ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ENVIRONMENTAL DEFENSE FUND, et al., ***Petitioners*,** **v.** **ANDREW WHEELER, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** ***Respondents*,** **and** **American Exploration & Production Council, et al.,** ***Intervenors*.**	**No. 20-1360** **(and consolidated cases)**

UNOPPOSED MOTION OF WESTERN ENERGY ALLIANCE FOR LEAVE TO INTERVENE AS RESPONDENT OUT OF TIME

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Western Energy Alliance ("Alliance") respectfully moves for leave to intervene as a Respondent in the above-captioned case beyond the thirty days provided for in the Rules. The motion is unopposed. On September 15, 2020,

Petitioners filed a petition for review challenging a final action of the United States Environmental Protection Agency ("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 Reconsideration," published at 85 Fed. Reg. 57,398 (Sept. 15, 2020) ("2020 Tech Rule").

BACKGROUND

The Alliance is a non-profit, regional trade association representing 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the western United States. Its members are independent oil and gas companies, the majority of which are small businesses with an average of fourteen employees. The Alliance promotes the beneficial use and development of oil and natural gas in the West and represents its membership in federal rulemakings that may affect members' operations throughout the West.

The 2020 Tech 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"). The Alliance filed detailed comments when the 2012 Rule was proposed.[1] It again

[1] *See* Alliance Comments, EPA-HQ-OAR-2010-0505-4231 (Nov. 30, 2011).

filed detailed comments when the 2012 Rule underwent went various revisions in 2013[2] and 2014.[3]

After the 2013 and 2014 revisions, in 2016 the NSPS for certain aspects of the oil and natural gas industry were added and sources within the segments were subject to new controls codified at 40 C.F.R. Part 60, Subpart OOOOa ("2016 Rule"). As with previous rulemakings and proposed revisions, the Alliance filed comments on the proposed 2016 Rule.[4] The Alliance has also taken part as a Petitioner in various challenges to the 2012 Rule (and its revisions) and the 2016 Rule in appeals consolidated before this Court in *Am. Petroleum Inst. v. EPA*, Nos. 13-1108, *et al.* (D.C. Cir.).

On October 15, 2018, EPA proposed changes to the 2012 Rule and 2016 Rule that were generally characterized as "technical revisions." 83 Fed. Reg. 52,056 (Oct. 15, 2018). The Alliance filed extensive comments on the proposed revisions.[5] In the 2020 Tech Rule, EPA granted reconsideration and made revisions to the NSPS in four primary areas or types of controls: fugitive emissions requirements (controlling leaks); well site pneumatic pump standards; certification requirements for professional

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[2] *See* Alliance Comments, EPA-HQ-OAR-2010-0505-4617 (May 28, 2013).

[3] *See* Alliance Comments, EPA-HQ-OAR-2010-0505-4674 (Aug. 18, 2014).

[4] *See* Alliance Comments, EPA-HQ-OAR-2010-0505-5287 (Oct. 16, 2015); *see also* Alliance Comments, EPA-HQ-OAR-2010-0505-6930 (Dec. 4, 2015).

[5] *See* Alliance Comments, EPA-HQ-OAR-2017-0483-1243 (Dec. 27, 2018).

engineers related to closed vent systems; and how to apply for/use an alternative means of emission limitation. 85 Fed. Reg. at 57,398. In addition to these four areas, the EPA revised various recordkeeping and reporting obligations that streamlined the process, reduced the regulatory burden to stakeholders including the Alliance's members, without also reducing environmental protection.

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 2012 Rule and 2016 Rule were not focused on existing wells or newly drilled marginal wells which are considerably smaller, producing much less gas and oil and emissions. While not eliminating the regulatory burden associated with the 2012 Rule and 2016 Rule, the 2020 Tech Rule's revisions to fugitive emissions requirements and reduced recordkeeping and reporting provided much-needed relief to Alliance members.

On September 15, 2020, the Petitioners filed a petition for review to challenge the 2020 Tech Rule that provided relief to existing wells. Because of the benefit of the relief that the 2020 Tech Rule afforded to its members, the Alliance advocated for it in comments starting with the 2012 Rule and continuing through to the current 2020 Tech Rule. The Petitioners' efforts to overturn the 2020 Rule, and the attendant relief for which the Alliance advocated, would therefore harm both the Alliance and its members if successful. For that reason, the Alliance is requesting leave to intervene as a Respondent to protect its interests and those of its members in ensuring that the 2020 Tech Rule be upheld.

ARGUMENT

The Court should allow the Alliance to intervene as a Respondent because, as discussed below, any delay seeking intervention is minimal and non-prejudicial and the Alliance otherwise meets 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). The 30-day period under Rule 15(d), however, is a "claim-processing rule" rather than a jurisdictional bar, *Int'l Union of Operating. Eng'rs, Local 18 v. Nat'l Labor Relations Bd.*, 837 F.3d 593, 594 (6th Cir. 2016), and may be extended by this Court for "good cause" under Federal Rule of Appellate Procedure 26(b). *See also Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1374 & n.6 (D.C. Cir. 1988) (Robinson, J., concurring) (Courts "have full authority to enlarge the time for intervention when good cause therefore has been shown.").

Although neither the Federal Rule 15 nor Circuit Rule 15 establish additional criteria, Federal Rule of Civil Procedure 24 governing intervention provides guidance. *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 Alliance has standing to participate in litigation on its members' behalf. The interests that the members of the Alliance have in the 2020 Tech Rule being upheld will be harmed if Petitioners prevail in their fundamental challenges to the 2020 Tech Rule. Members of the Alliance therefore would have standing to intervene in their own right. Further, the interests that the Alliance seeks to protect are germane to its purpose of participating in the past (2012 Rule and 2016 Rule) and current proceedings (2020 Tech Rule) and related litigation that affect its members. Participation of individual members of the Alliance in this litigation is not required.

II. Movant-Intervenor Meets the Standard for Intervention.

A. There is Good Cause to Excuse Strict Compliance with the 30-Day Filing Requirement.

The Petitioners filed their petition for review on October 15, 2020. Though the Alliance's motion concededly is being filed after the 30-day deadline under Federal

Rule of Appellate Procedure 15(d), this Court has the authority to excuse strict compliance with that requirement for "good cause" under Federal Rule of Appellate Procedure 26(b). This Court should do so here.

The Alliance represents 200 independent oil and gas companies in the West, most of whom are small businesses with an average of fourteen employees. These small, independent companies, which have been particularly affected by the depressed price of oil and gas, have limited resources generally and for litigation specifically. When it became clear, however, that no party or intervenor before this Court would represent the specific interests of the small, independent oil and gas company in the West, the Alliance identified the need to intervene in this case. No other party to this case specifically represents the Alliance's set of constituents and has its singular focus as the protection of their interests. And so where, as here, the 2020 Tech Rule has nationwide effect, there is good cause for this Court to excuse strict compliance with the 30-day deadline so that all interests and perspectives are before the Court.

Granting the Alliance leave to intervene also would not disrupt or delay any proceedings. The EPA has only recently filed the certified index to the record, and this Court has yet to establish the timing and format for briefing. Intervention would also not require additional briefing because the Alliance would also address its unique interests to this Court as part of a joint brief with an existing intervenor represented by the same counsel, James Elliott. Counsel for the Alliance has contacted counsel for Petitioners, Respondents, and Intervenors and the parties do not object to the

Alliance intervening and joining with the intervenors currently represented. For these reasons, the Alliance respectfully requests that Court excuse strict compliance with the 30-day deadline under Federal Rule of Appellate Procedure 15(d) and grant the Alliance leave to intervene under the other factors.

B. The Alliance and Its Members Have Cognizable Interests That Will Be Impaired If Petitioners Prevail.

Various requirements on the 2012 Rule and 2016 Rule embraced a "one-size-fits all" approach to regulation of many sources in the oil and natural gas industry and that approach disproportionately impacts members of the Alliance. From the EPA's initial efforts in 2011 to regulate additional sources from the oil and natural gas sector, the Alliance advocated for relief from the onerous fugitive emission requirements particularly affecting low production or marginal wells operated by many of its members. Numerous environmental groups, including the Petitioners, filed numerous sets of comments in opposition to the low production well exemption and having the low production well exemption vacated/removed is clearly one of its primary objectives in bringing this law suit.

If the 2020 Tech Rule is ultimately vacated, the interests of the Alliance and its members will be harmed. As discussed above, the economic viability of many members of the Alliance is marginal and additional regulation represents a tipping point to the viability of many members – putting many members at the risk of going

out of business. Thus, to the extent the "interests" prongs of Federal Rule of Civil Procedure 24 are relevant and helpful, the Alliance clearly meet those requirements.

C. Existing Parties Cannot Adequately Represent the Alliance.

The Petitioners are clearly adverse to the interests of the Alliance. As discussed above, the Petitioners and many other environmental groups have advocated for controls on low production wells and are clearly adverse to the Alliance and will not represent its interests. And while at this point, the EPA's position is not "adverse" to the Alliance in terms of control of existing sources (for the most part), the EPA continues to demonstrate it has very limited information on the operating characteristics and emissions profiles associated with low production wells. The EPA's lack of information and understanding demonstrates it cannot adequately represent the Alliance.

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 the EPA cannot adequately represent the interests of entities such as the Alliance 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, the EPA has demonstrated since 2012 that it does not represent the interests of owners of independent oil and gas companies in the West and, thus, the interests of the Alliance.

For the reasons set forth above, the existing parties cannot adequately represent the Alliance's unique interests in this case.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests leave to intervene as a Respondent.

Respectfully Submitted,

/s/ James D. Elliott

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Counsel for Movant-Intervenor Western Energy Alliance

Dated: January 19, 2021

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RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-INTERVENOR WESTERN ENERGY ALLIANCE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Western Energy Alliance ("Alliance") hereby provides the following information:

1. The Alliance is a non-profit, regional trade association representing 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the western United States. The Alliance advocates regulatory and legislative positions of importance to its members. Its member companies are regulated by the U.S. Environmental Protection Agency.

2. The Alliance has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock.

Respectfully Submitted,

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Dated: January 19, 2021

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CERTIFICATE OF PARTIES OF
MOVANT-INTERVENOR WESTERN ENERGY ALLIANCE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenor Western Energy Alliance ("Alliance") certifies that the parties, including intervenors, and *amici curiae* in this case are as set forth below. Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), a disclosure statement for Movant-Intervenor as required by Federal Rule

of Appellate Procedure 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. 20-1360: Environmental Defense Fund, Center for Biological Diversity, Clean Air Council, Earthworks, Environmental Integrity Project, Food & Water Watch, Ft. Berthold Protectors of Water and Earth Rights, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club.

No. 20-1364: Environmental Law and Policy Center

No. 20-1367: State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; 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.

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

Intervenors: American Petroleum Institute, American Exploration & Production Council, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas

Association, GPA Midstream Association, Illinois Oil & Gas Association, Independent Oil and Gas Association of West Virginia, Inc., Independent Petroleum Association of America, Indiana Oil and Gas Association, International Association of Drilling Contractors, Kansas Independent Oil & Gas Association, Kentucky Oil & Gas Association, Michigan Oil and Gas Association, National Stripper Well Association, Ohio Oil and Gas Association, Pennsylvania Independent Oil & Gas Association, Petroleum Alliance of Oklahoma, Texas Alliance of Energy Producers, Texas Independent Producers & Royalty Owners Association, and West Virginia Oil and Natural Gas Association.

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

Related Cases: The Alliance is not aware of any other related cases.

Respectfully Submitted,

/s/ James D. Elliott

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Counsel for Movant-Intervenor Western Energy Alliance

Dated: January 19, 2021

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 2,595 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.

Respectfully Submitted,

/s/ James D. Elliott

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Counsel for Movant-Intervenor Western Energy Alliance

Dated: January 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of January 2021, 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,

/s/ James D. Elliott
James D. Elliott (DC Bar #46965)