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 REPLY OF GROWTH ENERGY, NATIONAL BIODIESEL BOARD, AND PRODUCERS OF RENEWABLES UNITED FOR INTEGRITY TRUTH AND TRANSPARENCY TO OPPOSITIONS OF EPA, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND MONROE ENERGY, LLC TO MOTION TO SEVER PETITIONS AND HOLD THEM IN ABEYANCE

On March 11, 2019, the Moving Petitioners filed a motion to sever and hold in abeyance their petitions for review of *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule") until the Court decides either *American Fuel & Petrochemical Manufacturers ("AFPM") v. EPA*, No. 17-1258 (D.C. Cir.), or *Producers of Renewables United for Integrity Truth & Transparency ("Producers United") v. EPA*, No. 18-1202 (D.C. Cir.). *See* Moving Petitioners' Mot. to Sever and Hold Their Petitions in Abeyance, ECF #1777040 (D.C. Cir. Mar. 11, 2019)

(No. 19-1023) ("Moving Petitioners' Mot."). EPA opposes that motion, and so do American Fuel & Petrochemical Manufacturers and Monroe Energy, LLC ("Opposing Petitioners"). *See* EPA's Opposition to Biofuel Petitioners' Motion to Sever the Small Refinery Exemption Issue, ECF #1778332 (D.C. Cir. Mar. 19, 2019) (No. 19-1023); American Fuel & Petrochemical Manufacturers and Monroe Energy, LLC's Opposition to Motion to Sever and Hold in Abeyance, ECF #1778736 (D.C. Cir. Mar. 21, 2019) (No. 19-1023). For the reasons stated below, EPA's and Opposing Petitioners' arguments are meritless.

ARGUMENT

EPA acknowledges (at 7-8) that the Moving Petitioners' challenge here relates to the same issue presented in two other active cases in this Court: EPA's refusal to account for retroactive extensions of small refinery exemptions in setting the annual percentage standards under the Renewable Fuel Standard ("RFS").[1] Nonetheless, EPA argues that severing the Moving Petitioners' petitions from the consolidated cases and holding them in abeyance until the Court rules in either of the two related active cases would not serve judicial efficiency. EPA is wrong.

[1] *See* Growth Energy Non-Binding Statement of Issues, ECF #1777038 (D.C. Cir. Mar. 11, 2019) (No. 19-1023); NBB Non-Binding Statement of Issues, ECF #1777044 (D.C. Cir. Mar. 11, 2019) (No. 19-1023); Producers United Non-Binding Statement of Issues, ECF #1777751 (D.C. Cir. Mar. 15, 2019) (No. 19-1023).

Not only has this Court held cases in abeyance in prior RFS litigation (thus postponing the determination of the rule's validity), *see* Order, *Coffeyville Resources Refining & Marketing, LLC v. EPA*, No. 17-1044, ECF #1665514 (D.C. Cir. Mar. 10, 2017),[2] but the Court has also severed certain issues or petitions from consolidated RFS cases and held just those in abeyance, *see* Order, *Monroe Energy, LLC v. EPA*, No. 13-1265, ECF #1483336 (D.C. Cir. Mar. 11, 2014) (per curiam) (granting EPA's unopposed motion to sever certain issues and hold them in abeyance pending administrative reconsideration); Order, ECF #1491582 (D.C. Cir. May 6, 2014) (No. 13-1265) (per curiam) (deconsolidating certain petitions from the lead case in *Monroe* and holding them in abeyance pending administrative reconsideration). In fact, in the *Monroe* case, which involved challenges to the 2013 RFS standards, *EPA* and one of Opposing Petitioners (AFPM) asked for severance and abeyance of an issue relating to an extension of

[2] EPA argues (at 8 n.4) that the *Coffeyville* order is inapposite because the order did not sever any issue while holding the case in abeyance. But that order (as the Moving Petitioners correctly described it, *see* Moving Petitioners' Mot. 9-10) held the *consolidated cases* in abeyance pending resolution of another case, so the order could not have severed anything. Here, only the Moving Petitioners' challenge overlaps with the retroactive exemption extension issue in *AFPM* and *Producers United*, while other petitioners' challenges do not. Thus, the *Coffeyville* order (as well as other examples cited herein) supports severing and holding the Moving Petitioners' challenge in abeyance.

the small refinery exemption.[3] And although EPA cites (at 8 n.4) a later order in *Coffeyville* in which the Court denied severance of an issue pending administrative proceedings, there EPA noted that the arguments in litigation were "quite distinct" from any potential arguments that might be raised in a challenge to EPA's action on the pending administrative proceedings. EPA's Opposition to Petitioners' Motion to Sever the Point-Of-Obligation Issue 6-7, ECF #1704206 (D.C. Cir. Nov. 13, 2017) (No. 17-1044). By contrast, EPA does not dispute that the Moving Petitioners' challenge substantially coincides with the issues raised in *AFPM* and *Producers United*.

EPA says (at 6-7) the Moving Petitioners' challenge could be "interrelated with the other challenges to the 2019 Rule." As EPA concedes (at 3), however, other petitioners will likely raise distinct challenges to the 2019 Rule. Certainly, none of the other petitioners' statements of issues indicates an intention to raise challenges that relate to EPA's treatment of retroactive small-refinery exemption extensions. Rather, they identify issues such as whether EPA needs to account for electricity transportation fuel production, whether EPA needs to consult with other

[3] Joint Motion of EPA, API, and AFPM to Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration 2, ECF #1488129 (D.C. Cir. Apr. 11, 2014) (No. 13-1265); *see also* Respondent EPA's Unopposed Motion to Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration, ECF #1478306 (D.C. Cir. Feb. 4, 2014) (No. 13-1265) (seeking severance and abeyance of certain other issues).

agencies in setting the percentage standards, and whether EPA properly declined to exercise its general-waiver authority to avoid supposed severe economic harm.[4] EPA avers (at 7) that it does "not know at this time whether the [Moving Petitioners] may attempt to argue that some aspect of EPA's approach to setting the 2019 volumes and percentage standards supports" accounting for retroactive exemption extensions in setting those standards. But the arguments that petitioners will likely raise here are well known by all the parties given that petitioners have articulated their objections to the 2019 Rule during the rulemaking. Yet, neither EPA nor Opposing Petitioners identify any specific interrelation.

Next, EPA says (at 7) that if a petitioner's challenge were to succeed, "the 2019 Rule might be remanded on that basis alone." But EPA does not explain why that outcome would create inefficiency, or greater inefficiency, *because of* the severance and abeyance of the Moving Petitioners' challenge. If the Court resolves EPA's failure to account for retroactive exemption extensions in setting the percentage standards in one of the other active cases before or during the remand of the 2019 Rule to EPA—which is likely given the advanced procedural

[4] *See, e.g.*, RFS Power Coalition Non-Binding Statement of Issues, ECF #1777016 (D.C. Cir. Mar. 11, 2019) (No. 19-1023); National Wildlife Federation, Healthy Gulf, and Sierra Club Non-Binding Statement of Issues to be Raised, ECF #1777633 (D.C. Cir. Mar. 14, 2019) (No. 19-1023); American Fuel & Petrochemical Manufacturers' Nonbinding Statement of Issues, ECF #1777857 (D.C. Cir. Mar. 15, 2019) (No. 19-1023).

status of those cases (*see infra*)—EPA can (and should) account for that ruling in the course of revising the 2019 Rule. That would not be a markedly different process compared to the Court resolving the issue in this case.

EPA also says (at 6-7) the Moving Petitioners' challenge is based on "the same administrative record" as other petitioners' challenges and that severance would "create a need for EPA and the Court to revisit the same administrative record twice." This is a makeweight point. If it were sufficient to defeat severance and abeyance, there would never be severance and abeyance because every review of an administrative action has this character.[5] Moreover, it reflects a simplistic and monolithic view of the "administrative record." The parts of the record that are relevant to the Moving Petitioners' challenge are largely distinct from the parts that are likely relevant to the other petitioners' challenges, and all parties will, of course, point EPA and the Court to portions that are relevant to their arguments in the course of briefing. Thus, abeyance is not likely to cause meaningful duplication of effort studying the administrative record.

EPA argues (at 7) that severance and abeyance would not "conserve the resources of the parties" because the Moving Petitioners have already briefed

[5] Yet, the Court has heard challenges to the same agency rule separately. *Compare National Petrochemical & Refiners Ass'n v. EPA*, No. 10-1070, ECF #1247859 (D.C. Cir. June 3, 2010) (Certified Index to the 2010 RFS rule), *with National Chicken Council v. EPA*, No. 10-1107, ECF #1342896 (D.C. Cir. Nov. 18, 2011) (Corrected Certified Index to the 2010 RFS rule).

EPA's failure to account for retroactive exemption extensions in setting the percentage standards in other cases and thus the Moving Petitioners' substantive arguments are "well-developed." But EPA misses the point. The Moving Petitioners cannot simply submit one of those briefs in this case; if the Court were to first resolve the issue presented in *AFPM* or *Producers United*, abeyance here *would* save the time and resources the Moving Petitioners would otherwise unnecessarily expend litigating the issue (not to mention the Court's time and resources considering it).

EPA suggests (at 8) that severance is inappropriate in challenges to EPA's RFS rules because, given the annual nature of the rulemakings, there will "necessarily be some overlap between litigation over one year's rulemaking and the next." If anything, that suggests that more issues could rightly have been severed and held in prior RFS cases. Moreover, the degree of the overlap matters. Regardless of whether issues raised in litigation challenging one year's RFS rule are *similar* to issues raised in another year's litigation, the Moving Petitioners' challenge here raises the *same* issue as presented to the Court in *AFPM* and *Producers United*. *See* Moving Petitioners' Mot. 8.

EPA speculates (at 8-9) that there is "a real likelihood that the Court will not address the merits of the [Moving Petitioners'] arguments in" *AFPM* or *Producers United*. That argument assumes that EPA will prevail on the procedural defenses

raised in those cases. The Moving Petitioners certainly disagree (*see, e.g.*, Final NBB Reply Br. 3-7, ECF #1767119 (D.C. Cir. Jan. 4, 2019) (No. 17-1258); Producers United Reply Br. 17-23, ECF #1778025 (D.C. Cir. Mar. 18, 2019) (No. 18-1202)), and the Court here should not effectively resolve that dispute in order to decide this motion. Nothing EPA says dispels the substantial possibility that the issue raised by the Moving Petitioners here will be resolved first in one of the other two active cases, and that suffices to show the efficiency of severing and holding the Moving Petitioners' petitions in this case. *See* Moving Petitioners' Mot. 8-10.

Also unconvincing is EPA's argument (at 9) that consolidated proceedings will allow EPA to "consider the results of that review in formulating further standards" while severance would leave the validity of the 2019 Rule "unsettled for an unspecified period of time." The Moving Petitioners proposed severing and holding their petitions in abeyance until the Court rules in either *AFPM* or *Producers United*. *See* Moving Petitioners' Mot. 9-10. *AFPM* was argued on February 20, 2019, and *Producers United* will be argued on May 7, 2019. Thus, delay in resolving the validity of the 2019 Rule, if any, would likely be minimal, and would be outweighed by the efficiency of litigating only those issues that remain after the Court's decision in *AFPM* or *Producers United*.

Finally, the only argument that Opposing Petitioners add to EPA's is that (at 2-3) the Court could mitigate any "potential for inefficiency" by setting a briefing

and argument schedule that "accommodate[s] the anticipated dates of decisions" in *AFPM*—which they say would "likely" be "in the next few months"—and *Producers United*, or ordering supplemental briefing after the Court's decision in either case. The Moving Petitioners agree that the Court could decide those other cases soon, but that is exactly why severance and abeyance would not unduly "delay final resolution of the lawfulness" of the 2019 Rule, contrary to Opposing Petitioners' argument (at 3). Moreover, Opposing Petitioners' recognition that supplemental briefing may be needed after the Court's ruling in *AFPM* or *Producers United* shows why it would be *in*efficient not to sever and hold the Moving Petitioners' challenge.

CONCLUSION

For the foregoing reasons, the Moving Petitioners request that the Court grant their motion to sever their petitions and hold them in abeyance.

Respectfully submitted,

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March 26, 2019

CERTIFICATE OF COMPLIANCE

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

1. This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,972 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.

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/s/ Seth P. Waxman
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I certify that on March 26, 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.

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