaking by September 16, 2022. *Id.*

Since it filed its brief in opposition to the motion to sever, EPA has filed a joint motion to enter that proposed consent decree. *See* Joint Mot. to Enter Consent Decree, *Growth Energy v. EPA*, No. 1:22-cv-01191-RC (D.D.C. July 22, 2022) (ECF 11). As explained in that motion, the parties to the proposed consent decree agreed to extend the deadline by which EPA would sign the notice of proposed rulemaking from September 16, 2022 until November 16, 2022. *Id.* at 2.

Despite this short extension of the deadline for EPA to issue a proposed rule taking comment on, *inter alia*, the separated food waste

recordkeeping issue, it remains the case that EPA will provide opportunity for further comment on the challenged regulation in relatively short order. Accordingly, it continues to make sense to continue to hold the food waste issue in abeyance alongside the other challenges to the rule as EPA explained in its opposition to the motion to sever.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 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