ARGUMENT NOT YET SCHEDULED

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

RFS POWER COALITION, *Petitioner*, v. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 20-1046

EPA'S OPPOSITION TO RFS POWER COALITION'S MOTION TO CONSOLIDATE OR COORDINATE RELATED CASE OR, IN THE ALTERNATIVE, HOLD IN ABEYANCE

Each year, EPA must issue a rulemaking, based on the administrative record compiled for that rulemaking, in which it sets percentage standards that obligated parties must apply to their own production or import of gasoline or diesel to determine their individual renewable fuel obligations. 42 U.S.C. §§ 7545(o)(2)(A)(i), (iii), 7545(o)(3)(B)(i), 7545(o)(7)(D)(i), 7545(o)(7)(A). Respondents United States Environmental Protection Agency, et al., ("EPA") hereby oppose Petitioner's motion to consolidate its newly filed petition for review of EPA's rulemaking setting the 2020 renewable fuel standards ("2020 Rule"),[1]

[1] *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7,016 (Feb. 6, 2020).

with the fully briefed challenge to EPA's separate rulemaking setting the 2019 renewable fuel standards ("2019 Rule").[2]

By styling its motion as a request to "consolidate," Petitioner RFS Power Coalition attempts to obscure the unusual and extraordinary nature of the relief that it seeks. In effect, Petitioner is *sub silentio* moving this Court to expedite its challenge to 2020 Rule, departing from the Court's usual practice of consolidating "all petitions for review of agency orders entered in the same administrative proceeding." *See* D.C. Cir. Handbook at 24; *see also, e.g.*, 28 U.S.C. § 2112(a).[3] Petitioner does so on the assumption that the administrative record for the 2020 Rule—which has yet to be certified—and motion practice and briefing on its challenge to the 2020 Rule are all unnecessary, and that a decision on its challenge to the 2019 Rule will necessarily control. Petitioner fails to show that any of these assumptions are valid—and, indeed, they are not. Moreover, it misleads the Court in arguing that the extraordinary relief it requests is required in order to preserve what it terms an effective remedy. The purported efficiency interests Petitioner asserts are also illusory. EPA therefore respectfully opposes this motion and urges

[2] *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018).

[3] Petitioner recognizes the likelihood that other parties will challenge the 2020 Rule, *see* Mot. at 10, as they have in previous years. EPA likewise expects that the 2020 Rule will be subject to other petitions for review.

that the Court should address this case in the ordinary course of its business, with neither undue haste nor undue delay.

I. The Court Should Reject Petitioner's Unusual and Extraordinary Request to "Consolidate" this Case with the 2019 Rule.

A. Petitioner Is *Sub Silentio* Moving to Expedite Without Meeting the Requirements for Expedition and Based on Invalid Assumptions.

To begin with, we should call Petitioner's motion what it is: a motion to expedite its challenge to the 2020 Rule. The Court, however, "grants expedited consideration very rarely," and "[t]he movant must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge." D.C. Circuit Handbook at 34.[4] Petitioner does not even attempt to show that it has a "substantial challenge" to the 2020 Rule, and has therefore waived its ability to do so. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 664 (D.C. Cir. 2019) (arguments made for the first time in a reply brief are forfeited). And, as discussed below, Petitioner's claimed harm is based on a misstatement of the facts—it is simply false that EPA has taken the position that "no remedy for undercounting biofuel volumes can ever be retroactively or prospectively adjusted after the close of the annual compliance period." Mot. at 5-6; *see also infra* at 7-8.

[4] The Court may also expedite a case based on an unusual public interest or unusual interest of persons not before the Court—neither of which is relevant here.

In addition to requesting the "very rare" relief of expediting this case, Petitioner goes a step further. It asks that the Court simply dispense with all initial deadlines, dispense with the administrative record, and dispense with briefing and argument on the 2020 Rule. Petitioner cites to no precedent for such an extreme departure from this Court's rules of practice. To justify this extraordinary request it assumes that (1) the record in the 2020 Rule will be identical to the 2019 Rule; (2) EPA must advance the same arguments as it did in 2019; and (3) a decision on its challenge to the 2019 Rule will necessarily be *stare decisis* for the 2020 Rule. These assumptions are all false.

Because EPA has not certified the administrative record for the 2020 Rule and the deadline to do so is not until April 13, 2020, RFS Power Coalition can only speculate that the record here is materially identical to the 2019 Rule. In the absence of a certified record, counsel for EPA has not yet evaluated the full extent to which the records might differ, including on the issue Petitioner suggests it will raise. However, and contrary to Petitioner's unsupported assertion, *see* Mot. at 4-5, even a cursory review of EPA's response to comments for the 2020 Rule reveals that the record here is different. For instance, the 2020 Rule's response to comments expressly cited to EPA's "2016 REGS proposal" as outlining some of the regulatory and technical issues at stake in addressing renewable electricity

generation. *See* 2020 RTC at 31.[5] By contrast, in its reply brief in its challenge to the 2019 Rule, RFS Power Coalition criticized EPA because "the administrative record for the 2019 rule did not rely on or even cite the 2016 [REGS proposal] notice." Reply Brief for Petitioners Growth Energy, *et al*. at 17, *Growth Energy v. EPA*, No. 19-1023, Dkt. 1832054 (D.C. Cir. March 5, 2020) ("Growth Energy Reply"). Petitioner cannot plausibly fault EPA for failing to cite the 2016 REGS proposal in the 2019 Rule and then, in the next breath, claim that the 2020 Rule which cites this document is materially identical.

Moreover, Petitioner cannot lock EPA into making the same arguments it raised in support of the 2019 Rule, particularly given that the 2020 Rule is a separate rule with a separate record. Although EPA certainly *may* choose to advance the same arguments it advanced in 2019, it is free to chart a different course if it determines that other arguments are better. Nor is EPA compelled to make this decision now, long before the deadline for the certified index to the record, let alone the deadline for briefing on the 2020 Rule. Petitioner has no authority to dictate the arguments that EPA asserts to defend against Petitioner's challenge to the 2020 Rule, and it would prejudicial to limit EPA's defense of the 2020 Rule in this manner.

[5] Available at <https://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2020-and-biomass-based-diesel-volume>.

Petitioner's motion also proceeds on the assumption that it and EPA are the only potential interested parties. Challenges to EPA's renewable fuel standards have typically involved multiple parties, including respondent intervenors arguing in support of the rule. Petitioner seeks in its petition to increase the renewable fuel volume standards EPA set in the 2020 Rule, thereby increasing the burden on the parties obligated to comply with the renewable fuel standards. Such obligated parties may seek to intervene in support of EPA and, in fact, one such entity, American Fuel & Petrochemical Manufacturers, has already moved to do so. Petitioner's proposal would effectively deny respondent intervenors the opportunity to respond to Petitioner's arguments in context of the 2020 Rule.

Finally, and relatedly, Petitioner's approach takes for granted that a decision on the 2019 Rule will be *stare decisis* on the 2020 Rule. But there is no guarantee that this will be the case. As just discussed, the record may be materially different or EPA could advance different arguments in the 2020 Rule as compared to the 2019 Rule. Or, in fact, the Court might find reason not to address Petitioner's issue in the 2019 Rule *at all*, if it determines that some other basis for its decision warrants remand or moots that issue. Ordinarily, before a Court holds that parties are bound to a previous decision that decision will, at a minimum, have *actually issued*. Often there will be briefing on whether that decision does, in fact, control and—occasionally—this issue alone can merit full briefing and argument. *See*,

e.g., *Mexichem Fluor, Inc. v. EPA*, 760 Fed. App'x 6 (D.C. Cir., April 5, 2019) (unpublished).

B. Petitioner's Approach Will Not Increase Efficiency and Petitioner Misleads the Court in Claiming that Deciding Its Petition in the Ordinary Course Will Deny It Effective Review.

Petitioner repeatedly and misleadingly claims that EPA has taken the "position that it will never retroactively adjust its volume rules from prior years to provide relief" even in the face of a remand from this Court. Mot. at 7; *see also id.* at 5-6. This incorrect statement comprises the core of Petitioner's claim that expedited disposition of this case is necessary. In reality, however, EPA has said no such thing and Petitioner's claimed harm is exactly the same as most of the parties who attempt to challenge EPA's renewable fuel standards.

Petitioner's sole support for this claim is EPA's proposed rule, which was never finalized, in which EPA suggested how it might respond to this Court's remand of the rule setting renewable fuel standards for 2016. *See* 84 Fed. Reg. at 36,788; *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 696-97, 713 (2017) (remand of 2016 rule). Under the circumstances of that remand, EPA proposed that it would "retain the original 2016 total renewable fuel standard" in light of the undue burdens the agency believed would be imposed on obligated parties and absence of a benefit to altering those standards. 84 Fed. Reg. at 36,788-89. Among other things, the proposal rested upon specific factual findings unique to the

circumstances under which it issued. *See, e.g., id.* at 36,789 & n.128 (analyses of the market's ability to use certain biofuels in 2020). At no point did EPA propose a general policy to "never retroactively adjust its volume rules from prior years." Mot. at 7. To the contrary, EPA has retroactively adjusted its volume rules in prior years when the agency found that the record warranted doing so. *See, e.g.*, 80 Fed. Reg. 77, 420, 77,508-09 (adjusting the 2011 cellulosic biofuel standard in response to this Court's ruling in *API v. EPA*, 706 F.3d 474 (D.C. Cir. 2013)).

Regardless, the proposal was not finalized.[6] As the 2020 Rule itself states, EPA is "still actively considering this issue" and "is not taking final agency action in [the 2020 Rule]." 85 Fed. Reg. at 7,019. Thus, even if EPA had *proposed* the generic policy that Petitioner claims (it did not), EPA has never actually taken this approach. *Cf., e.g.*, Growth Energy Reply at 17 (Petitioner RFS Power Coalition arguing that because the 2016 REGS proposal was not finalized it "has no legal significance").

The purported harm that Petitioner identifies is run-of-the-mill for cases challenging EPA's renewable fuel standards. It is routine in those cases that some parties (typically those obligated to comply with the standards) argue that the standards are too high and others (typically the biofuels industry) argue that the

[6] Even if this proposal *had* been finalized, this still would not deprive Petitioner of its avenues for relief—Petitioner could, and no doubt would, have sought judicial review of the finalized proposal.

standards are too low. RFS Power Coalition appears to be identically situated as every biofuels producer who believes that the standards EPA set are too low. It has not identified any unique harm that it faces—indeed, it has submitted no declarations or evidence on this point at all. There is no reason to expedite RFS Power Coalition's challenge after roughly a decade of litigating challenges to RFS rules with similar stakes in the ordinary course of the Court's business.

Petitioner's invocation of "judicial economy" and "resource demands" is similarly hollow. The fundamental premise of Petitioner's motion is that it believes its arguments are well-developed and it will rest on those arguments. If so, the burden of preserving Petitioner's challenge in a brief filed in the 2020 Rule litigation is negligible. Because the statute requires that EPA issues establishing renewable fuel standards annually, there will necessarily be some overlap between litigation over one year's rulemaking and the next. Faced with this fact, petitioners have often raised materially identical challenges to EPA's successive renewable fuel standard rulemakings. Typically, they simply import the arguments from their previous brief into their current brief (often with more brevity) and direct the Court to the pending case that already raises this argument. *See, e.g.*, NBB Final Opening Br., *Am. Fuel & Petrochem. Mfgrs. v. EPA*, Dkt. No. 17-1258, Doc. 1767114 at 28 (D.C. Cir. Jan. 4, 2019) (noting that the issue raised there had been

raised in the previous year's challenge, *Alon*, and thus might be resolved by that case, but setting forth NBB's argument).[7]

II. The Court Should Deny Petitioner's Request for an Abeyance.

Petitioner changes its tune in the last pages of its motion, urging—in the alternative to its arguments that time is of the essence—that an abeyance *delaying* the case would be appropriate. Just as the Court should not treat this case with undue haste and conclude that there is no need for a record or briefing because a yet-to-be-issued decision will control, it also should not delay the case so that Petitioner can raise a second-wave challenge to the 2020 Rule after this Court has already resolved any other pending challenges to the Rule.

Petitioner does not establish any reason to depart from this Court's ordinary approach of consolidating "all petitions for review of agency orders entered in the same administrative proceeding." *See* D.C. Cir. Handbook at 24; *see also, e.g.*, 28 U.S.C. § 2112(a). It has not shown that the record or arguments that will be advanced in the two cases are necessarily identical, as it claims. Nor has it shown

[7] For similar reasons, the prospect of conflicting rulings in the 2019 and 2020 Rule challenges is minimal. Oral argument in the 2019 Rule has been set for May 1, 2020—before briefing will even begin on the 2020 Rule. If still pending at the time of briefing, the challenges to the 2019 Rule will no doubt be identified as a related case to this litigation. *Cf., e.g., Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 587 (D.C. Cir. 2019) (avoiding inconsistent rulings between three renewable fuel standard cases that had been simultaneously pending).

any significant gains in efficiency or economy that will occur by placing the case into abeyance. In fact, placing this case into abeyance could create a need for EPA and the Court to revisit the same administrative record twice. It would also leave the validity of the 2020 Rule, and therefore the compliance obligations of the obligated parties, unsettled for an unspecified period of time. Given that Petitioner has not provided any persuasive rationale for an abeyance on these particular facts, the Court should deny this request.

Finally, Petitioner's request is premature. It is likely that the challenges to the 2020 Rule will involve a diverse set of parties that may raise a wide range of issues. Moreover, Petitioner's arguments may be interrelated with the other challenges to the 2020 Rule, and the outcome of judicial review on some claims may affect the others. Granting an abeyance at this stage would be improper because it is not clear which entities will participate or what issues they will raise.

If Petitioner believes the 2020 Rule is defective, it should raise its arguments at the same time as any other challenges to the 2020 Rule.

CONCLUSION

Accordingly, the Court should deny the Petitioner's motion to consolidate, or, in the alternative, place its petition into abeyance.

Dated: March 12, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. 27(d)(2)(A) because it contains 2,616 words according to the count of Microsoft Word, 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 with the proportionally-spaced typeface of Times New Roman 14-point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing 12th day of March 2020, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

s/ Benjamin R. Carlisle
BENJAMIN R. CARLISLE