

**ORAL ARGUMENT NOT YET SCHEDULED**

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

_____	)	
AMERICANS FOR CLEAN	)	
ENERGY, et al.,	)	
	)	
Petitioners,	)	No. 16-1005 (and consolidated
	)	cases)
v.	)	
	)	
UNITED STATES	)	
ENVIRONMENTAL PROTECTION	)	
AGENCY, et al.,	)	
	)	
Respondents.	)	
_____	)	

**JOINT PROPOSAL ON BRIEFING SCHEDULE AND FORMAT**

Petitioners, Respondents, and Intervenors in the above-captioned consolidated petitions for review respectfully submit this response to the Court’s order of May 5, 2016. This response sets forth the parties’ positions on briefing format, schedule and word limits. The Petitioners in Nos. 16-1005 and 16-1056 (American Coalition for Ethanol, Americans for Clean Energy, Biotechnology Innovation Organization, Growth Energy, National Corn Growers Association, National Farmers Union, National Sorghum Producers, and Renewable Fuels Association, referred to collectively as “ACEI”) state that they will submit

separately a detailed justification of their request for a separate opening brief limited to 14,000 words and a separate reply brief limited to 7,000 words, as well as a detailed justification for their proposed briefing schedule. The Petitioner in No. 16-1053 (National Biodiesel Board) also states that it will submit a detailed justification on its request for a separate opening brief of 10,000 words and a separate reply brief of 5,000 words separately.

## **I. BRIEFING SCHEDULE**

The parties have not reached agreement on the briefing schedule, and set forth their separate positions below.

### **A. Respondent EPA**

Respondent EPA proposes the following briefing schedule, and is joined by Petitioners in Nos. 16-1044, 16-1047, 16-1050, 16-1053, 16-1054 (American Fuel and Petrochemical Manufacturers, American Petroleum Institute, National Biodiesel Board, Monroe Energy, LLC, Valero Energy Corporation, who are also Respondent-Intervenors in No. 16-1005). The Small Refinery Coalition Petitioners in No. 16-1049 (Alon Refining Krotz Springs, Inc., American Refining Group, Inc., Calumet Specialty Products Partners, L.P., Lion Oil Company, Ergon-West Virginia, Inc., Hunt Refining Company, Placid Refining Company LLC, Wyoming Refining Company, and U.S. Oil & Refining Co.) agree to the briefing schedule because the time provided in the proposed schedule is necessary to allow for

coordination among the petitioners so they can adequately address the highly complex issues in these cases, but, because the briefing schedule will make it impossible for this Court to resolve the cases in advance of the compliance deadlines established in the challenged rule, they intend to seek a stay of compliance deadlines in order to preserve an effective remedy.

Petitioners' Briefs	September 15, 2016
Respondent's Brief	December 15, 2016
Respondent-Intervenors' Briefs	January 5, 2017
Petitioners' Reply Briefs	January 23, 2017
Deferred Joint Appendix	February 9, 2017
Final Briefs	February 23, 2017

EPA believes that these proposed briefing deadlines are reasonable in light of the number of words that may be encompassed by each side's briefs, the technical nature of the issues presented, and the fact that EPA requires substantial time for coordination between EPA and the Department of Justice and review by EPA and the Department of Justice management. The schedule also ensures that briefing on the Renewable Fuel Standard Rule at issue in this matter will not substantially overlap with the notice and comment period and final rulemaking proceedings for the 2017 Renewable Fuel Standard Rule, which is required by statute to be issued by November 30, 2016.

In regard to the Small Refinery Coalition Petitioners' statement above, EPA does not believe that a stay of the 2016 Renewable Fuel Standard compliance deadline is necessary or appropriate, and EPA reserves all rights and defenses to such a motion. Furthermore, a decision by the Court prior to the March 31, 2017 compliance deadline cannot be guaranteed under any reasonable briefing schedule, and EPA believes the issue of a possible stay should be fully briefed and resolved separately from consideration of an appropriate briefing schedule.

**B. Petitioners in Nos. 16-1005 and 16-1056**

The ACEI Petitioners (Nos. 16-1005 and 16-1056) propose the following briefing schedule and are joined by Respondent-Intervenor E.I. Du Pont De Nemours and Company ("DuPont").

Petitioners' Briefs	August 12, 2016
Respondent's Brief	October 18, 2016
Respondent-Intervenors' Briefs	November 8, 2016
Petitioners' Reply Briefs	November 22, 2016
Deferred Joint Appendix	December 6, 2016
Final Briefs	December 13, 2016

**II. BRIEFING FORMAT**

EPA proposes the following briefing format, to which Petitioners in Nos. 16-1044, 1047, 1049, 1050, 1054 (Monroe Energy, LLC, American Fuel and

Petrochemical Manufacturers, the Small Refinery Coalition, American Petroleum Institute, Valero Energy Corporation), do not object.

<p><b>Petitioners American Petroleum Institute, American Fuel and Petrochemical Manufacturers, Alon Refining Krotz Springs, Inc., American Refining Group, Inc., Calumet Specialty Products Partners, L.P., Ergon-West Virginia, Inc., Hunt Refining Company, Lion Oil Company, Placid Refining Company, U.S. Oil &amp; Refining Co., Wyoming Refining Company, Monroe Energy, LLC, Valero Energy Corporation (collectively “Obligated Parties”) (Case Nos. 16-1044, 16-1047, 16-1049, 16-1050, 16-1054)</b></p> <p><b>ACEI and National Biodiesel Board (Case Nos. 16-1005, 16-1053, 16-1056)</b></p>	<p>Opening brief(s) 14,000 words Reply brief(s) 7,000 words</p> <p>Opening brief(s) 14,000 words Reply brief(s) 7,000 words</p>
<p><b>Respondent</b></p>	<p>Response brief 28,000 words (or an amount equal to the aggregate number of words in Petitioners’ brief(s))</p>
<p><b>Respondent-Intervenors DuPont, National Biodiesel Board, and ACEI</b></p>	<p>Intervenor brief(s) 8,750 words</p>
<p><b>Respondent-Intervenors Obligated Parties</b></p>	<p>Intervenor brief(s) 8,750 words</p>

The parties set forth their positions and justifications on briefing format and word limits below. Some parties are separately submitting more detailed justifications of their positions.

**A. Petitioners' Briefs**

**i. Statements of Petitioners ACEI and National Biodiesel Board**

ACEI and the National Biodiesel Board do not consent to EPA's proposed briefing format with respect to its treatment of ACEI and the National Biodiesel Board as a single Petitioner group subject to a single allotted word count. The National Biodiesel Board agrees that the Obligated Parties are aligned, as they all seek to reduce their obligations under the program, and should be treated as a single Petitioner group, but do not oppose their filing two separate briefs. Based on their Statement of Issues, there is substantial overlap in the issues being raised by these parties and mere parity is not sufficient grounds to require the same total allotted words for both purported Petitioner groups. This would unfairly prejudice the National Biodiesel Board's ability to fully address its issues.

The National Biodiesel Board has consistently stated and previously expressed its rationale for why it does not believe it is aligned with any other party in filings with this Court, and no one provided any substantive responses to these statements. EPA's interpretation and implementation of the statute for these years

does impact the fuel categories differently. As explained in their respective submissions justifying their requests, ACEI and the National Biodiesel Board do not agree that they are fully aligned with each other or any other party. ACEI is requesting a separate opening brief limited to 14,000 words and a separate reply brief limited to 7,000 words, and the National Biodiesel Board is requesting a separate opening brief of 10,000 words and a separate reply brief of 5,000 words. ACEI and the National Biodiesel Board, however, will coordinate to ensure that there is no duplicative briefing.

ACEI and the National Biodiesel Board agree that Respondent EPA should be allowed additional words in their Respondent brief to account for the additional words being requested by these parties.

**ii. Statement of Respondent EPA**

EPA does not object to the Obligated Parties (*i.e.*, Petitioners in Nos. 16-1044, 16-1047, 16-1049, 16-1050, and 16-1054) receiving 14,000 words for their opening brief and 7,000 words for their reply brief, with the option of filing separate briefs within that total word allotment. EPA believes that ACEI and National Biodiesel Board should be treated as a single petitioner group, but does not oppose those parties filing separately from the Obligated Parties' brief(s) so long as the total words allotted between ACEI and National Biodiesel Board is limited to the standard allotment of 14,000 for opening briefs and 7,000 words for

rely briefs. Petitioners ACEI and National Biodiesel Board have refused to share with the other parties their separate statements in support of their position that they are not sufficiently aligned with each other and that they should receive more than the standard word allotments. However, ACEI and National Biodiesel Board represent parties interested in promoting enhanced renewable fuel production and use. Although their members may not produce the same renewable feedstocks or fuels, in general their interests with respect to the Renewable Fuel Standards are aligned and their anticipated issues do not justify more than the standard word allotment.

### **iii. Statements of Obligated Party Petitioners**

#### **Statements of Monroe Energy, LLC and the Small Refinery Coalition.**

Monroe and the Small Refinery Coalition agree with EPA that ACEI and National Biodiesel Board should be treated as a single petitioner group limited to an opening brief of 14,000 words. However, if the Court grants ACEI's and National Biodiesel Board's requests and permits them to file opening briefs that together amount to 24,000 words, then fairness requires that the Court allow the Obligated Parties a similar enlargement to 24,000 words. Monroe explains this position in a separate submission.



**Statement of AFPM and API.** AFPM and API agree with EPA's proposed briefing format and schedule. They submit this additional statement in support of their position.

*Briefing Format.* AFPM and API believe that it would be unfair to grant the renewable fuels petitioners a total of 24,000 words for their opening briefs while limiting the obligated party petitioners to a total of 14,000 words. Consequently, AFPM and API request that the obligated party petitioners and the renewable fuels petitioners be granted an equal number of words for their opening and reply briefs.

The renewable fuels petitioners include ACEI and NBB. Both ACEI and NBB are filing separate statements with this Court arguing for their preferred briefing format and schedule, and both have refused to share their separate statements with the other parties prior to filing. As a result, AFPM and API are not able to address specific arguments in those filings.

ACEI and NBB apparently plan to challenge EPA's exercise of its statutory waiver authority. *See* ACEI Non-Binding Statement of Issues, Document #1598569, at 1–2 (D.C. Cir. filed Feb. 11, 2016); NBB Non-Binding Statement of Issues, Document #1604684, at 1–2 (D.C. Cir. filed Mar. 18, 2016). NBB may wish to raise additional issues that ACEI does not plan to raise, and that appears to be the basis for the renewable fuels petitioners' request for additional words. But the obligated party petitioners are in exactly the same position. Some obligated

party petitioners plan to raise issues that other obligated party petitioners do not plan to raise. *Compare, e.g.*, API Non-Binding Statement of Issues, Document #1603830, at 1–2 (D.C. Cir. filed Mar. 14, 2016) (raising only two questions presented, one regarding the *Final Rule*'s cellulosic biofuel volume requirements, the other regarding the *Final Rule*'s biomass-based diesel volume requirements), *with* AFPM Nonbinding Statement of Issues, Document #1603682, at 2–3 (D.C. Cir. filed Mar. 11, 2016) (raising six questions presented, including a challenge to the *Final Rule*'s overall renewable fuel volume requirement and a challenge to EPA's determination regarding the point of obligation for the RFS program), Monroe Energy Non-Binding Statement of Issues, Document #1603647, at 1–2 (D.C. Cir. filed Mar. 11, 2016) (challenging the total RFS volume requirement and EPA's failure to reconsider the RFS program's point of obligation, but not raising other issues raised by API and AFPM); Alon Refining Krotz Springs Non-Binding Statement of Issues, Document #1603944, at 1–2 (D.C. Cir. filed Mar. 14, 2016) (raising issues similar to those raised by Monroe Energy, while omitting many of the issues raised by API and AFPM). Indeed, the obligated party petitioners have had diverging interests in prior RFS litigation. See Joint Scheduling Proposal Pursuant to the Court's October 18, 2013 Order, Monroe Energy LLC et al. v. EPA, No. 13-1265, at 2 (D.C. Cir. filed Oct. 24, 2013) (requesting “two separate briefs—one by Monroe and one by API/AFPM . . . because Monroe and API are

potentially adverse on one or more issues”); *see also* Order, *Monroe Energy LLC et al. v. EPA*, No. 13-1265 (D.C. Cir. Oct. 29, 2013) (granting request for separate petitioner briefs).

It is not apparent to AFPM and API why ACEI and NBB cannot live with the 14,000-word limit on opening briefs and the 7,000-word limit on reply briefs. (In addition to these petitioners’ briefs, ACEI and NBB can file a third brief as intervenors supporting EPA to address issues on which they agree with EPA.) But if the Court is inclined to grant their request for additional words, in whole or in part, AFPM and API respectfully request that the Court grant the obligated party petitioners an equal number of additional words.

*Briefing Schedule.* AFPM and API believe the briefing schedule proposed by EPA appropriately balances the need to eliminate legal uncertainty concerning the RFS rules against the need to allow sufficient time for a large number of parties to coordinate their positions on a range of complex issues. Obligated parties, including the members of AFPM and API, have a strong interest in eliminating legal uncertainty concerning the scope of their obligations under the RFS program. Indeed, AFPM and API recently sued EPA in order to compel the agency to issue the RFS rules no later than the deadlines imposed by Congress. *See American Fuel & Petrochemical Manufacturers v. McCarthy*, Civ. No. 1:15-cv-394 (D.D.C). In this case, however, API and AFPM do not believe that it is practical for this Court

to issue a decision before the end of 2016. Even if the Court were able to issue a decision before the end of the year, it would come too late to allow obligated parties to make meaningful adjustments to their business operations for 2016. As a result, AFPM and API see little if any benefit to an accelerated briefing schedule. Moreover, an accelerated briefing schedule would deprive the parties of adequate time to consult and harmonize, to the extent possible, their views on the multiple issues in this case. Because AFPM and API are multi-member trade associations, and many of their members are themselves large organizations, the review process is time-consuming. AFPM and API therefore support EPA's proposed briefing schedule, which they believe appropriately balances these concerns.

### **B. Respondent's Brief**

All parties agree with EPA's proposal regarding Respondent's Brief. In these consolidated cases, EPA must defend in a single brief the Renewable Fuel Standards against multiple challenges from opposing viewpoints. Accordingly, the parties jointly request that the Court grant EPA parity with the aggregate word count for the opening brief(s).

### **C. Respondent-Intervenors' Briefs**

All parties agree with EPA's proposal regarding intervenor briefs. ACEI, National Biodiesel Board and DuPont have intervened in support of EPA against the petitions brought by the Obligated Parties, while the Obligated Parties have

intervened in support of EPA against the claims brought by ACEI and the National Biodiesel Board. Thus, the Obligated Parties on the one hand and ACEI, National Biodiesel Board, and DuPont on the other are not aligned. The rules provide for 8,750 words for an intervenor brief, and the parties believe that the full amount is necessary for each of these two groups to respond to the arguments raised by the other.

Respectfully submitted,

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Dated: June 6, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2016, a copy of the foregoing was served electronically through the Court's CM/ECF system on all registered counsel.

*s/ Lisa Bell*  
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Counsel for Respondents