ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL WASTE & RECYCLING ASSOCIATION, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	)	Consolidated Case Nos. 16-1371, 16-1374

OPPOSITION TO MOTION TO SUBSTITUTE PARTY OR, IN THE ALTERNATIVE, FOR LEAVE TO INTERVENE

Respondent-Intervenors Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, and Natural Resources Defense Council respectfully oppose the motion of the National Rural Electric Cooperative Association ("NRECA") to substitute into Case No. 16-1374 as Petitioner or to intervene in Case No. 16-1371. NRECA does not meet the requirements for either substitution or intervention, and its motion should be denied.

BACKGROUND

EPA promulgated a regulation entitled "Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills," published at 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("Guidelines"). The Guidelines revised the rules

governing existing municipal solid waste landfills to achieve additional reductions in emissions of landfill gas and its components—including methane, smog-forming pollutants, and hazardous air pollutants—by lowering the emissions threshold at which a landfill must install pollution controls. *Id*. at 59,276. They also sought new data from landfill operators, and addressed other issues including the monitoring of landfill gas emissions. *Id*.

A number of municipal solid waste landfill trade groups and companies ("landfill petitioners") filed a petition for review, No. 16-1371. ECF 1643890 (Oct. 27, 2016). The Utility Air Regulatory Group ("UARG") also filed a petition for review, No. 16-1374. ECF 1644012 (Oct. 28, 2016). In its corporate disclosure statement, UARG stated that it "participates on behalf of certain of its members in administrative proceedings under the Clean Air Act, and litigation arising from those proceedings." *Id.* It did not disclose on which "members[']" behalf it was litigating, nor did UARG typically disclose its membership publicly.

In May of this year UARG publicized a statement that its "membership has decided to disband the organization following a wind down period." Statement of UARG Policy Committee (May 10, 2019), *available at* https://www.prnewswire.com/news-releases/statement-of-uarg-policy-committee-300848377.html ("UARG Statement"). Two months later, UARG filed a motion to dismiss its petition for review. ECF 1797990 (July 18, 2019). At the same time,

NRECA filed a motion to substitute as a party for UARG or, in the alternative, intervene in the landfill petitioners' petition. ECF 1797991 (July 18, 2019) ("Mot."). NRECA premises its motion—filed almost two years after this case was initiated—on the fact that it earlier decided to participate in this case "through UARG." Mot. 4. On July 22, Hunton Andrews Kurth LLP, counsel of record to UARG[1] and now moving on behalf of NRECA in this case, issued a statement with respect to its representation of UARG explaining that: "Judicial and administrative actions have been taken in the name of the Group to advance Group positions, not in the name of any individual member to advance its individual interest."[2]

ARGUMENT

I. NRECA Does Not Meet the Standards for Substitution.

Federal Rule of Appellate Procedure 43 permits substitution of parties only in very limited circumstances, including "if a party dies," in which case that party's

[1] Formerly Hunton & Williams. Hunton Andrews Kirth, Firm History *available at* https://www.huntonak.com/en/about/overview/ ("In 2018, Hunton & Williams and Andrews Kurth Kenyon merged to become Hunton Andrews Kurth LLP.")

[2] *See* Juliet Eilperin, *EPA's Watchdog Scrutinizes Ethics Practices of Former Air Policy Chief*, Wash. Post (July 22, 2019) *available at* https://www.washingtonpost.com/climate-environment/epas-watchdog-is-scrutinizing-ethics-practices-of-agencys-former-air-policy-chief/2019/07/22/469c22be-a8a8-11e9-a3a6-ab670962db05_story.html?utm_term=.ad6c2ce6291e.

"personal representative" may substitute, Fed. R. App. P. 43(a), or when a public officer participating in an official capacity ceases to hold office, in which case the official's successor is automatically substituted, *id.* 43(c). Outside of those two instances, Rule 43(b) also permits substitution in a narrow range of cases "[i]f a party needs to be substituted for any reason other than death." *Id.* 43(b). This Court has held that in the context of Rule 43(b), "necessary means that a party to the suit is unable to continue to litigate, not . . . that an original party has voluntarily chosen to stop litigating." *Alabama Power Co. v. I.C.C.*, 852 F.2d 1,361, 1,366 (D.C. Cir. 1988).

NRECA does not meet the requirements of Rule 43(b). Contrary to NRECA's claim, UARG's disbandment is not "akin to the death of a party." Mot. 7. Rather, as the press statement NRECA cites, Mot. 3, makes clear, "UARG's membership has *decided* to disband the organization." UARG Statement at 2 (emphasis added). UARG's members, including NRECA, "voluntarily chose[]" to disband the organization, thereby choosing to cease UARG's litigation. *Alabama*

Power Co., 852 F.2d at 1366.[3] Moreover, NRECA did not "take[] steps to protect its interest," nor "ma[k]e clear in timely fashion to both the agency and court the existence of its interest . . . ." *Id.* at 1368. To the contrary, in its corporate disclosure and docketing statements, UARG did not state that it was representing NRECA's interests in this case (or even include a list of its members), *see* ECF 1644012 (Oct. 28, 2016); ECF 1648936 (Dec. 1, 2016), nor did it do so in the comments it filed with the agency, Comments of Utility Air Regulatory Group at 1-4 (Aug. 27, 2015) (EPA Docket No. EPA-HQ-OAR-2003-0215-0201). (NRECA, for its part, did not file administrative comments.)

Furthermore, unlike a personal representative substituting for a deceased individual, or a newly elected or appointed public official substituting for a former official, NRECA is not the successor in interest to UARG. NRECA's request does not fit the circumstances under which this court has allowed a private entity to substitute for another one under Rule 43(b), such as when a "transfer of interest in

[3] Documents published by Politico Magazine reveal that the vast majority of UARG's activities and budget in 2017 were related to litigation and administrative proceedings leading to litigation. *See* Workshop Materials from UARG's 2017 Policy Committee Meeting, (June, 2017) *available at* https://static.politico.com/59/f4/19e386684cde98d283683e8bbb54/utility-air-regulatory-group.pdf. Accordingly, by choosing to disband, UARG's members were largely choosing to end its participation in litigation. Thus, this *is* a "situation where a party has decided it no longer wishes to pursue continued participation in a pending case," Mot. 6; UARG has decided it no longer wishes to participate in *all* of its pending cases.

the company or property involved in the suit occurred." *Id.* at 1,366. UARG did not transfer its interests in the organization or this litigation to NRECA.[4] Nor are NRECA's interests coextensive with UARG's; rather, it is just one of UARG's many members.

More fundamentally, "to permit substitution . . . in these circumstances would be to condone the impermissible—an evasion of clear jurisdictional requirements ordained by Congress for obtaining judicial review." *Alabama Power Co.*, 852 F.2d at 1,366–37. This Court has warned—in circumstances remarkably analogous to this case—that where a statute requires that a petition for review be filed within a certain period of time, and the would-be-petitioner did not file within that time, that "[p]ermitting [a member of a trade association] either to substitute itself for the now-departed trade association or to intervene at [a] late juncture . . . sanctions an undisputed failure to comply with applicable statutes and rules." *Id.* at 1,367; *cf. Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514-15 (D.C. Cir. 1990) ("Permitting SCM to continue suit in the role of petitioner would effectively

[4] Indeed, it is difficult to see how an organization could transfer its interest in a petition for review of agency action. Movants do not point to any case since this Court's observation in *Alabama Power Co.* that "[o]ur research has yielded no instance of a court permitting a non-party to substitute in an appeal (or petition for review) from an agency action[,]" 852 F.2d at 1,366 (emphasis in original), in which this Court has permitted substitution in an analogous circumstance.

endorse the circumvention of specific jurisdictional prerequisites enacted by Congress for obtaining judicial review."). Here, the Clean Air Act requires that a petition for review be filed within sixty days, 42 U.S.C. § 7307(b), a statutory deadline that NRECA failed to meet almost two years ago.

Accordingly, this Court should deny NRECA's motion to substitute parties.

II. In the Alternative, NRECA Does Not Meet the Standards for Intervention.

NRECA makes separate requests to intervene as of right and for permissive intervention. Neither request meets the requirements for intervention under Federal Rule of Appellate Procedure 15(d) and both should, accordingly, be denied.

NRECA's attempt to intervene is doomed at the outset because NRECA, an association representing members who "own or operate electric generating units," Mot. 4, does not have standing to challenge EPA's regulation of municipal solid waste landfills. *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018) ("Intervenors become full-blown parties to litigation, and so all would-be intervenors must demonstrate Article III standing."). NRECA premises its standing *not* on any alleged injury that it suffers from the regulation challenged in this case—a regulation of the emission of landfill gas from municipal solid waste landfills. Rather, it premises its standing entirely upon the legal "precedent" set by the landfills regulation that EPA may revise a regulation under section 111(d) of the Clean Air Act to make it stronger. Mot. 7. (NRECA appears to believe EPA

does have authority to weaken such regulations.) NRECA argues that "[i]t is possible that EPA could attempt to make [its 111(d) standards for electric generating units] more stringent at some point in the future," and "NRECA would have an interest in such a rule not becoming more stringent in the future." Mot. 8.

Under this Court's and the Supreme Court's precedents, NRECA has failed to carry its burden to demonstrate standing or a legal interest to warrant participation in this case. To establish "the irreducible constitutional minimum of standing," a party must have suffered an "injury in fact" that is "(a) concrete and particularized" and "(b) "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Here, NRECA asserts that it *might* be harmed some day in the future *if* EPA decides to strengthen its unrelated regulation of existing power plants relying on the legal position it took in the landfills regulation challenged here.

But "mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." *Sea–Land Serv., Inc. v. DOT,* 137 F.3d 640, 648 (D.C. Cir. 1998); *see Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 (D.C. Cir. 1989) ("[W]e know of no authority recognizing that the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint."); *Am. Family Life Assurance Co. v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997) ("[W]e

have said before, and we say again, that the mere precedential effect of [an] agency's rationale in later adjudications is not an injury sufficient to confer standing on someone seeking judicial review of the agency's ruling." (internal quotation marks omitted)). If NRECA is concerned with the legal precedent set by EPA's regulation of landfills, it may follow the usual course of parties who are concerned about how precedent in one case may affect future cases and file an amicus brief.

NRECA likewise fails the other requirements for intervention under Federal Rule of Appellate Procedure 15(d). Its intervention motion is undisputedly untimely. Fed. R. App. P. 15(d) (intervention motions "must be filed within 30 days after the petition for review is filed"); *see Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (noting that in "a proceeding to review agency action" motions to intervene "shall be filed within 30 days of the date on which the petition for review is filed"). Contrary to NRECA's assertion, Mot. 11, good cause for an extension does not exist here, where NRECA and UARG's other members decided to disband the organization, thereby ceasing its litigation. *See supra* pp. 4–5.

For the same reasons that NRECA does not have standing, *supra* pp. 8–9, it does not have a "significantly protectable" interest in this action—a challenge to the regulation of municipal solid waste landfills. *See S. Christian Leadership*

Conference, (SCLC) v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984) ("interest" showing refers "not to *any* interest the applicant can put forward, but only to a legally protectable one" because "[s]uch a gloss upon the rule is … required by Article III of the Constitution" (emphasis in original)). Disposition of this case will not as a practical matter impair or impede NRECA or its members, who do not operate municipal solid waste landfills. And, as NRECA concedes, the landfill petitioners intend to raise the same issue about which NRECA is concerned, Mot. 13, and there is no reason believe that they will not adequately make the legal arguments NRECA wishes to advance. If NRECA believes additional briefing is warranted on that issue after reviewing landfill petitioners' brief, it may file an amicus brief.

CONCLUSION

This Court should deny NRECA's motion to substitute for UARG or, in the alternative, to intervene in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing OPPOSITION TO MOTION TO SUBSTITUTE PARTY OR, IN THE ALTERNATIVE, FOR LEAVE TO INTERVENE on all parties through the Court's electronic case filing (ECF) system.

DATED: July 29, 2019

/s/ *Susannah L. Weaver*
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that pursuant to Federal Rules of Appellate Procedure 32(f) and (g), this document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this document contains 2,128 words.

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DATED: July 29, 2019

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