

("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act") entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," published at 85 Fed. Reg. 57,018 (Sept. 14, 2020) ("2020 Rule"). Pursuant to Federal Rule of Appellate Procedure 15(d), this motion to intervene has been timely filed within 30 days after Petitioners filed their petition for review and the Additional Independent Producers meet the standards for intervention as described below.

BACKGROUND

The Additional Independent Producers are similarly situated as the "Independent Producers" that filed a motion to intervene in the same matter on September 28, 2020 (USCA Case #20-1357, Document # 1863645). The only difference between the Additional Independent Producers and the Independent Producers is that they needed additional time to obtain the necessary approvals from their respective board of directors and decision makers to seek intervention. They have received that permission. The Additional Independent Producers have been a part of the Independent Producers from at least 2015, participating in the rulemakings and related legal challenges. They have been represented by the same counsel and desire to participate in this matter as part of the "Independent Producers" and will participate as one respondent/intervenor. Being substantial in the same position or exactly the same position as the Independent Producers that filed a motion to intervene on September 28, 2020, the remainder of this motion is revised to seek intervention on behalf of the

Additional Independent Producers and respectfully request that both motions be granted and the Additional Independent Producers be joined with the Independent Producers as one respondent/intervenor.

The 2020 Rule amended the 2012 New Source Performance Standards ("NSPS") pursuant to Section 111 of the CAA for certain emissions source in the oil and natural gas industry, codified at 40 C.F.R. part 60, Subpart OOOO ("2012 Rule"). Many of the associations that are currently included in the Additional Independent Producers filed comments when the 2012 Rule was proposed and ultimately petitioned for review of the 2012 Rule. The 2012 Rule underwent various revisions in 2013 and 2014. Many of the associations included in the Additional Independent Producers participated in the rulemakings associated with 2013 and 2014 revisions and petitioned for review of the revisions. The NSPS for certain aspects of the oil and natural gas industry were added or modified in 2016 and codified at 40 C.F.R. part 60, Subpart OOOOa ("2016 Rule"). The Additional Independent Producers filed comments on the proposed 2016 Rule and petitioned for review of the 2016 Rule. The various challenges to the 2012 Rule; revisions to the rule; and the 2016 were consolidated in *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. filed Apr.3, 2013). Various associations that make up the Additional Independent Producers have been actively

involved in all aspects of the promulgation and legal challenges to the 2012 Rule and 2016 Rule.¹

On September 24, 2019, EPA proposed changes to the 2012 Rule and 2016 Rule that was generally characterized as "policy amendments". 84 Fed. Reg. 50244 (Sept. 24, 2019). The Additional Independent Producers filed extensive comments on the proposed revisions.² In the 2020 Rule, EPA determined that Subpart OOOO and Subpart OOOOa improperly included the transportation and storage segments of the oil and natural gas industry into the existing single source category focused on production and gas production. 59 Fed. Reg. at 57,019. EPA corrected this problem in the 2020 Rule by removing these segments from the source category that originally had been defined to include only crude oil and natural gas production in 1979. *Id.* EPA also determined that establishing emissions standards for methane in Subpart OOOOa was redundant to existing NSPS for the same sources to control volatile organic compounds ("VOC"). In the 2016 Rule, EPA admitted the controls and methods to control VOCs were exactly the same controls and methods necessary to control methane. Consequently, EPA concluded in the 2020 Rule that the methane NSPS were an unreasonable and unwarranted extension of the regulations promulgated to control

¹ See Independent Producers Comments, No. EPA-HQ-OAR-2010-0505-4216 (Nov. 11, 2011), No. EPA-HQ-2010-0505-4236 (Nov. 11, 2011), No. EPA-HQ-OAR-2010-0505-4626 (May 23, 2013), No. EPA-HQ-OAR-2010-0505-6983 (Dec. 4, 2015).

² See Independent Producers Comments, No. EPA-HQ-OAR-2017-0757-2077 (Nov. 25, 2019).

VOCs. Additionally, the 2016 methane standards accomplished no more environmental protection than the previously established VOC standards. EPA rescinded the methane standards to simplify the Rule and eliminate unnecessary duplicative regulations.

The Additional Independent Producers are trade associations representing entities and individuals within the oil and gas industry, including oil and gas producers and extractors, royalty owners, oilfield service companies, and state and national independent oil and gas associations. The individual members of the Additional Independent Producers number in the thousands and are spread out across the country and operate thousands of new and existing oil and natural gas wells. Many of these members are "mom and pop" operations – owning hundreds, sometimes thousands of existing wells producing very little gas and oil – generally referred to as "marginal wells". These wells are marginal not only in their production but also with regard to their economic viability. These existing wells are dramatically different than the hydraulically fractured wells drilled in the late 2000's with horizontal legs producing historically large volumes of gas or oil. The 2012 Rule and 2016 Rule were in response to the latest technology that caused a boom in new oil and natural gas wells. The rules were not focused on existing wells or newly drilled marginal wells which are considerably smaller, producing much less gas and oil and emissions.

On September 14, 2020, Petitioners filed a petition for review to challenge the 2020 Rule that provided some relief to existing wells. Additional Independent

Producers are requesting leave to intervene as a respondent to protect its unique interests in ensuring that the 2020 Rule be upheld.

ARGUMENT

The Court should allow the Additional Independent Producers to intervene as a respondent because, as discussed below, they meet the standard for intervention in petition for review proceedings in this Court.

I. The Legal Standard for Intervention

Federal Rule of Appellate Procedure 15(d) and Circuit Court Rule 15(b) establish the criteria for intervention in petition for review proceedings in this Court. 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." Fed. R. App. P. 15(d). Although neither the Federal Rule 15 nor Circuit Rule 15 establish additional criteria, Federal Rule of Civil Procedure 24 governing intervention, while not binding in cases originating in courts of appeals, provides guidance for the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam). The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the intervention motion is timely; (2) the movant claims a cognizable interest in the action; (3) movant's absence will impair or impede its ability to protect its stated interest; and

(4) existing parties inadequately represent movant's interests. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

Additionally, the Additional Independent Producers have standing to participate in litigation on its members behalf. The interests of the members of the Additional Independent Producers have in the Rule being upheld will be harmed if Petitioners prevail in their fundamental challenge to the 2020 Rule as well as their motions for stay and summary vacatur. Members of the Additional Independent Producers therefore would have standing to intervene in their own right. Further, the interests that the Additional Independent Producers seek to protect are germane to its purpose of participating in the past (2012 and 2016 Rules) and current proceedings (2020 Rule) and related litigation that affect its members. Participation of individual members of the Additional Independent Producers in this litigation is not required.

II. Movant-Intervenor Meets the Standard for Intervention.

A. The Motion Is Timely.

The Petitioners filed their petition for review on September 14, 2020 and their Emergency Motion for Stay and Summary Vacatur on September 15, 2020. The Additional Independent Producers' motion is timely because it was filed within 30 days after the petition for review was filed. Additionally, this motion is being filed at an early stage of the proceeding and intervention will not disrupt or delay any proceedings and no briefing schedule or format has been established.

B. Additional Independent Producers and Its Members Have Cognizable Interests That Will Be Impaired If Petitioners Prevail.

As the Emergency Motion makes clear, a primary concern of the Petitioners is the 2020 Rule's removal of the methane requirements which render the provisions of Section 111(d) pertaining to existing sources no longer relevant. As a result of the 2020 Rule, existing sources are no longer exposed to regulation pursuant to Section 111(d) of the CAA. A significant percentage of the individual members of the Additional Independent Producers operate thousands of existing wells. As Petitioners detail in their motion, EPA initiated the rulemaking process shortly after the 2016 Rule to potentially regulate existing sources (purportedly pursuant to 111(d)). That rulemaking was halted, in part, as a result of the proposed revisions to the 2016 rule. Many of the same Petitioners sued EPA to force continuation of the rulemaking exposing existing sources to new and burdensome regulation. If the judicial stay of the 2020 Rule remains in place or the 2020 Rule is vacated, the members of the Additional Independent Producers will be subject to regulations promulgated pursuant to Section 111(d). Clearly the Petitioners' challenge to the 2020 Rule threatens the interests of the Additional Independent Producers and its respective members. If the stay granted by this Court on September 17 remains in place; if the summary vacatur is granted; or the 2020 Rule is ultimately vacated, the interests of the Additional Independent Producers will be harmed. As discussed above, the economic viability of many members of the Additional Independent Producers is marginal and additional regulation pursuant to

Section 111(d) will represent a tipping point to the viability of many members – putting many members out of business. Thus, to the extent the "interests" prongs of Federal Rule of Civil Procedure 24 are relevant and helpful, the Additional Independent Producers clearly meet those requirements.

C. Existing Parties Cannot Adequately Represent Additional Independent Producers.

The Petitioners are clearly adverse to the interests of the Additional Independent Producers. As the Petitioners' Emergency Motion makes clear, a primary concern with the 2020 Rule is that it removes any debate as to whether existing sources can be regulated under Section 111(d). The majority of oil and natural gas wells in the United States are existing wells, with many of the existing wells characterized as marginal wells. From EPA's initial efforts to promulgate additional regulations on new or modified sources in 2012, the Additional Independent Producers have argued that EPA failed to recognize the unique operating aspects of existing and marginal wells – that EPA's "one-size-fits all" to regulation disproportionately impacts existing wells. EPA's focus has historically been and continues to be on new sources, often to the detriment of existing sources.

As previously discussed by this Court, the burden of showing inadequate representation in a motion for intervention "is not onerous" and "[t]he applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192

(D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). In the same case, this Court found that EPA cannot adequately represent the interests of entities such as the Additional Independent Producers as the EPA represents the broader "general public interest." *Dimond*, 792 F.2d at 192-93 ("A government entity ... is charged by law with representing the public interest of its citizens. ... The [government entity] 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."). Perhaps in favor of or representation of the general public interest, EPA has demonstrated since 2012 that it does not represent the interests of existing sources, and, thus, the interests of Additional Independent Producers.

For the reasons set forth above, the existing parties do not and cannot adequately represent the Additional Independent Producers interests in this case.

CONCLUSION

For the foregoing reasons, the Additional Independent Producers respectfully request leave to intervene as a respondent.

Respectfully Submitted,

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Dated: October 14, 2020

IADC's contract-drilling members own most of the world's land and offshore drilling units that drill the vast majority of the wells producing the planet's oil and gas. IADC's membership also includes oil-and-gas producers, and manufacturers and suppliers of oilfield equipment and services. Through conferences, training seminars, print and electronic publications, and a comprehensive network of technical publications, IADC continually fosters education and communication within the upstream petroleum industry. IADC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The National Stripper Well Association ("NSWA") was founded in 1934 as the only national association *solely* representing the interests of the nation's smallest and most economically-vulnerable oil and natural gas wells before Congress, the Administration and the Federal bureaucracies. It is the belief of NSWA that producers, owners, and operators of marginally-producing oil and gas wells have a unique set of needs and concerns regarding federal legislation and regulation. NSWA is a member based trade association representing over 1,000 members nationwide across 35 states. NSWA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The North Dakota Petroleum Council ("NDPC") is a trade association representing more than 650 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, and storage, as well as mineral leasing, consulting, legal work, and oil field service activities in North Dakota,

South Dakota, and the Rocky Mountain Region. Established in 1952, NDPC's mission is to promote and enhance the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in North Dakota, South Dakota, and the Rocky Mountain region; to promote opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; to monitor and influence legislative and regulatory activities on the state and national level; and to accumulate and disseminate information concerning the petroleum industry to foster the best interests of the public and industry. NDPC has no parent corporation and there is not publicly held corporation that owns 10% of more of its stock.

The Petroleum Alliance of Oklahoma ("Petroleum Alliance") is the only trade association in Oklahoma that represents every segment of the oil and natural gas industry, representing more than 1,300 member companies engaged in the upstream, midstream and downstream sectors of the state's defining industry. The Petroleum Alliance of Oklahoma has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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Dated: October 14, 2020

26.1 and Circuit Rule 26.1 is being filed herewith. Because this case involves direct review in this Court of agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

Petitioners:

No. 20-1357: 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.

No. 20-1359: 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.

No. 20-1363: Environmental Law and Policy Center.

Respondents: Andrew R. Wheeler, Administrator, U.S. Environmental Protection Agency, and the United States Environmental Protection Agency are the Respondents.

Intervenors: The American Petroleum Institute, the Western Energy Alliance, the GPA Midstream Association and the Independent Producers have filed motions to intervene but it does not appear that the Court has acted upon those motions at the time of this filing.

Amici Curiae: There are no *amici curiae* at the time of this filing.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing motion complies with the type volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,319 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond font.

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Dated: October 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of October 2020, I am causing the foregoing motion and accompanying documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

Respectfully Submitted,

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