

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

AMERICANS FOR CLEAN ENERGY, <i>et al.</i>)	
)	
Petitioners,)	
)	No. 16-1005
v.)	
)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <i>et al.</i>)	
)	
Respondents.)	
)	

**MOTION OF E.I. DU PONT DE NEMOURS AND COMPANY
FOR LEAVE TO INTERVENE IN SUPPORT OF PETITIONERS**

E.I. du Pont de Nemours and Company (“DuPont”) respectfully moves for leave to intervene in this action under Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15. The petitioners in this case seek review of a final rule issued by the United States Environmental Protection Agency (“EPA”) entitled “Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017.” 80 Fed. Reg. 77,420 (Dec. 14, 2015) (“RFS Rule”).

Promulgated pursuant to the Clean Air Act, the RFS Rule sets requirements for volumes of renewable fuel that must be incorporated into the U.S. fuel supply. The Rule sets volumes for both “first generation” renewable fuel, such as

traditional corn ethanol, and “second generation” renewable fuel, such as cellulosic ethanol made from corn stover or switchgrass. The Petitioners are seven groups and associations that represent the interests of many significant first generation renewable fuel producers. DuPont is a leading supplier to the first generation ethanol industry. In addition, DuPont recently completed construction of a 30-million-gallon cellulosic ethanol plant in Nevada, Iowa—the world’s largest cellulosic biofuels refinery opened to date. DuPont shares the Petitioners’ concerns with EPA’s decision to reduce the statutory renewable fuel volumes. Additionally, DuPont brings a different and complimentary perspective to this litigation—namely, the impact of the RFS rule on the nascent cellulosic renewable fuel industry and on a company that has invested hundreds of millions of dollars in cellulosic biofuel technology. DuPont therefore seeks to intervene in support of Petitioners.¹

BACKGROUND

I. The Renewable Fuel Standard Program and the RFS Rule

EPA promulgated the RFS Rule as part of the Renewable Fuel Standard (“RFS”) program, which is codified in Section 211 of the Clean Air Act. *See* 42 U.S.C. § 7545(o). The statute sets volumes of renewable fuels that must be

¹ Counsel for Petitioners indicated that Petitioners consent to DuPont’s intervention. Counsel for Respondents stated that EPA takes no position on the motion.

blended into the U.S. fuel supply each year through 2022. *Id.* § 7545(o)(2)(B). The statute sets volumes for overall renewable fuel use, *id.* § 7545(o)(2)(B)(i)(I), as well as volumes for particular kinds of renewable fuel including “cellulosic biofuel,” *id.* § 7545(o)(2)(B)(i)(III). “Cellulosic biofuel” is “renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions . . . that are at least 60 percent less than” emissions from fossil gasoline or diesel fuel. *Id.* § 7545(o)(1)(E). EPA must issue regulations no later than November 30th of each year to ensure that the statutory volumes are met for the succeeding calendar year. *Id.* § 7545(o)(3)(B)(i).

EPA has limited authority to reduce the statutory volumes. Under EPA’s “general waiver authority,” EPA may reduce the total volume of renewable fuel if the Administrator determines that “implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States” or if “there is an inadequate domestic supply” of renewable fuel. *Id.* § 7545(o)(7)(A). Under EPA’s “cellulosic waiver authority,” EPA must estimate the volume of cellulosic biofuel that will be produced in a given year and reduce the statutory volume to the extent the projected volume is less. *Id.* § 7545(o)(7)(D)(i); *see Am. Petroleum Inst. v. E.P.A.*, 706 F.3d 474, 479 (D.C. Cir. 2013). EPA may also (but is not required to) reduce the total volume of renewable fuel by up to the

same amount by which it reduces the volume of cellulosic biofuel. 42 U.S.C. § 7545(o)(7)(D)(i).

In the challenged RFS Rule, EPA set volumes for 2014, 2015, and 2016. 80 Fed. Reg. at 77,422. For 2014, EPA set the volumes based on actual production and consumption in that year. *Id.* at 77,426. EPA did largely the same thing for 2015. *Id.* at 77,426-27. For 2016, EPA set the total renewable fuel volume requirement at 18.11 billion gallons, and the cellulosic biofuel volume requirement at 230 million gallons. *Id.* at 77,422. The statutory volumes for 2016 are 22.25 billion gallons of total renewable fuel and 4.25 billion gallons of cellulosic biofuel. *Id.* at 77,424; 42 U.S.C. § 7545(o)(2)(B)(i)(I) and (III).

To justify these volume reductions, EPA has invoked both its cellulosic waiver authority and its general waiver authority. Based on evaluation of facilities with either demonstrated or potential ability to produce cellulosic biofuel, EPA projects that 230 million gallons of cellulosic biofuel will be produced and available for consumption in 2016. 80 Fed. Reg. at 77,507-09. EPA reduced the total renewable fuel volume by 3.64 billion gallons as a result of this cellulosic shortfall. *Id.* at 77,439. EPA further exercised its general waiver authority to reduce the total renewable fuel volume by an additional 500 million gallons. *Id.* EPA has determined that there is an “inadequate domestic supply.” *Id.* at 77,435. Although EPA acknowledges that there is sufficient capacity to produce and/or

import renewable fuel to meet the statutorily required volume for 2016 and that there is no current or foreseeable constraint on shipment of this renewable fuel to blending stations for inclusion in the fuel supply, EPA decided that constraints on the ability of companies to distribute and consumers to use the required amount of renewable fuel after blending justify a volume reduction. *See id.* at 77,438.

II. DuPont’s Investment in Cellulosic Biofuel

Cellulosic biofuel is the future of renewable fuel in the United States. Cellulosic biofuel has a significantly better greenhouse gas profile as compared to first-generation renewable fuel, which has a better profile than fossil fuel. By statute, first-generation renewable fuel must achieve a 20 percent reduction in greenhouse gas emissions as compared to gasoline or diesel.² 42 U.S.C. § 7545(o)(2)(A)(i). Cellulosic biofuel, by contrast, must achieve at least a 60 percent reduction. *Id.* § 7545(o)(1)(E). The RFS statute contemplates that cellulosic biofuel will become an increasingly large part of the U.S. fuel supply. In 2010, for example, the statute specifies a volume of 100 million gallons of cellulosic biofuel—a small fraction of the total renewable fuel requirement of 12.95 billion gallons for that year. *Id.* § 7545(o)(2)(B)(i)(I) and (III). By 2022, however, the statute requires that the U.S. fuel supply use 16 billion gallons of cellulosic

² This requirement applies to “renewable fuel produced from new facilities that commence construction after December 19, 2007.” 42 U.S.C. § 7545(o)(2)(A)(i).

biofuel—nearly half of the total renewable fuel requirement of 36 billion gallons for that year. *Id.*

For years, DuPont has made significant investments in cellulosic biofuel technology. DuPont is a leading developer of the technology that allows converting cellulosic biomass into usable ethanol fuel. In 2009, DuPont began operating a demonstration facility in eastern Tennessee that produced cellulosic ethanol from switchgrass and corn stover (leaves, stalks, and other residue left in the field following harvest). DuPont moved to commercialize this technology and in 2012 began construction of a large cellulosic ethanol plant in the city of Nevada, Iowa. DuPont’s Iowa facility, which began commercial-scale operation towards commissioning in the fourth quarter of 2015, has the capacity to produce 30 million gallons of cellulosic ethanol per year. DuPont’s Iowa facility is one of the facilities EPA considered in projecting the available quantity of cellulosic biofuel for 2016. 80 Fed. Reg. at 77,508.

ARGUMENT

DuPont’s intervention in this case is authorized by Rule 15(d) of the Federal Rules of Appellate Procedure. Under Rule 15(d), “a person who wants to intervene in a proceeding” for review of an agency action “must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties.” Fed. R. App. P. 15(d). The motion “must be filed within 30 days after the petition for

review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” *Id.*

First, DuPont’s intervention motion is timely. The Petitioners filed their petition for review on January 8, 2016, and this motion is being filed within 30 days of that petition.

Second, DuPont has a significant and concrete interest in this case. As explained above, DuPont has invested substantial resources in cellulosic ethanol, including hundreds of millions of dollars to construct a state-of-the-art facility in central Iowa to produce commercial quantities of cellulosic ethanol. The facility started commissioning activities in the fourth quarter of 2015, and it has the capacity to produce 30 million gallons per year. Having made this substantial investment, DuPont is keenly interested in ensuring that the RFS program remains true to its intended purpose—incentivizing investment to grow the renewable fuel market in the United States. The volume requirements are the central component of this statutory aim. EPA’s decision to reduce the total renewable fuel volume for 2016 (and, necessarily, in future years) will diminish incentives to invest in infrastructure necessary to make renewable fuel an increasing part of the U.S. fuel supply. Quite simply, EPA’s action puts DuPont’s investment at risk.

Appellate courts often look to Rule 24 of the Federal Rules of Civil Procedure for guidance in determining when intervention under Appellate Rule

15(d) is appropriate. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFO-CIO, Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965). DuPont meets the standard for permissive intervention under Rule 24(b) because DuPont “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). DuPont also meets the standard for intervention as of right because it “claims an interest relating to the . . . [rulemaking] transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede [DuPont’s] ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). Moreover, the “existing parties” do not “adequately represent [DuPont’s] interest.” As explained above, the Petitioners are groups and associations that represent the interests of many significant first generation ethanol producers. DuPont—a company that has itself made significant investments in second generation biofuels and that has a cellulosic ethanol plant in the ground in Iowa—has complimentary but nevertheless distinct interests.

For these same reasons, DuPont also meets this Court’s requirement that an intervenor “satisfy the requirements of Article III standing imposed on petitioners.” *Ala. Mun. Distribs. Grp. v. F.E.R.C.*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002). Article III standing has three requirements: “(1) an injury in fact . . . ; (2) causation . . . ; and (3) redressability.” *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554

U.S. 269, 273 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). EPA's decision to reduce volumes impairs the renewable fuel market in the United States, harming DuPont as a significant player in the market and putting DuPont's substantial investment in cellulosic ethanol at risk. *See Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (market participant has standing to challenge regulation that affects market). DuPont's injury is caused by EPA's decision to reduce volumes in the RFS rule, and the injury would be redressed by a decision of this Court vacating the rule. *See also Roeder v. Islamic Rep. of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement.") (citation omitted).

CONCLUSION

For these reasons, DuPont respectfully requests that the Court grant this motion and allow DuPont to intervene in this case.

Respectfully submitted this 5th day of February, 2016.

/s/ Daniel C. Taylor
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