ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY,	)	
	)	
***Petitioner*,**	)	
	)	
v.	)	**Case No. 19-1023**
	)	**(consolidated with Nos.**
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al,	)	**19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038, 19-1039)**
	)	
***Respondent*.**	)	
	)	

MOTION OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS FOR LEAVE TO INTERVENE IN SUPPORT OF 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 moves for leave to intervene in the above-captioned consolidated cases[1] in support of Respondents United States Environmental Protection Agency and Administrator Andrew Wheeler (collectively, "EPA"). The petitions for review in this case concern EPA's final rule entitled "Renewable Fuel Standard Program:

[1] AFPM is the petitioner in No. 19-1037.

Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule").

This motion is timely because it is filed within 30 days of Petitioner Growth Energy's filing of its petition for review. Fed. R. App. P. 15(d); Cir. R. 15(b). Counsel for AFPM is authorized to state that Petitioners in the consolidated cases Growth Energy; Monroe Energy, LLC; Small Retailers Coalition; National Biodiesel Board; Valero Energy Corporation; and National Wildlife Federation, Healthy Gulf, and Sierra Club do not oppose this motion; that Petitioners RFS Power Coalition and Producers of Renewables United for Integrity Truth and Transparency take no position on the motion; and that Respondent EPA takes no position on this motion.

BACKGROUND

AFPM is a trade association whose members include virtually all U.S. refining and petrochemical manufacturing capacity. 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 2019 Rule that is the subject of this litigation. The Renewable Fuel Standard is only one of a broad range of government initiatives that seek to displace the use of the petroleum-based fuels they manufacture, all of which adversely impact AFPM members.

I. The Renewable Fuel Standard Program

EPA promulgated the 2019 Rule pursuant to section 211(o) of the CAA. *See* 42 U.S.C. § 7545(o). 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)(1), (o)(2)(B).

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 his 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)(i), (ii).

Not only does the CAA authorize EPA to waive applicable volume requirements in any given year, it also 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—for each fuel category. *Id.* § 7545(o)(3)(B)(ii)(I); 40 C.F.R. § 80.1406. The renewable volume obligation 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 renewable volume obligations. *See* 42 U.S.C. § 7545(d)(1), (o)(3)(B)(ii); 40 C.F.R. § 80.1463.

AFPM members demonstrate compliance with their renewable volume obligations 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 renewable volume obligations 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), (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 Rule

The 2019 Rule sets the annual percentage standards for the renewable fuel standard program for 2019 and the applicable volume for biomass-based diesel for 2020. The renewable volume obligations that AFPM's members must meet, and accordingly the number of RINs AFPM's member companies must either generate or acquire, are determined by application of those percentage standards.

In promulgating the final 2019 Rule and its annual percentage standards, EPA exercised only its cellulosic waiver authority to reduce the required volumes of total renewable fuel, advanced biofuel, and cellulosic biofuel. 83 Fed. Reg. at 63,708. In taking this action, EPA recognized significant shortfalls in the projected production of cellulosic biofuels compared to the statutory volumes, determined

"attainable" volumes for advanced biofuels, and applied approximately the same reductions in the volumes for advanced biofuel and total renewable fuel as it did for cellulosic biofuel. 83 Fed. Reg. at 63,710-731. EPA also established the applicable volume for 2020 for biomass-based diesel after considering separate statutory criteria in section 211(o)(2)(B)(ii)(I)-(VI). *Id*. at 63,734-39.

AFPM submitted comments[2] on the proposed 2019 Rule that, among other things, supported EPA's exercise of the cellulosic waiver authority and encouraged EPA to also use its general waiver authority. *See*, *e.g.*, AFPM Comments 24-27. AFPM expects that one or more Petitioners will challenge EPA's exercise of its waiver authority in setting volumes for some or all renewable fuels in 2019 as well as other aspects of EPA's implementation of the RFS in 2019 and 2020, and for this reason AFPM seeks to intervene in support of EPA.

ARGUMENT

AFPM has a significant, direct interest in this litigation to protect its members' operations; indeed, AFPM has filed a petition for review of the 2019 Rule to protect its interests. AFPM members are directly regulated as obligated parties under the 2019 Rule, and thus, they have standing to intervene in this

[2] *See* Comments of the American Fuel & Petrochemical Manufacturers on EPA's Proposal for the 2019 RFS and Biomass-based Diesel Volume for 2020 (Aug. 17, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0672 ("AFPM Comments").

litigation. AFPM's interests in this case are not adequately represented by the existing parties and may be harmed by a favorable ruling for one or more 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. Petition for Review Intervention Standard

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 satisfies 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.

Under the current RFS regulations, refiners and importers are "obligated parties" required to demonstrate compliance with the applicable volume requirements. Compliance is demonstrated by retiring RINs, which are used to demonstrate that required volumes of renewable fuel have been blended into transportation fuel sold or introduced into commerce in the United States. AFPM's members are obligated parties and face significant penalties unless they can demonstrate that the requisite amount of renewable fuel has been blended into transportation fuel sold in the United States through the retirement of RINs.

As a result, AFPM members would be adversely affected if this Court set aside EPA's use of its statutory waiver authorities, which reduced the applicable volume requirements for 2019 below the volume requirements set forth in the Clean Air Act. Accordingly, the Court should grant AFPM's motion to intervene.

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. Petitioner Growth Energy filed its petition for review on February 4, 2019, and all other Petitioners filed within one week of that filing; as such this motion is being filed within the 30-day time period specified in Federal Rule of Appellate Procedure 15(d). Petitioners' petitions were consolidated shortly thereafter, with all petitions consolidated by February 13, 2019 (see Clerk's Orders 1772394, 1772937, 1773284, 1773294). The consolidated petitions are therefore in their 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 petitions may impair its interests.[3]

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) (citation omitted), 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) (citation omitted). 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,

[3] The second and third criteria for intervention are related, thus AFPM discusses them together.

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 2019 Rule, and thus objects of the very governmental regulation at issue.

In cases involving petitions for review of 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 motion to intervene on EPA's behalf in a challenge to an EPA fuel regulation under CAA Title II); *Sierra Club v. EPA*, No. 13-1112 (Doc.# 1436907) (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); *Coffeyville Resources Refining & Mktg., LLC et al. v. EPA*, No. 17-1044 (Doc# 1706266) (D.C. Cir. Nov. 28, 2017) (order granting AFPM's and others' intervention with respect to the 2017 RFS rule), *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258 (Doc.# 1725309) (D.C. Cir. Apr. 5, 2018) (order granting AFPM and others' intervention with respect to the 2018 RFS rule).

For these reasons, AFPM members also meet the Article III standing requirements in this Circuit.[4] *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 2019 Rule that is under review in this case, and they must demonstrate compliance with the requirements of that Rule. Any changes to the 2019 Rule as a result of this litigation, including increases in the annual renewable volume obligations, would impose significant additional compliance burdens on AFPM members.

AFPM commented extensively on the 2019 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

[4] 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. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The interests of AFPM's members will be harmed should Petitioner prevail in their challenge to the 2019 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 Petitioner is seeking equitable relief, not money damages. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553-54 (1996).

transportation fuel, including the E10 blendwall[5] and other constraints on 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 2019 Rule, including anticipated challenges concerning procedural compliance with the Clean Air Act, 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 existing party.

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)).

[5] The "E10 blendwall" is a limitation on ethanol demand caused by infrastructure and vehicle incompatibility with midlevel ethanol blends.

Here, none of the existing parties can adequately represent AFPM's interests. We expect one or more Petitioners to challenge EPA's exercise of its waiver authority to reduce cellulosic biofuel volumes by 8,082 million gallons and advanced biofuel and total renewable fuel volumes each by 8,080 million gallons. *See* 83 Fed. Reg. at 63,705. Those 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) ("[T]he 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." (internal quotation marks and citation omitted)); *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 2019 Rule and provide an invaluable perspective to the Court in resolving this case.

CONCLUSION

Because AFPM satisfies the requirements for intervention, AFPM respectfully requests that the Court grant AFPM leave to intervene in support of Respondent EPA.

DATED: March 1, 2019

Respectfully submitted,

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GROWTH ENERGY, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al, *Respondent*.	)	Case No. 19-1023 (consolidated with Nos. 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038, 19-1039)

RULE 26.1 DISCLOSURE STATEMENT OF
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner 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(b). AFPM is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its membership.

Respectfully submitted,

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Dated: March 1, 2019

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,536 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

/s/ Robert J. Meyers
Robert J. Meyers

DATED: March 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Meyers
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