UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR CLEAN ENERGY, *et al.*	)	
Petitioners,	)	
v.	)	No. 16-1005
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*	)	
Respondents.	)	

MOTION OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS FOR LEAVE TO INTERVENE AS A RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, American Fuel & Petrochemical Manufacturers ("AFPM") respectfully requests leave to intervene as a Respondent in this case, No. 16-1005. The petition for review in this case concerns the final rule of the U.S. Environmental Protection Agency ("EPA") entitled "Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017." 80 Fed. Reg. 77,420 (Dec. 14, 2015) (hereinafter, the "RFS Rule"). Petitioners filed their petition for review of the RFS Rule on January 8, 2016.

Pursuant to Federal Rule of Appellate Procedure 15(d), this motion is timely, as it is being filed within 30 days after Petitioners filed their petition for review.

Counsel for AFPM contacted counsel for the parties for their position on the motion. Counsel for Petitioners indicated that Petitioners do not oppose AFPM's intervention. Counsel for Respondents stated that EPA takes no position on the motion.

BACKGROUND

AFPM is a trade association whose members include virtually all U.S. refiners and petrochemical manufacturers. AFPM's members make virtually the entire U.S. supply of gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life. To protect its members' interests, AFPM participates on behalf of its members in Clean Air Act ("CAA") administrative proceedings that affect its members, as well as litigation, like this case, that results from those proceedings. AFPM members are obligated parties under the Renewable Fuel Standard and are directly regulated by the RFS Rule that is the subject of this litigation.

I. The Renewable Fuel Standard Program

EPA promulgated the challenged RFS Rule pursuant to Section 211 of the CAA. *See* 42 U.S.C. § 7545. In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Congress amended Section 211 of the CAA to establish the Renewable Fuel Standard ("RFS") program. Congress expanded the RFS program in 2007. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140,

121 Stat. 1492. Section 211(o) sets annual applicable volume requirements for renewable fuel, advanced biofuel, cellulosic biofuel and biomass-based diesel. *See* 42 U.S.C. §§ 7545(o)(2)(B); 7545(o)(1).

No later than October 31 of each year, the Energy Information Administration ("EIA") must provide EPA with estimates of the "volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States" in the next calendar year. *Id.* § 7545(o)(3)(A). EPA must then determine and publish in the *Federal Register* by November 30 the annual renewable fuel standards for the next calendar year for total renewable fuel, advanced biofuel, cellulosic biofuel and biomass-based diesel. *Id.* § 7545(o)(3)(B)(i). The annual standard for each of these four fuel categories is expressed as a "percentage of transportation fuel sold or introduced into commerce in the United States." *Id.* § 7545(o)(3)(B)(ii)(II).

EPA has authority under the CAA to waive any of the applicable volume requirements for a given calendar year "in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on [her] own motion by reducing the national quantity of renewable fuel required under [42 U.S.C. § 7545(o)(2)]." *Id.* § 7545(o)(7)(A). EPA may do so based on a determination that implementation of the applicable volume requirement(s) "would severely harm the economy or environment of a

State, region, or the United States" or based on a determination that "there is an inadequate domestic supply." *Id.* § 7545(o)(7)(A).

Not only does the CAA authorize EPA to waive applicable volume requirements in any given year, it specifies in a different provision when EPA *must* exercise waiver authority for cellulosic biofuel. The Act states that EPA "shall reduce" the applicable volume of cellulosic biofuel for a given calendar year if "the projected volume of cellulosic biofuel production is less than" the minimum applicable volume established under Section 211(o)(2)(B). *Id.* § 7545(o)(7)(D)(i). In those circumstances, EPA "may also reduce the applicable volume of renewable fuel and advanced biofuels requirements . . . by the same or a lesser volume." *Id.*

AFPM members are obligated parties who must show that they meet a required volume—the annual renewable volume obligation ("RVO")—for each fuel category. *Id.* § 7545(o)(3)(B)(ii)(I); 40 C.F.R. § 80.1406. The RVO is determined by multiplying the volume of non-renewable gasoline and diesel that the obligated party produces or imports in a calendar year by the applicable renewable fuel standard that EPA publishes for that year. 42 U.S.C. § 7545(o)(3)(B)(i); 40 C.F.R. § 80.1407. AFPM members face substantial penalties if they fail to demonstrate compliance with their annual RVOs. *See* 42 U.S.C. §§ 7545(d)(1), 7545(o)(3)(B)(ii); 40 C.F.R. § 1463.

AFPM members demonstrate compliance with their RVOs by retiring, for compliance purposes, a sufficient number of Renewable Identification Numbers ("RINs") to satisfy volumes measured in gallons derived from equations for calculating a party's RVO for each of the four renewable fuels. *See* 40 C.F.R. § 80.1427. RINs are unique numbers "generated to represent a volume of renewable fuel pursuant to [other regulatory provisions that specify the form, generation and assignment of RINs to renewable fuel]." *Id.* § 80.1401. While RINs are generated through the production of renewable fuel, they may be used for compliance or transferred to another party only after being separated from the fuel. Separation of RINs can occur only under defined circumstances, *e.g.*, where renewable fuel is owned by an obligated party, blended into gasoline or diesel or exported. *See* 42 U.S.C. §§ 7545(o)(2)(A)(ii)(II)(cc), 7545(o)(2)(A)(iii)(II)(bb); 40 C.F.R. § 80.1429.

EPA has promulgated regulations to establish an EPA Moderated Transaction System ("EMTS") to account for the production of renewable fuel and the transfer of RINs. 40 C.F.R. § 80.1452. Producers and importers of renewable fuel must submit information to EPA through EMTS to report certain information regarding RINs, including what type of renewable fuel has been produced or imported. *Id*. Parties who sell, buy, separate or retire RINs must also submit information to EPA through EMTS. *Id*.

II. The Challenged RFS Rule

When EPA failed to timely establish the annual renewable fuel standards for 2014 and 2015, AFPM sued EPA to compel compliance with the statutory deadlines for annual RFS rulemakings. *See Am. Fuel & Petrochemical Mfrs., et al. v. EPA*, No. 15-cv-394 (D.D.C). That lawsuit resulted in a consent decree that required EPA to promulgate final standards for calendar years 2014 and 2015 by November 30, 2015. Pursuant to the consent decree, EPA signed the final standards for 2014 and 2015 on November 30, 2015 and published the challenged RFS Rule on December 14, 2015, thereby establishing the annual renewable fuel standards for calendar years 2014 and 2015 in a single rulemaking. EPA's rule also establishes the annual standards for calendar year 2016 and the applicable volume of biomass-based diesel for 2017.

In the RFS Rule, EPA indicated that the annual renewable fuel standards for 2014 are based on actual renewable fuel use during that calendar year, as determined with respect to the number of RINs generated in EMTS, after making certain adjustments for RIN retirements and exports. *See* 80 Fed. Reg. at 77,426. For the 2015 annual renewable fuel standards, EPA stated that it used a combination of actual EMTS data, projections based on this data and "historical trends" in seasonal renewable fuel supply. *See id.* at 77,426-27.

With respect to the 2016 annual renewable fuel standards, EPA stated that the volume of renewable fuel used to set standards for total renewable fuel, 18.11 billion gallons, was based on the agency's "assessment of the maximum volumes that can reasonably be achieved, taking into account both the constraints on supply . . . and our judgment regarding the ability of the standards we set to result in marketplace changes in 2016." *Id* at 77,475. EPA then made the following determinations for the three subcategories of renewable fuel for calendar year 2016:

First, for advanced biofuel, EPA found that the volume of renewable fuel used to set standards for advanced biofuel, 3.61 billion gallons, would "require increases from current levels that are substantial yet attainable, taking into account the constraints on supply . . . our judgment regarding the ability of the standards we set to result in marketplace changes and various uncertainties[.]" *Id.* at 77,479.

Second, for biomass-based diesel, EPA determined that the volumes used to set final standards for 2016 and 2017, 1.90 and 2.0 billion gallons respectively, were based on "the appropriate balance between providing the market environment where the development of other advanced biofuels is incentivized, while also realizing the benefits associated with increasing the required volume of [biomass-based diesel]." *Id.* at 77,496.

Third, for cellulosic biofuel standards, EPA divided potential suppliers of cellulosic biofuel into four groups based on whether they were producing liquid or gaseous fuels and the production history of the facilities involved. *See id.* at 77,507. The agency then used the 25th, 50th and 75th percentile values to determine the projected volumes of cellulosic biofuel in 2016 and based the final requirements for cellulosic biofuel on these values. *See id.*

In determining renewable fuel requirements for 2014-2016, EPA relied on a combination of two waiver provisions in CAA Section 211(o)(7). Using its cellulosic waiver authority contained in CAA section 211(o)(7)(D), EPA waived the volume of total renewable fuel and advanced biofuel by 1.08 billion gallons in 2014, 2.62 billion gallons in 2015 and 3.64 billion gallons in 2016. *See* 42 U.S.C. §7545(o)(7)(D); *see also* 80 Fed. Reg. at 77,439. EPA also used its general waiver authority under CAA section 211(o)(7)(A) to reduce the applicable volume of total renewable fuel by an additional 0.79 billion gallons in 2014, 0.95 billion gallons in 2015 and 0.50 billion gallons in 2016 beyond the amount waived under its cellulosic waiver authority. *See* 42 U.S.C. §7545(o)(7)(A); *see also* 80 Fed. Reg. at 77,439.

AFPM and the American Petroleum Institute ("API") filed extensive comments on the EPA's Notice of Proposed Rulemaking for the RFS Rule. *See* Comment submitted by R. Moskowitz, AFPM & R. Greco, API, Docket ID EPA-

HQ-OAR-2015-0111-1948 (July 27, 2015). AFPM and API commented that EPA should make adjustments to the proposed waiver for total renewable fuel and advanced biofuel for 2016 to account for the "E-10 blendwall"—the inability of consumers to utilize gasoline-ethanol blends containing more than 10% ethanol—and other barriers to the use of renewable fuel. *Id*. at 2, 7-11. Among other comments, AFPM and API also indicated that EPA's proposed cellulosic biofuel volumes for 2016 relied on inaccurate methods for forecasting cellulosic biofuel production. *Id*. at 41-48. AFPM and API further raised objections to EPA's proposed volumes for biomass-based diesel and to EPA's violation of statutory rulemaking deadlines. *Id*. at 12-16, 53-56.

AFPM and API supported some aspects of EPA's proposal. In particular, they commented that EPA reached the correct conclusion concerning the *effect* of the E10 blendwall, namely that it represents a binding constraint on the ability to use ethanol in gasoline. *Id*. at 7. To address the blendwall, AFPM and API recommended that EPA utilize its general waiver authority based on inadequate domestic supply, although AFPM and API argued that EPA should additionally base its general waiver on severe economic harm. *Id*. at 49. AFPM and API also supported EPA's proposed use of its waiver authorities to address the decline in gasoline consumption, the E10 blendwall and other market conditions affecting the supply of transportation fuel. *Id.* at 52. While AFPM and API agreed that EPA

should establish compliance percentages for renewable fuels for 2014 and 2015 at the level EPA proposed (with the exception of biomass-based diesel), AFPM and API recommended lower levels than what EPA proposed for 2016.

ARGUMENT

AFPM has a significant, direct interest in this litigation to protect its members' operations. AFPM members are directly regulated as obligated parties under the RFS Rule, and thus, they have both Article III and prudential standing to intervene in this litigation. AFPM's interests in this case are not adequately represented by the existing parties and may be harmed by a favorable ruling for Petitioners. The Court should grant AFPM's motion for leave to intervene as a respondent in this case because AFPM meets the standard for intervention in petition-for-review proceedings in this Court.

I. Standard for Intervention in Petition for Review Proceedings

Under Federal Rule of Appellate Procedure 15(d), a party moving for intervention must do so "within 30 days after the petition for review is filed" and need only provide a "concise statement of interest . . . and the grounds for intervention." Fed. R. App. 15(d). Although Rule 15(d) does not provide clear criteria for intervention, Federal Rule of Civil Procedure 24(a) and the "policies underlying intervention" in federal district courts provide guidance. *See Int'l Union U.A.W. v. Scofield,* 382 U.S. 205, 216 n.10 (1965).

A party may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) if: (1) the intervention motion is timely, (2) the movant has a cognizable interest in the case, (3) the movant's absence from the case will impair its ability to protect its interests and (4) the movant's interests are inadequately represented by the existing parties. *See Williams & Humbert, Ltd. v. W&H Trade Marks (Jersey)*, 840 F.2d 72, 74 (D.C. Cir. 1988).

This Court has, at times, indicated that Article III standing is a prerequisite to intervention, even by parties seeking to intervene as respondents. *See, e.g.*, *Deutsche Bank Nat. Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998). Nonetheless, this Court has held that "any person who satisfied Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *accord Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). As discussed below, AFPM satisfies the requirements of Federal Rule of Civil Procedure 24(a) and meets any standing test that applies to intervention.

II. AFPM Meets the Criteria for Intervention

A. AFPM's Motion is Timely

When evaluating the timeliness of a motion to intervene, this Court will consider the amount of time that has passed since the filing of the case, the

likelihood of prejudice to the existing parties, the purpose for which intervention is sought and the need for intervention to preserve the proposed intervenor's rights. *See United States v. British Am. Tobacco Australian Servs.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006).

AFPM's motion to intervene is timely. Petitioners filed their petition for review on January 8, 2016, and this motion is being filed within the 30-day time period specified in Federal Rule of Appellate Procedure 15(d). In addition, this case is in its infancy, and the Court has not yet set a schedule for the filing of merits briefs. Thus, granting this motion will not delay the proceedings in this case and will not cause any undue prejudice to the parties.

B. AFPM Has Direct and Significantly Protectable Interests in this Case, and Disposition of the Petition May Impair Its Interests

The second and third criteria for intervention are related, and AFPM thus discusses them together. This court has held that a "significantly protectable" interest is required for intervention, *see S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984), but it has instructed that the interest test is flexible and serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). A party seeking to intervene can demonstrate it has a "legally protectable" interest upon a showing that it stands to "gain or lose by the direct legal operation and effect of the

judgment." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980). With respect to impairment, Federal Rule of Civil Procedure 24(a) requires only that a party seeking intervention be "so situated that disposing of the action *may* as a practical matter impair or impede the movant's ability to protect its interest." AFPM meets both the interest and impairment requirements.

Courts have routinely recognized that when objects of governmental regulation are involved, "there is ordinarily little question that the action or inaction has caused [them] injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (if there is "no doubt" a rule causes injury to a regulated party, standing is "clear"); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (trade association had standing in challenge of EPA regulation where some of its members were subject to the regulation). Here, AFPM's members are obligated parties under the RFS Rule.

In cases involving petitions to review EPA regulations, this Circuit has consistently granted requests by regulated entities to intervene as respondents. *See, e.g.*, *Energy Future Coal. v. EPA*, No. 14-1123 [Doc#1508246] (D.C. Cir. Aug. 19, 2014) (order granting AFPM's and API's motion to intervene on EPA's behalf in a challenge to an EPA fuel regulation under CAA Title II); *Wildearth Guardians v. EPA*, No. 13-1212 [Doc#1453765] (D.C. Cir. Aug. 27, 2013) (order granting trade

associations' motion to intervene on EPA's behalf in a challenge to EPA's denial of a petition for a Clean Air Act rulemaking); *Sierra Club v. EPA*, No. 13-1112 (D.C. Cir. May 20, 2013) (order granting trade association's motion to intervene in a petition to review a Clean Air Act rulemaking governing Portland cement manufacturing); *Waste Mgmt, Inc. v. EPA*, No. 11-1148 [Doc #1330873] (Sept. 21, 2011) (order granting numerous trade associations intervention on behalf of both EPA and Petitioner in a petition to review a Resource Conservation and Recovery Act rule governing non-hazardous secondary materials).

For these reasons, AFPM members also meet the Article III standing requirements[1] in this Circuit. *See, e.g.*, *Roeder*, 333 F.3d at 233; *Fund for Animals, Inc.*, 322 F.3d at 735 (recognizing that the interest requirement under Federal Rule of Civil Procedure 24(a) is met when the proposed intervenor has Article III standing). AFPM members are obligated parties under the RFS Rule that is under review in this case, and they must demonstrate compliance with the requirements

[1] Associations such as AFPM have associational standing to litigate on behalf of their members when: (i) their members would have standing to sue individually; (ii) the interests they seek to protect are germane to their purpose; and (iii) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The interests of AFPM's members will be harmed should Petitioners prevail in their challenge to the RFS Rule. AFPM members thus would have standing to intervene in their own right. Moreover, the interests AFPM seeks to protect are germane to its purposes, and individual member participation is not required because Petitioners are seeking equitable relief, not money damages. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553-54 (1996).

of that Rule. Any changes to the RFS Rule as a result of this litigation, including increases in the annual RVOs, would impose significant additional compliance burdens on AFPM members.

AFPM commented extensively on the challenged RFS Rule, just as it has on every RFS rulemaking since the program's inception. In particular, AFPM's comments explained why EPA should utilize both its general and cellulosic waiver authorities to address several conditions adversely affecting the use of renewable fuel in transportation fuel, including the E10 blendwall and other constraints in the ability to produce or utilize renewable fuel. AFPM's comments further detailed the severe economic consequences and domestic supply issues that could result from EPA's failure to utilize its waiver authorities to lower annual renewable fuel requirements for total renewable fuel, advanced biofuel and cellulosic biofuel and in establishing requirements for biomass-based diesel. The resolution of these and other issues presented by the RFS Rule will directly impact AFPM members' interests, and AFPM's ability to protect those interests will be impaired as a practical matter if it is not allowed to participate in this litigation.

C. The Interests of AFPM are not Adequately Represented by any of the Existing Parties

To the extent inadequate representation is a requirement for intervention under Federal Rule of Appellate Procedure 15(d), AFPM easily meets that requirement. The burden of demonstrating inadequate representation "is not

onerous," and AFPM "need only show that representation of [its] 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)).

Here, none of the existing parties can adequately represent AFPM's interests. Petitioners' interests are directly opposed to those of AFPM. EPA is not directly regulated by the rule and therefore does not share the same interests as AFPM. As a governmental entity "charged by law with representing the public interest of its citizens," EPA must avoid advancing the "narrower interest" of certain businesses "at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93; *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.'"); *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, 322 F.3d at 736). This makes EPA singularly unsuited to represent the interests of AFPM's members in this litigation.

Even if AFPM's interests and EPA's interests were more closely aligned, "that [would] not necessarily mean that adequacy of representation is ensured." *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (concluding that the interests of companies seeking to intervene on EPA's behalf were "concerned primarily with the regulation that affects their industries" and that the companies' "participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense"); *see also Trbovich*, 404 U.S. at 538 & n.10 (finding a prospective intervenor met his "minimal" burden of showing possible inadequate representation of his interests by the government even where a statute expressly obligated the Secretary of Labor to serve his interests). Here, the unique perspectives that AFPM brings to this case will supplement EPA's defense of the RFS Rule and provide an invaluable perspective to the Court in resolving this case.

CONCLUSION

For the reasons stated above, AFPM respectfully requests that the Court enter an order granting AFPM leave to intervene as Respondents.

DATED: January 13, 2016

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, American Fuel & Petrochemical Manufacturers ("AFPM") states that it is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM.

AFPM is a "trade association" within the meaning of Circuit Rule 26.1. AFPM is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its membership.

DATED: January 13, 2016

Respectfully submitted,

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CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), American Fuel & Petrochemical Manufacturers ("AFPM") hereby certifies that the parties in this case are:

Petitioners

Americans for Clean Energy; American Coalition for Ethanol; Biotechnology Innovation Organization; Growth Energy; National Corn Growers Association; National Sorghum Producers; and Renewable Fuels Association.

Respondent

U.S. Environmental Protection Agency ("EPA") and Gina McCarthy, EPA Administrator.

AFPM is unaware that this Court has granted any interventions in this proceeding, and there are no *amici* at this time.

DATED: January 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2016, I caused copies of the foregoing Motion for Leave to Intervene as Respondents to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users, and by first-class mail upon each of the following:

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