IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, ADMINISTRATOR Respondents.	Case No. 19-1023 (and consolidated cases)

MOTION OF GROWTH ENERGY TO INTERVENE IN SUPPORT OF RESPONDENTS

On February 4, 2019, Growth Energy petitioned the Court for review of the Environmental Protection Agency's *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule"). Subsequently, other petitions for review of the 2019 Rule were filed, and the Court consolidated them with Growth Energy's petition. *See* Order, *Growth Energy v. EPA*, No. 19-1023, ECF #1772394 (D.C. Cir. Feb. 7, 2019) (consolidating cases); Order, ECF #1772937 (D.C. Cir. Feb. 12, 2019) (same); Oder, ECF #1773278 (D.C. Cir. Feb. 13, 2019) (same); Order, ECF #1773284 (D.C. Cir. Feb. 13, 2019) (same); Order, ECF #1773294 (D.C. Cir. Feb. 13, 2019) (same).

Growth Energy expects other petitioners to raise issues that could adversely affect its interests. For example, Growth Energy anticipates that some petitioners will challenge the 2019 Rule on the ground that EPA set the cellulosic biofuel standard too high or that, in setting the total volume requirement, EPA overstated the volume of ethanol-based transportation fuel that could be distributed and consumed. Accordingly, Growth Energy respectfully seeks to intervene in these consolidated cases in support of respondents to protect Growth Energy's interests.

National Biodiesel Board and Monroe Energy, LLC consent to this motion. Valero Energy Corporation and National Wildlife Federation, Healthy Gulf, and Sierra Club do not object to this motion. American Fuel & Petrochemical Manufacturers, RFS Power Coalition, EPA, Producers of Renewables United for Integrity Truth and Transparency, and Small Retailers Coalition take no position at this time on the motion.

BACKGROUND

A. "[T]he Renewable Fuel Program requires that increasing volumes of renewable fuel be introduced into the Nation's supply of transportation fuel each year. Congress enacted those requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels." *Americans for Clean Energy v. EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) ("*ACE*") (quotation marks omitted). The required volumes are

specified according to four "nested" categories: cellulosic biofuel, which includes cellulosic ethanol (derived from corn); biomass-based diesel ("BBD"); advanced biofuel, which contains cellulosic biofuel, BBD, and other advanced biofuels; and total renewable fuel, which contains advanced biofuel and conventional corn-starch ethanol. 42 U.S.C. § 7545(*o*)(2)(A)(i), (B)(i); *Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018*, 81 Fed. Reg. 89,746, 89,750-89,751 (Dec. 12, 2016). For each category, the obligation is expressed as a percentage (roughly) reflecting the required volume divided by the projected nationwide transportation-fuel consumption for a given year. *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 148 (D.C. Cir. 2010) ("*NPRA*"); § 7545(*o*)(3)(B)(ii)(II); *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486, 58,491 (Dec. 12, 2017).

Congress provided EPA with the authority to "reduc[e]" the statutory volume requirements, but only "in limited circumstances" specified in the statute's waiver provisions. § 7545(*o*)(7)(A), (D); *NPRA*, 630 F.3d at 158. For any given calendar year, EPA has the specific power to reduce the applicable cellulosic volume requirement to the "projected volume of cellulosic biofuel production." § 7545(*o*)(7)(D)(i). If EPA exercises that waiver power, it may flow the waiver through the nested standards, i.e., reduce the advanced and total volume

requirements, "'by the same or a lesser volume.'" *ACE*, 864 F.3d at 731. EPA also has a general waiver authority, whereby it may reduce any volume requirement "in whole or in part" if "there is an inadequate domestic supply" of renewable fuel or if "implementation of the requirement would severely harm the economy or environment." § 7545(*o*)(7)(A). "[F]or purposes of examining whether the supply of renewable fuel is adequate, the 'inadequate domestic supply' provision authorizes EPA to consider only supply-side factors—such as production and import capacity—affecting the available supply of renewable fuel …, not … demand-side factors affecting the demand for renewable fuel." *ACE*, 864 F.3d at 710.

B. In November 2018, EPA finalized the 2019 percentage standards. Invoking its cellulosic-waiver authority, EPA reduced the required cellulosic biofuel volume from 8.5 billion gallons to 381 million gallons. 2019 Rule at 63,705 & n.6. EPA then flowed its cellulosic waiver through, reducing the advanced volume requirement from 13.0 billion gallons to 4.88 billion gallons, and reducing the total volume requirement from 28.0 billion gallons to 19.88 billion gallons. *Id.*; *see* § 7545(*o*)(2)(B). EPA did not invoke its general waiver authority to further reduce the volume requirements for 2019. 2019 Rule at 63,708.

Given the arguments that certain petitioners have raised in the rulemaking for the 2019 Rule, it is expected that they will argue in this case that EPA set the

standard for cellulosic biofuel too high and that in setting the total volume requirement, EPA overstated the volume of ethanol-based transportation fuel that could be distributed and consumed. It is also expected that they will argue that EPA erred in declining to reconsider the "point of obligation," i.e., the 2010 rule that defines the categories of actors in the renewable-fuel value chain that are obligated to comply with the percentage standards, and in not consulting with certain other government agencies in setting the percentage standards that implement the Renewable Fuel Standard ("RFS"). A ruling in favor of petitioners on these issues would adversely affect Growth Energy's interests.

ARGUMENT

Growth Energy seeks to intervene in these consolidated cases to protect its substantial interests in EPA's implementation of the 2019 Rule.[1]

I. Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b) establish procedural requirements for intervention on appeal, but not substantive ones.[2] Rather, this Court has "held that intervention in the court of appeals is

[1] *See* D.C. Cir. R. 15(b) ("A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.").

[2] This motion satisfies those procedural requirements. The motion is timely, it is being served on all parties to the consolidated cases, and the discussion in text constitutes "a concise statement of [Growth Energy's] interest … and the grounds for intervention." Fed. R. App. P. 15(d).

governed by the same standards as in the district court." *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (emphasis omitted). A party has a right to intervene under Federal Rule of Civil Procedure 24(a) if it "claims an interest relating to the … transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *see also Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013). Growth Energy satisfies this standard.[3]

A. EPA has already acknowledged that among the "[e]ntities potentially affected by this final rule are those involved with the production, distribution, and sale of … renewable fuels such as ethanol." 2019 Rule at 63,704. That includes Growth Energy, directly and through its members.

Growth Energy is a national trade association dedicated to promoting the commercial production and use of renewable fuels that are the subject of the RFS volume requirements, particularly conventional and cellulosic ethanol. Growth Energy's membership includes producers of conventional and cellulosic ethanol.

[3] A fortiori, Growth Energy satisfies the standard for permissive intervention under Rule 24(b), which requires only a showing that the proposed intervenor has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Growth Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020 (Aug. 17, 2018) (EPA-HQ-OAR-2018-0167-1292); 2019 Rule at 63,714 (Table III.B.4-1); Growth Energy, *Our Members*, https://growthenergy.org/members/. Because the percentage standards in effect mandate the national level of demand for renewable fuels, *see ACE*, 864 F.3d at 705; *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 917 (D.C. Cir. 2014), any reduction in the final 2019 percentage standards resulting from this litigation would consequently reduce demand for the products that Growth Energy's members develop and sell, harming their businesses and their substantial investments in facilities, materials, and technologies used in the production of renewable fuel. Further, those harms could recur and be compounded in the future because of EPA's obligation to issue percentage standards annually; Growth Energy may have no other means or opportunity to undo such harms. *See* 42 U.S.C. § 7607(b)(1).

In light of these interests, Growth Energy has actively participated in several prior actions in this Court involving challenges to EPA's RFS regulations, including rules setting percentage standards in prior years. Growth Energy is a founding member of Americans for Clean Energy, Inc., the lead petitioner in *ACE*, and it participated as petitioner in its own right in that case. It has also intervened in many other RFS cases. *See, e.g.*, Order, *American Fuel & Petrochemical Mfrs.*

v. EPA, No. 17-1258, ECF #1725309 (D.C. Cir. Apr. 5, 2018) (granting Growth Energy's motion to intervene); Order, *Alon Refining Krotz Springs, Inc. v. EPA*, No. 16-1052, ECF #1722824 (Mar. 19, 2018) (same); Order, *Coffeyville Resources Refining & Marketing v. EPA*, No. 17-1044, ECF #1706266 (D.C. Cir. Nov. 28, 2017) (same); Order, *Americans for Clean Energy v. EPA*, No. 16-1005, ECF #1611965 (D.C. Cir. May 5, 2016) (same); Order, *Monroe Energy, LLC v. EPA*, No. 13-1265, ECF #1468501 (D.C. Cir. Dec. 2, 2013) (same).

B. Growth Energy's interests would not be adequately represented by another party in this case. The requirement that there be no adequate representative is "'low,'" and precludes intervention only if "'it is clear that the party will provide adequate representation.'" *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Although Growth Energy would intervene in support of EPA, EPA—as a government agency—cannot adequately represent the specific interests of private commercial enterprises. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-737 (D.C. Cir. 2003); *Crossroads*, 788 F.3d at 321; *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-913 (D.C. Cir. 1977). In fact, EPA's defense of its 2019 Rule here could be in tension with the defense that Growth Energy would advance in some respects. *See Crossroads*, 788 F.3d at 321 (agency did not adequately represent private party even though there was "general alignment" between their positions). Only a

private entity such as Growth Energy could adequately represent the ethanol industry in this case.

II. This Court has also occasionally suggested that a proposed intervenor must establish Article III standing (even where the proposed intervention is in support of respondents). *Deutsche Bank*, 717 F.3d at 193. Even if that requirement applies here, it would be satisfied. An association has Article III standing to sue 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." *Military Toxics Project v. EPA*, 146 F.3d 948, 953-954 (D.C. Cir. 1998). And to have standing in its own right, an association member must show "injury-in-fact, causation, and redressability." *Deutsche Bank*, 717 F.3d at 193.[4]

For the same reasons that Growth Energy has a substantial interest that could be affected adversely by this litigation, some of its members will suffer a cognizable injury-in-fact if the 2019 Rule is set aside on any ground that would result in reduced volume requirements. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("any person who satisfies Rule 24(a) will also

[4] It suffices for a single member of Growth Energy to have standing. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); *Military Toxics Project*, 146 F.3d at 954.

meet Article III's standing requirement"). For example, lowering the volume requirements could cause a reduction in domestic demand for renewable fuels, including corn ethanol. That would clearly hurt Growth Energy members' bottom lines and impair the future value of their businesses and investments. *See Crossroads*, 788 F.3d at 317 ("Our cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit."); *cf. Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) ("economic actors suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them" (quotation marks omitted)). This injury could be redressed simply by not lowering the volume requirements.

Moreover, the interests that Growth Energy seeks to protect in this litigation are germane—indeed, vital—to its purposes and membership, and the validity of the relevant determinations reflected in the 2019 Rule can be adjudicated without the participation of any of its individual members.

CONCLUSION

For the foregoing reasons, the Court should grant Growth Energy's motion to intervene.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
DAVID M. LEHN
SAURABH SANGHVI
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com
david.lehn@wilmerhale.com
saraubh.sanghvi@wilmerhale.com
claire.chung@wilmerhale.com

Counsel for Growth Energy

March 11, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Growth Energy states that it is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
DAVID M. LEHN
SAURABH SANGHVI
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com
david.lehn@wilmerhale.com
saraubh.sanghvi@wilmerhale.com
claire.chung@wilmerhale.com

Counsel for Growth Energy

March 11, 2019

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 27(a)(4), Growth Energy certifies that the parties in these consolidated cases are:

Petitioners: Growth Energy; RFS Power Coalition; Monroe Energy, LLC; Small Retailers Coalition; National Biodiesel Board; Producers of Renewables United for Integrity Truth and Transparency; American Fuel & Petrochemical Manufacturers; Valero Energy Corporation; National Wildlife Federation, Healthy Gulf, and Sierra Club.

Respondents: United States Environmental Protection Agency; Andrew Wheeler, Administrator.

Movant-Intervenors: American Fuel & Petrochemical Manufacturers and Monroe Energy, LLC have moved for leave to intervene. Those motions are pending.

Amici curiae: None.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
DAVID M. LEHN
SAURABH SANGHVI
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com
david.lehn@wilmerhale.com
saraubh.sanghvi@wilmerhale.com
claire.chung@wilmerhale.com

Counsel for Growth Energy

March 11, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,195 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Seth P. Waxman
Seth P. Waxman

CERTIFICATE OF SERVICE

I certify that on March 11, 2019, I filed the foregoing using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman
Seth P. Waxman