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

GROWTH ENERGY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, ADMINISTRATOR Respondents.	Case No. 19-1023 (and consolidated cases)

JOINT MOTION OF GROWTH ENERGY, NATIONAL BIODIESEL BOARD, AND PRODUCERS OF RENEWABLES UNITED FOR INTEGRITY TRUTH AND TRANSPARENCY TO SEVER THEIR PETITIONS AND HOLD THEM IN ABEYANCE

Pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rule 27, Petitioners Growth Energy, National Biodiesel Board ("NBB"), and Producers of Renewables United for Integrity Truth and Transparency ("Producers United") (collectively, "Moving Petitioners") respectfully move this Court to sever and hold in abeyance their petitions for review of final agency action by the Environmental Protection Agency ("EPA"), entitled *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule"). The Moving Petitioners intend to raise issues related to EPA's failure to account for small refinery exemptions that are

granted after the covered year's compliance obligations are finalized by EPA. Active cases pending in this Court may resolve these issues first.

National Wildlife Federation, Healthy Gulf, and Sierra Club, RFS Power Coalition, American Fuel & Petrochemical Manufacturers, Monroe Energy, LLC, EPA, Valero Energy Corporation, and Small Retailers Coalition take no position at this time on the motion.

BACKGROUND

A. Statutory And Factual Background

The Renewable Fuel Standard ("RFS") program under the Clean Air Act "requires an increasing amount of renewable fuel to be introduced into the Nation's transportation fuel supply each year," to "move the United States toward greater energy independence and to reduce greenhouse gas emissions." *Americans for Clean Energy ("ACE") v. EPA*, 864 F.3d 691, 696 (D.C. Cir. 2017) (citing 42 U.S.C. § 7545(*o*)). EPA is allowed to "reduc[e]" the minimum applicable volumes, but only "in limited circumstances" specified by the statute's waiver provisions. § 7545(*o*)(7)(A), (D); *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 149 (D.C. Cir. 2010).

Each year, EPA translates the national minimum volume requirements (whether reduced or not) into percentage standards, or renewable volume obligations ("RVOs"), pursuant to the formula defined in 40 C.F.R. § 80.1405.

ACE, 864 F.3d at 699. The percentage standards enable certain market participants—refiners and importers of gasoline and diesel fuel, or "obligated parties"—to determine how much renewable fuel they must introduce into the nation's supply of transportation fuel. *Id.* at 697-699; *see also* § 7545(*o*)(3)(B)(i)-(ii). "If each obligated party meets the required percentage standards, then the Nation's overall supply of … renewable fuel will meet the total volume requirements set by EPA." *ACE*, 864 F.3d at 699. EPA has a "statutory mandate to 'ensure[]' that those volume requirements are met." *Id.* at 698-699 (quoting § 7545(*o*)(3)(B)(i)); *see also* § 7545(*o*)(2)(A)(i) (EPA must "ensure" the volume requirements are met).

By statute, all "small refineries" were "[t]emporar[ily]" exempt from complying with the RVOs from the commencement of the program through December 2010. § 7545(*o*)(9)(A)(i); *see also* § 7545(*o*)(1)(K) ("small refinery" means "a refinery for which the average aggregate daily crude oil throughput for a calendar year … does not exceed 75,000 barrels"). After 2010, EPA could "exten[d]" this exemption, but only if it found that certain statutorily specified criteria were present. § 7545(*o*)(9)(A)(ii), (B). Congress directed EPA to "extend" the exemption "for a period of not less than 2 additional years" for any small refinery that the Department of Energy ("DOE") determined would face "disproportionate economic hardship" in complying with the RVOs.

§ 7545(*o*)(9)(A)(ii). In a March 2011 study, DOE determined that thirteen small refineries would be subject to disproportionate economic hardship. *See* DOE, Small Refinery Exemption Study, at vii-viii, 26, 37 (Mar. 2011), https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf; *Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 990 (10th Cir. 2017). EPA has subsequently stated that its initial extension of the exemption—for 2011 and 2012—applied to twenty-four small refineries. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions ("*EPA Data*"); *see* § 7545(*o*)(9)(A)(ii).

Apart from that one-time DOE-based extension, Congress allowed EPA to "exten[d]" the exemptions on a case-by-case basis, upon an application submitted by a small refinery showing that it would face "disproportionate economic hardship" in complying with the RVOs. § 7545(*o*)(9)(B). In September 2018, EPA established a website, which showed that, for 2016 and 2017, EPA suddenly started granting extension applications much more liberally than it had in prior years. *EPA Data*.[1] Further, all those extensions were granted retroactively, i.e.,

[1] The Moving Petitioners do not concede that all the granted applications were proper "extensions" of existing exemptions, as required by the statute. Some small refineries may have had no existing exemption and thus EPA could not have validly granted them any "extension." Because that issue does not affect the merits of this motion, however, this motion refers to all the granted applications as "extensions," whether validly granted or not.

they were granted *after* EPA had set the percentage standards for those years. *See* 80 Fed. Reg. 77,420, 77,511 (Dec. 14, 2015) (no exemption for 2016 as of the final 2014-2016 RFS rule); 81 Fed. Reg. 89,746, 89,800 (Dec. 12, 2016) (no exemption for 2017 as of the final 2017 RFS rule).

These retroactive exemption extensions have a significant effect on the RFS. In calculating the percentage standards, EPA takes into account only those exemption extensions it grants *prior to* finalizing the percentage standards for the year covered by the extended exemptions, by subtracting the exempt volumes from the volume of transportation fuel used to set the standards. 40 C.F.R. § 80.1405(c). By contrast, EPA does not take into account any exemption extensions it has already granted retroactively for prior compliance years or could reasonably anticipate granting retroactively in the upcoming compliance year. *Id.*; *see* 2019 Rule at 63,740. Because the percentage standards are based on the expected national volume of transportation fuel to be consumed, granting retroactive exemption extensions without ever adjusting the percentage standards to make up for those exempt volumes means that EPA is not meeting its duty to "ensure" that "the Nation's overall supply of … renewable fuel will meet the total volume requirements set by EPA." *ACE*, 864 F.3d at 699.

B. 2019 Rule

In the proposal for the 2019 percentage standards, EPA first acknowledged

the magnitude of the exemptions it had been secretly granting: "approximately 1,460 million RINs … were not required to be retired by small refineries that were granted hardship exemptions for 2017" and "approximately 790 million RINs … were not required to be retired by small refineries that were granted hardship exemptions for 2016."[2] 83 Fed. Reg. 32,024, 32,029 (July 10, 2018). The combined 2.25 billion RINs represent the amount of renewable fuel that was no longer required for 2016 and 2017 because of the retroactively granted extensions for those years.

During the rulemaking, EPA appeared to acknowledge that "the impact of small refinery exemptions" made the renewable fuel market more vulnerable, 83 Fed. Reg. at 32,027, and received numerous comments on its small refinery extension practices, but it finalized the 2019 RVOs without accounting for prior or anticipated retroactively granted extensions. 2019 Rule at 63,740 (declaring that EPA would "maintain [its] approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that

[2] "RINs"—short for "Renewable Identification Numbers"—are the "credits in the trading program established by EPA." *ACE*, 864 F.3d at 699. In this program, "each batch of renewable fuel that is produced or imported for use in the United States is assigned a unique set of RINs 'that correspond to the volume of ethanol-equivalent fuel gallons in that batch.'" *Id.* Obligated parties "comply with their renewable fuel obligations by accumulating or purchasing the requisite number of RINs and then 'retiring' the RINs in an annual compliance demonstration with EPA." *Id.*

apply to all gasoline and diesel produced or imported in 2019"); *see also* Renewable Fuel Standards for 2018 and Biomass-Based Diesel Volume for 2019, Response to Comments, at 183-185 (Dec. 2018) (EPA-HQ-OAR-2018-0167-1387). As in prior years, there was no exemption granted for 2019 prior to EPA's finalizing the 2019 percentage standards. 2019 Rule at 63,740. Accordingly, EPA "calculated the percentage standards for 2019 without any adjustment for exempted volumes" during the 2019 compliance year or any accounting for renewable fuel volumes that were effectively waived from prior compliance years. *Id.*

C. The Moving Petitioners' Challenges To The 2019 Rule

The Moving Petitioners have petitioned this Court for review of the 2019 Rule. *See* Growth Energy Petition for Review, ECF #1772386 (D.C. Cir. Feb. 4, 2019) (No. 19-1023); NBB Petition for Review, ECF #1772932 (D.C. Cir. Feb. 8, 2019) (No. 19-1035); Producers United Petition for Review, ECF #1773270 (D.C. Cir. Feb. 9, 2019) (No. 19-1036). The Moving Petitioners intend to raise challenges relating to EPA's refusal to account for retroactive small-refinery exemption extensions in setting the 2019 percentage standards, including the retroactive extensions for prior years that EPA has still not accounted for in setting percentage standards and the extensions EPA expects to grant retroactively for the

2019 compliance year.

D. Pending Litigation Regarding EPA's Failure To Account For Retroactive Exemption Extensions

EPA's failure to account for retroactive small-refinery exemption extensions is at issue in other lawsuits pending in this Court. The Moving Petitioners are aware of two such active cases.

1. In *American Fuel & Petrochemical Manufacturers ("AFPM") v. EPA*, No. 17-1258 (D.C. Cir. Dec. 12, 2017), NBB challenged EPA's refusal to account for retroactive exemption extensions in setting the percentage standards for 2018. *See* Final NBB Br. 13-20, ECF #1767114 (D.C. Cir. Jan. 4, 2019) (No. 17-1258); *see also* 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017) ("EPA is maintaining its approach that any exemptions for 2018 that are granted after the final rule is released will not be reflected in the percentage standards"). The Court heard argument on February 20, 2019.

2. On July 31, 2018, Producers United petitioned this Court for review of EPA's determination that it can grant small-refinery exemption extensions retroactively and that it can do so without accounting for them in annually setting the percentage standards. Petition for Review, *Producers of Renewables United for Integrity Truth & Transparency ("Producers United") v. EPA*, No. 18-1202, ECF #1743716 (D.C. Cir. July 31, 2018); *see* Producers United Br. 49-55, ECF #1773103 (D.C. Cir. Feb. 12, 2019) (No. 18-1202). Briefing in the case is

currently in progress and is scheduled to conclude on April 1, 2019.[3]

ARGUMENT

The Moving Petitioners respectfully request that the Court sever their petitions for review from the consolidated cases. Further, the Moving Petitioners request that the Court then hold consideration of their petitions in abeyance pending resolution of either *AFPM* or *Producers United*, the two active related cases identified above.

This request serves the interests of judicial economy. The Court may address the Moving Petitioners' concerns in these pending cases—particularly the *AFPM* case, which has already been submitted for decision—before it reaches decision in this case. Decision in one of these related cases may thus obviate the need for the Court and the parties to expend resources litigating the issue here. The Moving Petitioners believe that other issues expected to be raised in this case can be resolved independently of the issue regarding retroactive exemption extensions. This Court has granted similar motions in prior lawsuits concerning the RFS. *See, e.g.*, Order, *Coffeyville Resources Refining & Marketing, LLC v.*

[3] In addition, Growth Energy, NBB, and other parties petitioned this Court for review of EPA's rule specifying how EPA calculates RFS percentage standards, insofar as the rule fails to account for retroactive exemption extensions. *See* Petition for Review, *Renewable Fuels Association v. EPA*, No. 18-1154, ECF #1735386 (D.C. Cir. June 4, 2018). This case is currently being held in abeyance pending administrative action by EPA, and EPA is required to file a status report every 90 days. Order, ECF #1737438 (D.C. Cir. June 22, 2018) (No. 18-1154).

EPA, No. 17-1044, ECF #1665514 (D.C. Cir. Mar. 10, 2017) (holding consolidated cases in abeyance pending resolution of other case).

The Moving Petitioners further propose that if there is any ruling on the petitions for review in *AFPM* or *Producers United* that affects the Moving Petitioners' challenges here, the parties file within 30 days of that ruling a motion to govern further proceedings.

CONCLUSION

For the foregoing reasons, the Moving Petitioners request that the Court sever and hold in abeyance their petitions for review pending a ruling on the petitions for review in the *AFPM* case or the *Producers United* case.

Respectfully submitted,

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March 11, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Moving Petitioners state the following:

Growth Energy is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The National Biodiesel Board ("NBB") is a trade association as defined in Circuit Rule 26.1(b). It is the national trade association for the biodiesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel industry growth. NBB has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

Producers of Renewables United for Integrity Truth and Transparency ("Producers United") is an ad hoc working group of companies that own and operate biomass-based diesel and ethanol production plants and participate in the Renewable Fuel Standard program. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It has not issued shares

or debt securities to the public. None of the members of Producers United has issued shares or debt securities to the public, except Renewable Energy Group, Inc.

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March 11, 2019

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 27(a)(4), the Moving Petitioners certify that the parties in these consolidated cases are:

Petitioners: Growth Energy; RFS Power Coalition; Monroe Energy, LLC; Small Retailers Coalition; National Biodiesel Board; Producers of Renewables United for Integrity Truth and Transparency; American Fuel & Petrochemical Manufacturers; Valero Energy Corporation; National Wildlife Federation, Healthy Gulf, and Sierra Club.

Respondents: Environmental Protection Agency; Andrew Wheeler, Administrator.

Movant-Intervenors: Growth Energy, American Fuel & Petrochemical Manufacturers, and Monroe Energy, LLC have moved for leave to intervene. Those motions are pending.

Amici curiae: None.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,022 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Seth P. Waxman
Seth P. Waxman

CERTIFICATE OF SERVICE

I certify that on March 11, 2019, I filed the foregoing using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman
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