

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF CALIFORNIA, by and through
ATTORNEY GENERAL XAVIER BECERRA, and
the CALIFORNIA AIR RESOURCES BOARD, the
STATE OF COLORADO, by and through
ATTORNEY GENERAL PHILIP J. WEISER and
the COLORADO DEPARTMENT OF PUBLIC
HEALTH AND ENVIRONMENT, STATE OF
CONNECTICUT, STATE OF DELAWARE, STATE
OF ILLINOIS, STATE OF MAINE, STATE OF
MARYLAND, COMMONWEALTH OF
MASSACHUSETTS, PEOPLE OF THE STATE OF
MICHIGAN, STATE OF MINNESOTA, STATE OF
NEW JERSEY, STATE OF NEW MEXICO, STATE
OF NEW YORK, STATE OF NORTH CAROLINA,
STATE OF OREGON, COMMONWEALTH OF
PENNSYLVANIA, STATE OF RHODE ISLAND,
STATE OF VERMONT, COMMONWEALTH OF
VIRGINIA, STATE OF WASHINGTON, THE CITY
OF CHICAGO, THE DISTRICT OF COLUMBIA,
THE CITY AND COUNTY OF DENVER,

Petitioners,

v.

ANDREW R. WHEELER, in his official capacity as
Administrator, United States Environmental
Protection Agency; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Case No. 20-1357
(consolidated with
Nos. 20-1359, 20-
1363)

**MOTION OF GPA MIDSTREAM FOR LEAVE TO INTERVENE
ON BEHALF OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, GPA Midstream Association (“GPA Midstream”) respectfully moves for leave to intervene in support of Respondents the U.S. Environmental Protection Agency (“EPA” or “Agency”), and Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency, in these consolidated Petitions for Review.¹ GPA Midstream is an association whose members include companies that would be directly harmed if Petitioners prevail in their challenge to the final rule being challenged. And GPA Midstream has participated not only in the administrative proceedings leading to the rule at issue, but also as petitioner in challenges to the predecessor to the current rule.

GPA Midstream undoubtedly meets the standards for intervention in support of EPA in this case: (1) the request is timely; (2) GPA Midstream has material interests related to the Petitions for Review;

¹ Pursuant to D.C. Circuit Rule 15(b), this motion will be deemed an intervention motion in all cases that have been filed and that will be filed in this Circuit involving the same underlying rule.

(3) disposition of the Petitions may impair those interests, as any relief Petitioners might obtain might be borne directly by GPA Midstream's members; and (4) neither Petitioners nor EPA can adequately represent GPA Midstream. For similar reasons, GPA Midstream has standing, as it has a concrete interest in the outcome of the Petitions. Accordingly, GPA Midstream's motion should be granted.

BACKGROUND

The Section 111 of the Clean Air Act ("CAA") authorizes and directs EPA to prescribe New Source Performance Standards ("NSPS") applicable to certain new stationary sources and existing sources that undergo "modification" within the meaning of CAA section 111(a)(4). 42 U.S.C. § 7411. Under the NSPS program, for each "new source" that the Administrator believes "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Administrator shall promulgate a "standard of performance." *Id.* at § 7411(a)(1)–(2), (b)(1)(A). EPA created the NSPS for the Crude Oil and Natural Gas Production source category in 1979. 44 Fed. Reg. 49,222 (Aug. 21, 1979). EPA promulgated performance standards for volatile organic compounds ("VOC") and sulfur dioxide

emissions for that source category in 1985. 50 Fed. Reg. 26,122 (June 24, 1985) (VOC emissions found at 40 C.F.R., Subpart KKK); 50 Fed. Reg. 40,158 (Oct. 1, 1985) (sulfur dioxide emissions found at 40 C.F.R., Subpart LLL).

In 2012, EPA added Subpart OOOO, regulating VOC emissions from oil and gas wells, compressors, pneumatic controllers, storage vessels, and leaking components from onshore natural gas processing plants, as well as sulfur dioxide emissions from onshore natural gas processing plants. 77 Fed. Reg. 49,490 (Aug. 16, 2012) (“2012 Rule”). Several industry and environmental groups petitioned for review of the rule in this Court. *See Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. filed Apr. 3, 2013) (listing consolidated cases). In addition, EPA twice granted reconsideration of certain aspects of the Subpart OOOO rule and promulgated additional definitional provisions. 78 Fed. Reg. 58,416 (Sept. 23, 2013) (storage vessel requirements); 79 Fed. Reg. 79,018 (Dec. 31, 2014) (well completion provisions); 80 Fed. Reg. 48,262 (Aug. 12, 2015) (definitions of low-pressure gas well and storage vessels).

In 2016, EPA imposed methane regulations on the Crude Oil and Natural Gas Production source category by adding Subpart OOOOa. 81 Fed. Reg. 35,824 (June 3, 2016) (“2016 Rule”). GPA Midstream and several industry groups, along with the States of North Dakota and Texas, filed petitions for review of this rule. *See Am. Petroleum Inst.*, No. 13-1108 (D.C. Cir.) (listing petitions for review consolidated with Case No. 13-1108). Further, GPA Midstream petitioned for reconsideration of the rule, and EPA received several other petitions for reconsideration and for a partial stay of the 2016 Rule. *See* 82 Fed. Reg. 25,730 (June 5, 2017).

Due, in part, to Presidential Executive Order No. 13783, *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (“Executive Order”), EPA issued a three-month stay for certain requirements of the 2016 Rule, 82 Fed. Reg. 27,641 (June 16, 2017), which was vacated by this Court, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (per curiam). EPA subsequently agreed to reconsider portions of the 2016 Rule. 83 Fed. Reg. 52,056 (Oct. 15, 2018). The combined challenges to the 2012 Rule and the 2016 Rule,

however, remain pending while EPA evaluates the reconsideration requests.

On September 24, 2019, EPA, after reviewing the 2012 and 2016 Rules as directed by Executive Order, issued a proposed rule to amend the 2012 Rule and 2016 Rule for the oil and natural gas industry that would remove regulatory duplication. *See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 84 Fed. Reg. 50,244 (Sept. 24, 2019) (“Proposed Rule”). GPA Midstream submitted comments on the Proposed Rule. *See GPA Midstream Ass’n Comments*, No. EPA-HQ-OAR-2017-0757-0667 (Nov. 25, 2019).

On September 14, 2020, EPA promulgated the final rule at issue. *See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 85 Fed. Reg. 57,018 (Sept. 14, 2020) (“Policy Rule” or “Rule”). The Rule amends the NSPS promulgated in the 2012 and 2016 Rules, removing sources in the transmission and storage segment from the source category and rescinding the NSPS applicable to those sources, and also removes the

methane-specific requirements of the NSPS applicable to sources in the production and processing segments as redundant. *Id.*

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 80 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing. Thus, GPA Midstream’s members operate in precisely those industry segments affected by the challenged Rule, and on whom Petitioners would seek to impose greater regulation. GPA Midstream’s members have a direct, protectable interest in the outcome of this litigation, and for the reasons discussed below, GPA Midstream meets the requirements for intervention.

ARGUMENT

I. Movant Satisfies the Standard for Intervention.

Because Petitioners, through this case, seek to impose greater regulations on its members, GPA Midstream easily satisfies the standard for intervention in this case. The standard for intervention under Federal Rule of Civil Procedure 24 informs the grounds for intervention under Federal Rule of Appellate Procedure 15(d).

Amalgamated Transit Union Int'l v. Donovan, 771 F.2d 1551, 1553 n.3 (D.C. Cir 1985) (per curiam); see *Int'l Union, United Auto. Workers of Am., Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Accordingly, to intervene as of right, an applicant must: (1) file a timely application; (2) claim an interest relating to the subject of the action; (3) show that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect the interest; and (4) demonstrate that existing parties may not adequately represent the applicant's interest. See, e.g., *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Each requirement is satisfied here.

A. The Motion to Intervene Is Timely.

GPA Midstream's motion is timely because it was filed within 30 days after the filing of the Petitions on September 14, 2020 (Nos. 20-1357, 20-1359) and September 15, 2020 (No. 20-1363). *See* Fed. R. App. P. 15(d). Allowing GPA Midstream to intervene will not disrupt the proceedings because GPA Midstream is seeking to join this case at the earliest possible stage, before Petitioners' initial filings are due and before the Court has established a schedule and format for briefing.

B. Movant Has Interests Relating to the Subject of This Proceeding That May as a Practical Matter Be Impaired by the Outcome of These Petitions.

GPA Midstream has direct and substantial interests in the outcome of this case that may be impaired or impeded if Petitioners prevail. *See Karsner v. Lothian*, 532 F.3d 876, 885–88 (D.C. Cir. 2008). As detailed, GPA Midstream's members are engaged in midstream activities, and the Policy Rule directly addresses midstream activities, along with other segments of the natural gas industry. The Rule thus speaks to the obligations of GPA Midstream's members and informs the various investments they must undertake to come into compliance with NSPS regulations.

In addition, as an association representing companies who are directly and indirectly affected by the Rule, GPA Midstream falls within the class of parties that this Court routinely allows to intervene in cases reviewing final agency action. *See, e.g., Fund for Animals*, 322 F.3d at 735; *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (association whose members produced military munitions and operated military firing ranges permitted to intervene in a challenge to EPA’s Munitions Rule); *Conservation Law Found. of New Eng., Inc. v. Mosbacher*, 966 F.2d 39, 41–44 (1st Cir. 1992) (commercial fishing groups subject to a regulatory plan to address overfishing had a cognizable interest in litigation over the plan’s implementation); *NRDC, Inc. v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (industry representatives and pesticide manufacturers subject to challenged regulation had a legally protected interest supporting intervention).

Further, the outcome of this case could impair GPA Midstream’s ability to protect its interests and those of its members. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (impairment where the litigation “could establish unfavorable precedent that would make it more difficult for [the intervenor] to succeed” in any future suit to

enforce its rights); *NRDC v. Costle*, 561 F.2d 904, 909–11 (D.C. Cir. 1977) (industry members’ interests practically impaired if not permitted to intervene in proceedings which would determine which rulemakings EPA would initiate over which pollutants). If this Court were to grant the Petitions and vacate the Rule in whole or in part, GPA Midstream’s members would be subject to more onerous regulatory requirements associated with the 2012 and 2016 Rules revised by the Rule, which would impact members’ compliance obligations directly. Moreover, EPA might also undertake to promulgate a new rule to address the Court’s decision, which could impose further regulatory requirements on GPA Midstream’s members. Additionally, the Petitions in this case could ask this Court to address important issues of statutory construction, which could affect GPA Midstream’s arguments before EPA or this Court in future proceedings.

GPA Midstream undoubtedly has an interest in the subject of this proceeding.

C. Existing Parties Cannot Adequately Represent Movant’s Interests.

GPA Midstream’s interests will not be adequately represented by the existing parties. The burden of showing that the existing parties

will not adequately support a movant's interest is "minimal," and a movant need only show that representation of its interests "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). This factor is easily satisfied here.

Petitioners cannot adequately represent GPA Midstream's interests because Petitioners' interests are directly opposed to GPA Midstream's. EPA likewise cannot adequately represent GPA Midstream's interests because EPA is a government agency necessarily focused on a broad "representation of the general public interest," not the particular interests that motivate GPA Midstream. *Dimond*, 792 F.2d at 192–93. GPA Midstream represents entities who have direct and substantial financial interests in this proceeding. This Court has long recognized the "inadequacy of governmental representation" when the government has no financial stake in the suit, but the private intervenor does. *See, e.g., id.* at 192; *Fund for Animals*, 322 F.3d at 735–37; *Costle*, 561 F.2d at 912 & n.41. Mere agreement between a private party and a government agency is not sufficient to establish adequate representation. *See Fund for Animals*, 322 F.3d at 736.

II. Movant Has Standing to Intervene in This Case.

GPA Midstream has standing to intervene in support of EPA in this proceeding because, as discussed, it represents entities directly addressed by the Rule being challenged.² An association has standing to intervene on behalf of its members when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). In this Circuit, “[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability.” *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

² Although this Court has previously required intervenor-respondents to demonstrate standing, *see NRDC v. EPA*, 896 F.3d 459, 462–63 (D.C. Cir. 2018), the Supreme Court recently clarified that an intervenor who is not invoking the Court’s jurisdiction need not demonstrate standing, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019). Regardless, GPA Midstream has standing.

GPA Midstream satisfies each of these elements. First, “at least some of the [GPA Midstream’s] members would have standing to [intervene] in their own right.” *Fed’n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899–900 (D.C. Cir. 1996). As explained, the Policy Rule directly addresses the obligations of many of GPA Midstream’s members. These entities would have standing for the same reasons they fulfill the grounds for intervention. *See Roeder v. Islamic Republic 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.”).

Because these entities are subject to NSPS regulation, and the Rule finalizes changes to the NSPS regulations, there is “little question” that these entities have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992) (a party who “is himself an object of the [governmental] action (or forgone action) at issue” has standing); *cf.* *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (parties establish standing when agency action imposes “regulatory restrictions, costs, or other burdens” on them). GPA Midstream’s standing is thus “self-evident.” *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002); *see also Am. Trucking Ass’ns, Inc. v. Fed. Motor Carrier Safety*

Admin., 724 F.3d 243, 247 (D.C. Cir. 2013) (trade association had an “obvious interest in challenging [Federal Motor Carrier Safety Administration] rulemaking that directly—and negatively—impact[ed] its motor carrier members”).

Second, the interests that GPA Midstream seeks to protect are germane to its organizational purpose of promoting the well-being of its member companies and of representing those interests in, *inter alia*, federal agency rulemaking. And as explained above, one object of the challenged Rule is the requirements on GPA Midstream’s members.

Finally, the participation of individual member companies is unnecessary. Petitioners request the Court to overturn a final rule applicable across industry. This final agency action is not directed at, and does not depend on the circumstances of, any specific entity.

For these reasons, GPA Midstream unquestionably has a sufficient stake in this case to support Article III standing.

III. Alternatively, Movant Should Be Granted Permissive Intervention.

Although GPA Midstream clearly satisfies the standards for intervention as of right, it also qualifies for permissive intervention. This Court authorizes permissive intervention when, on a timely

motion, a movant shows that its claim or defense has a question of law or a question of fact in common with the main action. *E.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045–46 (D.C. Cir. 1998) (supporting flexible reading of Rule 24(b)). Permissive intervention requires neither a showing of the inadequacy of representation, nor a direct interest in the subject matter of the action.³

This motion is timely, and if permitted to intervene, GPA Midstream will address the issues of law and fact that Petitioners present on the merits. Because GPA Midstream and Petitioners maintain opposing positions on these common questions, and because permissive intervention would contribute to the just and equitable adjudication of the questions presented, it should be permitted.

³ This Circuit has not decided whether standing is needed for permissive intervention. *E.g.*, *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 980 (D.C. Cir. 2013). Under the recent *Virginia House of Delegates* decision from the Supreme Court, standing should not be required here. Regardless, GPA Midstream has standing. *See supra*, Part II.

CONCLUSION

For the foregoing reasons, GPA Midstream respectfully requests that this Court grant its motion to intervene in support of Respondents.

Dated: September 25, 2020

Respectfully submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and D.C. Circuit Rule 26.1, GPA Midstream Association (“GPA Midstream”) states that GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 80 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing. GPA Midstream has no parent companies, and no publicly-held company has a 10% or greater ownership interest in GPA Midstream.

Dated: September 25, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), GPA Midstream Association (“GPA Midstream”) hereby states as follows:

A. Parties and Amici

Because these consolidated cases involve review of a final agency action, the requirement to furnish a list of parties, intervenors, and amici that appeared below is inapplicable. These consolidated cases involve the following parties.

Petitioners in No. 20-1357 are the State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board, the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment, the States of Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the City of Chicago, the District of Columbia, and the City and County of Denver. Petitioners No. 20-1359 are Environmental Defense Fund, Sierra Club, Natural Resources Defense Council, National Parks

Conservation Association, Ft. Berthold Protectors of Water and Earth Rights, Food & Water Watch, Environmental Integrity Project, Earthworks, Clean Air Council, and Center for Biological Diversity. Petitioner in No. 20-1363 is the Environmental Law and Policy Center.

Respondents in these consolidated cases are the U.S. Environmental Protection Agency (“EPA”) and EPA Administrator Andrew Wheeler.

As of the date of this filing, American Petroleum Institute and Western Energy Alliance have moved to intervene in these consolidated cases. Counsel are not aware of any amici in these consolidated cases. The movant-intervenor is GPA Midstream Association.

B. Rulings Under Review

The final agency action under review is the EPA action entitled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review.” 85 Fed. Reg. 57,018 (Sept. 14, 2020).

C. Related Cases

This case has not previously been before this Court or any other court. GPA Midstream is not aware of any other related cases.

Dated: September 25, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2) and 32(g), and D.C. Circuit Rules 27(a)(2) and 32(a), the undersigned certifies that the accompanying Motion for Leave to Intervene has been prepared using 14-point, Century Schoolbook typeface and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the document is proportionally spaced and contains 2,812 words exclusive of the accompanying documents excepted from the word count by Rule 27(a)(2)(B), (d)(2).

/s/ Samuel B. Boxerman
Samuel B. Boxerman

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to Intervene will be served, this 25th day of September, 2020, through the Court's CM/ECF system on all registered counsel.

/s/ Samuel B. Boxerman
Samuel B. Boxerman