

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GROWTH ENERGY, <i>et al.</i>)	
)	
	<i>Petitioners,</i>)	
)	
v.)	No. 19-1023 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
	<i>Respondent.</i>)	
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**MOTION FOR LEAVE TO INTERVENE ON
BEHALF OF RESPONDENTS**

The above consolidated cases involve challenges to final agency action by the United States Environmental Protection Agency (“EPA”) entitled “Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020,” published at 83 Fed. Reg. 63,704 (Dec. 11, 2018). The final agency action challenged here sets the volume for the biomass-based diesel mandate for 2020 and the standards for 2019 under the Renewable Fuel Standard program. Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the National Biodiesel Board respectfully requests leave to intervene on behalf of

Respondent.¹ This motion is being filed within 30 days of the most recently filed petitions in this case, and, thus, is timely.²

The National Biodiesel Board, which represents U.S. biodiesel and renewable diesel producers and supporting industries such as feedstock suppliers, has a substantial interest in this case because its members participate in the Renewable Fuel Standard program and could be adversely affected by the outcome. Biodiesel—a domestically produced and commercially available advanced biofuel—makes up a significant portion of the biomass-based diesel requirement, but also may be used to meet the advanced biofuel and the total renewable fuel mandates.

Because of this interest, the National Biodiesel Board consistently has been granted intervention by this Court in cases involving challenges to EPA’s implementation of the Renewable Fuel Standard (“RFS”), including challenges to EPA’s past RFS volumes brought by obligated party petitioners here.³ In past

¹ A corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and a certificate of parties and *amici* pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A) are also attached to this motion.

² Through this motion, the National Biodiesel Board seeks to intervene in all consolidated petitions under this action other than its own petition.

³ See, e.g., *AFPM v. EPA*, No. 17-1258; *Coffeyville Resources Refining v. EPA*, No. 17-1044; *ACEI v. EPA*, No. 16-1005; see also *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010), *reh’g en banc denied*, 643 F.3d 958 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 571 (2011) (involving challenge to 2010 renewable fuel standards); *Am. Petroleum Inst. v. EPA*, No. 12-1139 (D.C.

litigation, obligated parties have generally taken a position opposite to that of the National Biodiesel Board, seeking to restrict growth of biomass-based diesel and advanced biofuels. In addition, environmental group petitioners have indicated in their petition for review that they plan to raise challenges seeking to lower volumes under the RFS and increase compliance burdens for renewable fuel producers. The National Biodiesel Board seeks to intervene to support EPA on issues raised by the obligated party petitioners and environmental groups in which it has an interest in supporting the agency.

I. Interests of Intervenor.

The Renewable Fuel Standard, first established by the Energy Policy Act of 2005 and then expanded by the Energy Independence & Security Act of 2007, is codified in Section 211(o) of the Clean Air Act and requires a minimum volume of renewable fuel be sold in the United States each year. 42 U.S.C. § 7545(o)(2).

The 2007 amendments to the program included specific mandates for renewable fuels that are considered “advanced biofuels,” including specific mandates for

Cir. Apr. 24, 2012) (involving consolidated challenges to 2012 renewable fuel standards) (a copy of this Order is attached); *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 12-1249 (D.C. Cir. Nov. 15, 2012) (involving consolidated challenges to denial of petition for reconsideration and waiver related to 2011 renewable fuel standards) (a copy of this Order is attached); *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 12-1464 (D.C. Cir. Jan. 2, 2013) (involving consolidated challenges to 2013 biomass-based diesel volume) (a copy of this Order is attached); *Monroe Energy, LLC v. EPA*, Nos. 13-1265, 13-1267, 13-1268 (D.C. Cir. Dec. 2, 2013) (involving challenges to 2013 renewable fuel standards) (a copy of this Order is attached).

“biomass-based diesel” and “cellulosic biofuels.” *Id.* § 7545(o)(2)(B). Thus, biodiesel and renewable diesel are part of the RFS program and qualify as biomass-based diesel, which is an advanced biofuel. *Id.* § 7545(o)(1)(B), (D). The purpose of the program is to promote the use of transportation fuels derived from renewable biomass, including biodiesel, which provide numerous environmental, economic and energy security benefits.

The statute specifies annual required volumes through 2022 for renewable fuel, advanced biofuel, and cellulosic biofuel. 42 U.S.C. § 7545(o)(2)(B)(i)(I-III). For biomass-based diesel, the statute specifies the annual required volumes through 2012. *Id.* § 7545(o)(2)(B)(i)(IV). For the years in which the applicable volumes are not specified in the statute, EPA determines the volumes in coordination with the Departments of Energy and Agriculture, based on an analysis of factors outlined in the statute. *Id.* § 7545(o)(2)(B)(ii). Thus, for biomass-based diesel, EPA is to promulgate rules establishing the applicable volumes starting for calendar year 2013.

The National Biodiesel Board is the national trade association representing the biodiesel industry in regulatory, litigation, and legislative matters that affect its members. Its membership includes biodiesel and renewable diesel producers, feedstock providers and others along the biodiesel supply chain. The National Biodiesel Board has participated throughout EPA’s administrative proceedings

with respect to actions implementing the Renewable Fuel Standard, including testifying before the agency and providing comments on the proposal for the final agency action at issue here.

Members of the National Biodiesel Board produce biodiesel and renewable diesel that qualify to meet the volume requirements under the Renewable Fuel Standard program, and its members actively participate in the program. As was the case for the prior challenges, in which the National Biodiesel Board sought and was granted intervention, a decision in this litigation in favor of obligated party or environmental group petitioners would adversely affect National Biodiesel Board members. As such, the National Biodiesel Board has a substantial interest in the outcome of this case.

II. Reasons for Granting Intervention.

The National Biodiesel Board should be permitted to intervene in this case because it has a significant, direct interest in the outcome of this case that will be harmed, and that interest will not be adequately represented in the absence of intervention. The National Biodiesel Board can also provide this Court with information regarding the biodiesel industry that may assist the Court in understanding the issues in this litigation and the potential broader implications of its rulings. In addition, the motion to intervene is timely, and granting intervention will not adversely affect any party or the timely resolution of the case.

A. The National Biodiesel Board has a direct and substantial interest in the outcome of this case.

The National Biodiesel Board has a substantial interest in the subject matter of this case because its members are subject to the regulations at issue. Biodiesel is a key component of the Renewable Fuel Standard program, qualifying as biomass-based diesel and as an advanced biofuel. Members of the National Biodiesel Board are actively participating in the program, and, therefore, are subject to the requirements of the Renewable Fuel Standard program and are directly affected by its implementation.

This Court has consistently found the regulated industry has standing in challenges to an agency rule. Indeed, this Court recently affirmed the National Biodiesel Board's standing in RFS-related matters in *National Biodiesel Board v. EPA*, 843 F.3d 1010 (D.C. Cir. 2016). The National Biodiesel Board meets Article III standing requirements because its members produce fuels eligible under the program that is the subject of this litigation, and the individual participation of the members in the case is not required. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (finding trade association had standing in challenge of EPA regulation where some of its members were subject to challenged regulation); *see generally S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006). This Court has further recognized that the interest requirement under Federal Rule of Civil Procedure 24(a) is met when the proposed intervenor has

constitutional standing. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

As noted above, the obligated party Petitioners have previously challenged the volume obligations established by EPA, seeking to reduce or eliminate the statutory volume requirements. This Court recognized that the goal of the program is to promote the use of renewable fuel, including biodiesel, and that the statutory volumes are minimum requirements. *Nat'l Petrochemical & Refiners Ass'n*, 630 F.3d at 156. The National Biodiesel Board has a significant interest in ensuring the agency fully implements the program, and seeks to defend its interests against another attempt to undermine Congressional intent to, among other things, promote investment in advanced biofuels. Certainty is a cornerstone of the program, providing members of the National Biodiesel Board with support for their investments and continued efforts to meet the goals of the program.

Additionally, environmental group petitioners have indicated that they plan raise challenges that would seek to lower renewable fuel volumes set by EPA. Environmental group petitioners have also indicated that they will challenge EPA's use of an aggregate approach for verifying compliance with the RFS, which, if successful, would significantly increase compliance burdens for the National Biodiesel Board's members. Thus, as with the obligated parties' petitions, the

National Biodiesel Board has a significant interest in defending EPA's regulatory approach against challenges by environmental groups.

As in the cases in which the National Biodiesel Board has been granted intervention, an adverse ruling here could have a significant negative financial effect on the National Biodiesel Board's members. *See Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 177 (D.D.C. 2008) ("The [Supreme] Court routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement] It follows logically that any ... petitioner who is likely to suffer economic injury as a result of agency action satisfies this part of the standing test.") (quoting 3 Richard Pierce, *Administrative Law Treatise* § 16.4 at 1122 (4th ed. 2002)) (alterations in original); *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1118-1119 (D.C. Cir. 2005) (finding a "sufficient likelihood of economic injury to establish standing") (quoting *Clinton v. City of New York*, 524 U.S. 417, 432 (1998)). It could undermine the certainty and incentives Congress sought in setting mandates to promote production and use of advanced biofuels. Moreover, the Court's ruling could set precedent on how EPA is to set the applicable volumes for future years. Thus, the ability of the National Biodiesel Board to protect the interests of its members will be impaired if it is not able to participate in this litigation.

B. The interests of the National Biodiesel Board are not adequately represented by any of the existing parties.

Intervention is appropriate and necessary to adequately protect the National Biodiesel Board's interests. The burden of showing inadequate representation "is not onerous," and an "applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Although not all of the Petitioners' statements of issues have been filed, based on the positions taken in their comments on the proposed rule and with respect to the Renewable Fuel Standard program, it is clear that the obligated party petitioners and the National Biodiesel Board have divergent interests regarding EPA's implementation of the volume requirements under the program. Likewise, environmental groups have indicated in their petition for review that they will take positions contrary to the National Biodiesel Board's interests.

Respondent EPA is the administrative agency responsible for implementing and administering the Renewable Fuel Standard. Accordingly, the Agency is not in a position to represent adequately the National Biodiesel Board's member companies' interests. *See Dimond*, 792 F.2d at 192-93 ("A government entity ... is charged by law with representing the public interest of its citizens. ... The District [of Columbia] would be shirking its duty were it to advance th[e] narrower interest

[of a business concern] at the expense of its representation of the general public interest”); *see also Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (“We have repeatedly pointed out that in such a situation the government’s prospective task of protecting ‘not only the interest of the public but also the private interest of the petitioners in intervention’ is ‘on its face impossible’ and creates the kind of conflict that ‘satisfies the minimal burden of showing inadequacy of representation.’”) (citations omitted); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (finding EPA did not adequately represent interests of proposed industry intervenors where “appellants’ interest is more narrow and focused than EPA’s, being concerned primarily with the regulation that affects their industries”); *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) (“The District of Columbia Circuit has ‘often concluded that government entities do not adequately represent the interests of aspiring intervenors.’”) (quoting *Fund for Animals, Inc.*, 322 F.3d at 736) (footnote omitted)). Thus, the National Biodiesel Board can more than meet the minimal burden to show its interests are not adequately represented by the existing parties.

C. The requested intervention would be timely and consistent with the orderly resolution of the case.

Under Federal Rule of Appellate Procedure 15(d), a motion for leave to intervene “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.” The current motion is being filed within 30 days after the latest-filed petitions for review in this case and, therefore, is timely.

Granting the instant motion to intervene in this action will not delay the proceedings in this Court and will not cause undue prejudice to any party. Counsel for the National Biodiesel Board has corresponded with counsel for the other parties in this case, and no party has opposed this motion. Specifically, Growth Energy and Monroe Energy have consented to this motion, Valero has indicated that it does not oppose this motion, and EPA, AFPM, Producers United for Integrity, Truth, and Transparency, the RFS Power Coalition, and environmental petitioners have taken no position. The National Biodiesel Board has not received a response from other petitioners.

WHEREFORE, the National Biodiesel Board respectfully requests that the Court enter an order granting leave to intervene in support of Respondent.

Respectfully submitted,

/s/ Bryan M. Killian

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Dated: March 11, 2019

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the National Biodiesel Board makes the following disclosures:

The National Biodiesel Board has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It has not issued shares or debt securities to the public.

The National Biodiesel Board is a trade association as defined in D.C. Circuit Rule 26.1(b). It is the national trade association for the biodiesel industry, and its mission is to advance the interests of its members by creating sustainable biodiesel industry growth.

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Dated: March 11, 2019

CERTIFICATE AS TO PARTIES

As required by Circuit Rule 27(a)(4) and pursuant to Circuit Rule 28(a)(1)(A), the following Certificate as to Parties and Amici is made on behalf of the National Biodiesel Board:

(A) Parties and Amici

This is a matter on petition for review of an agency action undertaken by the United States Environmental Protection Agency. There was no action in the district court, and so there were no parties in the district court. The parties are:

Petitioners:

Growth Energy (19-1023)

RFS Power Coalition (19-1027)

Monroe Energy, LLC (19-1032)

Small Retailers Coalition (19-1033)

National Biodiesel Board (19-1035)

Producers United for Integrity, Truth, and Transparency (19-1036)

American Fuel & Petrochemical Manufacturers (19-1037)

Valero Energy Corporation (19-1038)

National Wildlife Federation, Healthy Gulf, and Sierra Club (19-1039)

Respondents:

U.S. Environmental Protection Agency

Intervenors:

No parties have yet been granted intervention, though several of the petitioners have indicated their intent to move to intervene in other of the consolidated cases.

(B) Rulings Under Review

This case involves consolidated petitions for review of a final action of the U.S. Environmental Protection Agency (“EPA”) entitled Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020,” published at 83 Fed. Reg. 63,704 (Dec. 11, 2018).

(C) Related Cases

Petitioner is not aware of any other pending cases involving the same underlying agency action at issue in this case.

We believe that no entity has been admitted as an amicus at this time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1), I certify that the foregoing meets the type-volume limitations of Rule 27(d)(2)(A) because it contains 2,422 words.

/s/ Bryan M. Killian

