

ORAL ARGUMENT NOT YET SCHEDULED

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

RFS POWER COALITION,

Petitioner,

V.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and ANDREW  
WHEELER, ADMINISTRATOR,

Respondents.

Case No. 20-1046  
(and consolidated cases)

**PETITIONER RFS POWER COALITION’S RENEWED MOTION  
TO SEVER AND HOLD CASE IN ABEYANCE**

Petitioner, RFS Power Coalition, respectfully renews its motion to sever from these consolidated cases and hold in abeyance a single stand-alone issue relating to electricity renewable fuel raised by Petitioner in this case No. 20-1046. Petitioner requests that the electricity issue be held in abeyance pending resolution of an identical issue currently being considered by the Court in related case No. 19-1027, which case has been fully briefed and is awaiting scheduling of oral

argument before this Court.<sup>1</sup> This relief is necessary to alleviate the burden of duplicative briefing during this time of economic crisis.

### Background

These consolidated cases in No. 20-1046, as well as consolidated cases in No. 19-1027, involve challenges to the U.S. Environmental Protection Agency's ("EPA") annual rulemakings setting renewable fuel volumes under the federal Renewable Fuel Standard program for the years 2020 and 2019, respectively.<sup>2</sup> In each of these cases, Petitioner RFS Power Coalition – who are producers of renewable electricity fuel used in electric vehicles – has challenged EPA's failure to properly account for available electricity fuel.

Shortly after filing its petition in this case, No. 20-1046, Petitioner filed a motion on March 2, 2020 (ECF#1831291) to consolidate or coordinate related

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<sup>1</sup> *RFS Power Coalition v. EPA*, No. 19-1027 (D.C. Cir. filed Feb. 6, 2019) (consolidated with *Growth Energy v. EPA, et al.*, No. 19-1023, and with Nos. 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038 and 19-1039). Oral argument in No. 19-1023 was scheduled for May 1, 2020, but has been postponed due to the covid-19 pandemic by the Court's order dated April 8, 2020 (ECF#1837303).

<sup>2</sup> No. 20-1046 and consolidated cases involve challenges to EPA's rulemaking setting renewable fuel volumes under the federal Renewable Fuel Standard program for the 2020 compliance year, entitled *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) ("2020 Volume Rule").

No. 19-1027 and consolidated cases involve challenges to EPA's Renewable Fuel Standard program for the 2019 compliance year, entitled *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Volume Rule").

cases or, in the alternative, to hold Petitioner's newly filed case in abeyance, so that the identical issues relating to electricity fuel in the 2019 and 2020 rulemakings could be decided together. Respondents opposed on March 12, 2020 (ECF#1833292), and Petitioner timely filed a reply on March 19, 2020 (ECF#1834360). An order denying relief was entered (ECF#1834177), prior to receiving Petitioner's reply brief, on March 18, 2020. Petitioner filed a motion to reconsider and modify the denial on March 24, 2020 (ECF#1835082). The Court again denied the requested relief on April 2, 2020 (ECF#1836550), but noted that the denial of Petitioner's alternative request for relief to hold in abeyance was without prejudice and could be renewed once the 60-day statutory deadline for challenges to the 2020 rulemaking had passed and the administrative record was certified.<sup>3</sup> The deadline for challenges to the 2020 Volume Rule was April 6, 2020.<sup>4</sup> Respondents filed the certified index to the administrative record on May 21, 2020 (ECF#1843855). Accordingly, Petitioner now respectfully renews its

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<sup>3</sup> See Order dated April 2, 2020 (ECF#1836550) ("The Court notes that denial of the alternative motion to hold in abeyance is without prejudice to renewal once all petitions for review of the 2020 Volumetric Rule have been filed and once the administrative record for the 2020 Volumetric Rule has been certified.").

<sup>4</sup> See *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); see also Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b) (stating that petitions for review must be filed within 60 days from the date that notice of the action appears in the Federal Register).

motion to sever No. 20-1046, which raises only issues relating to electricity fuel, and to hold this case in abeyance pending resolution of No. 19-1027, which has been fully briefed. The parties have taken various positions on this motion, which are reported herein.<sup>5</sup>

### Argument

It makes eminent sense for the Court to consider and decide the electricity fuel issue once, rather than have the same issue decided in two successive cases. No. 19-1027 (the 2019 EPA rulemaking) and No. 20-1046 (the 2020 EPA rulemaking) and their respective consolidated cases involve challenges to successive annual rulemakings by EPA setting renewable fuel volumes under the federal Renewable Fuel Standard program for the compliance years 2019 and 2020, respectively. In each case, Petitioner has raised the same unique legal issue: the legality of EPA's blanket omission of electricity fuel from the annual cellulosic

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<sup>5</sup> Respondents EPA and Administrator Wheeler have indicated that they reserve their position on this motion. The following parties have consented to this motion: Petitioners/ Intervenors Waste Management Inc., WM Renewable Energy, LLC, and Producers of Renewables United for Integrity, Truth and Transparency. The following parties have indicated that they take no position on this motion at this time: Petitioners/ Intervenors National Biodiesel Board, Iogen Corporation, Iogen D3 Biofuels Partners II LLC, and Growth Energy; and Petitioners Alon Refining Krotz Springs, Inc., et al. and Small Retailers Coalition. The following parties have indicated that they oppose this motion: Petitioners/ Intervenors American Fuel & Petrochemical Manufacturers and American Petroleum Institute; and Petitioner Valero Energy Corporation.

renewable fuel volumes and corresponding volume adjustments.<sup>6</sup> In each case, no other party has raised the electricity fuel issue.<sup>7</sup> The administrative records in each case are substantially identical in terms of EPA's description of its action with respect to electricity fuel, the agency's response to comments, and the agency's

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<sup>6</sup> Compare RFS Power Coalition, *Statement of Issues*, 1-2 (May 6, 2020) (ECF#1841619) ("Whether Respondents' failure to consider the existence of electricity transportation fuel production when determining applicable volumes of renewable fuel for the 2020 Renewable Volume Obligation under 42 U.S.C. § 7545(o) is contrary to statute, unreasonable, arbitrary and capricious...where qualified electricity transportation fuel is in actuality being produced, capable of being produced, and available."), with RFS Power Coalition, *Statement of Issues*, 1-2 (Mar. 11, 2019) (ECF#1777016) ("Whether Respondents' failure to consider the existence of electricity transportation fuel production when determining applicable volumes of renewable fuel for the 2019 Renewable Volume Obligation under 42 U.S.C. § 7545(o) is contrary to statute, unreasonable, arbitrary and capricious...where qualified electricity transportation fuel is in actuality being produced, capable of being produced, and available.").

<sup>7</sup> See RFS Power Coalition, *Non-Binding Statement of Issues* (May 6, 2020) (ECF#1841619); compare American Fuel & Petrochemical Manufacturers, *Nonbinding Statement of Issues* (May 6, 2020) (ECF#1841587); Valero Energy Corporation, *Nonbinding Statement of Issues* (May 6, 2020) (ECF#1841522); American Petroleum Institute, *Non-Binding Statement of Issues* (May 7, 2020) (ECF#1841674); Alon Refining Krotz Springs, Inc., et al., *Non-Binding Statement of Issues* (May 11, 2020) (ECF#1842275); National Biodiesel Board, *Non-Binding Statement of Issues* (May 11, 2020) (ECF#1842163); Small Retailers Coalition, *Statement of Issues to be Raised* (May 8, 2020) (ECF#1841869); Waste Management, Inc., et al., *Non-Binding Statement of Issues* (May 8, 2020) (ECF#1842009); Producers of Renewables United for Integrity Truth and Transparency, *Non-Binding Statement of Issues* (May 8, 2020) (ECF#1842013); Iogen Corporation, et al., *Nonbinding Statement of Issues* (May 7, 2020) (ECF#1841821); Growth Energy, *Non-Binding Statement of Issues* (May 7, 2020) (ECF#1841710).

asserted basis with respect to electricity fuel volumes.<sup>8</sup> In the administrative record for each rulemaking, there is little discussion of the electricity fuel issue in either the proposed rule or final rule preamble, and the only substantive discussion appears in EPA's response-to-comments documents in each rulemaking. A comparison of EPA's discussion in the respective 2019 and 2020 rulemaking records and the government's brief in No. 19-1027 (ECF#1831996) shows that the issues and stated bases for the successive rules are substantially similar in their phrasing, and materially identical in their legal basis. Petitioner attempted to confer in good faith with Respondents with regard to whether the government takes the position that there is any material difference between the administrative records in the 2019 Volume Rule and 2020 Volume Rule; however, counsel for the government declined to respond substantively or fully, and has reserved its position on the relief requested. It is Petitioner's view that there is no material difference between the administrative records, and that there is no additional basis asserted for the government's final action with respect to electricity fuel in the 2020 Volume Rule administrative record that was not asserted either in the 2019

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<sup>8</sup> Compare U.S. EPA, *Certified Index to Administrative Record* (May 21, 2020) (ECF#1843855) (2020 Volume Rule administrative record), with U.S. EPA, *Certified Index to Administrative Record* (Mar. 25, 2019) (ECF#1779055) (2019 Volume Rule administrative record) (listing only the rule proposal, final rule and response-to-comments documents as mentioning electricity fuel).

Volume Rule administrative record or in the government's brief in No. 19-1027.

In light of the identity of the legal issues and the substantially identical administrative records, a ruling in No. 19-1027 (the 2019 EPA rulemaking) on the electricity fuel issue would control, or at least be highly relevant to, a subsequent panel's consideration of the same legal issue in No. 20-1046 (the 2020 EPA rulemaking) by virtue of law-of-the-circuit or other preclusion doctrines. Because the legal issues are identical and the administrative records materially indistinguishable, it would be a needless expenditure of party and judicial resources to repeat the merits briefing on the electricity issue.

As a coalition of aggrieved biofuel producers that have been financially devastated by EPA's actions – as detailed in Petitioner's standing declaration in No. 19-1027 (ECF#1809534) – as well as by the economic recession brought on by the current pandemic, Petitioner simply cannot afford to brief the same legal issues a second time in successive proceedings, and there is no good reason to foist that needless expense upon the parties. Placing Petitioner's case in abeyance will not prejudice other litigants in the consolidated cases. Petitioner's challenge is limited to electricity fuel issues which have not been raised or addressed by the other parties, and it would be a simple matter to sever Petitioner's challenge from the consolidated cases for purposes of the relief sought. As a result, the grant of an abeyance in this case will not prevent, or even affect, the timely resolution of

the other challenges to the 2020 Volume Rule, which will be governed by separate briefing schedules to be established by the Court.

### Conclusion

Petitioner therefore requests that its petition in No. 20-1046 be severed from the other consolidated petitions and held in abeyance pending the Court's decision in No. 19-1027, so that these issues can be resolved efficiently, without undue burden on an economically fraught industry, and with consistent treatment. This motion is made without prejudice to Petitioner's position on procedural or substantive aspects of the case, and Petitioner retains its right to file a motion to reactivate this case in the future should the requested relief be granted.

Dated: June 1, 2020

Respectfully submitted,

/s/ David M. Williamson

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## CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that the foregoing filing complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive of the caption, signature block, and any certificates of counsel, contains 1,821 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that the foregoing filing complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: June 1, 2020

/s/ David M. Williamson

David M. Williamson

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 1st day of June 2020, I caused the foregoing filing to be served on counsel of record in this case by means of the Court's CM/ECF system.

/s/ David M. Williamson

David M. Williamson