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

GROWTH ENERGY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	)	No. 19-1023 (and consolidated cases)

MOTION OF AMERICAN PETROLEUM INSTITUTE
FOR LEAVE TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), American Petroleum Institute ("API") respectfully moves for leave to intervene in the above-captioned cases,[1] as well as "all [other] cases before this court involving the same agency action or order, including later filed cases," Circuit Rule 15(b). These cases concern a final rule of the Environmental Protection Agency (EPA) entitled "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018), to be codified at 40 C.F.R. Part 80 ("*2019 Final Rule*").

[1] The above-captioned cases include Nos. 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038, 19-1039.

Petitioner in the lead case, No. 19-1023, filed its petition for review of the *2019 Final Rule* on February 4, 2019. *See* Doc. No. 1772386. Additional petitions for review were filed on February 6, 2019, *see* Doc. No. 1772379, February 8, 2019, *see* Doc. Nos. 1772902, 1772922, 1772932, February 9, *see* Doc. No. 1773270, and February 11, *see* Doc. Nos. 1773288, 1773274, 1773280. The later-filed cases were consolidated with the lead case by orders dated February 7, 2019, *see* Doc. No. 1772394, February 12, 2019, *see* Doc. No. 1772937, and February 13, 2019, *see* Doc. Nos. 1773278, 1773284, 1773294.

This motion is timely because it is filed within 30 days of the petitions for review in Nos. 19-1037, 19-1038, and 19-1039. *See* Fed. R. App. P. 15(d); Circuit Rule 15(b). Counsel for API is authorized to state that Petitioners in Nos. 19-1023 (Growth Energy), 19-1033 (Small Retailers Coalition), 19-1035 (National Biodiesel Board), 19-1037 (American Fuel & Petrochemical Manufacturers), and 19-1039 (National Wildlife Federation et al.) do not oppose this motion. Respondents EPA and Administrator Andrew Wheeler, as well as Petitioners in Nos. 19-1027 (RFS Power Coalition), 19-1032 (Monroe Energy, LLC), 19-1036 (Producers of Renewables United for Integrity, Truth, and Transparency), and 19-1038 (Valero Energy Corporation), take no position on this motion.

SUMMARY OF ARGUMENT

API is a national trade association that represents a broad range of petroleum producers, including many companies that are obligated parties under EPA's Renewable Fuel Standard ("RFS") program. The *2019 Final Rule* at issue in these cases establishes the RFS program compliance duties of obligated parties for 2019 (and for 2020 with respect to biomass-based diesel), including how much renewable fuel obligated parties must blend or how many compliance credits they must purchase. Many of API's member companies are obligated parties under the RFS program, and therefore have a direct and substantial financial stake in the provisions of the *2019 Final Rule* and the disposition of these cases. *See* Am. Petroleum Institute, Members, http://www.api.org/membership/members (last visited Mar. 12, 2019). That interest is sufficient to meet the requirements for intervention under Federal Rule of Appellate Procedure 15(d) and this Court's precedent. API was an active participant in the rulemaking proceeding before EPA, and it has been a party in prior cases before this Court litigating aspects of EPA's rules for the RFS program. *See, e.g.*, *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017); *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014); *API. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

BACKGROUND

1. *API and the RFS Program.* API is a national trade organization that represents all aspects of America's oil and gas industry. API's more than 625 corporate members, ranging from the largest major oil company to the smallest independents, represent all segments of the industry. API's members include producers, refiners, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API regularly represents its members in judicial, legislative, and administrative forums, including in proceedings regarding implementation of the Clean Air Act.

This suit concerns one aspect of the Act's regulatory regime: the RFS program, which is designed to regulate the quantity of renewable fuels used in transportation fuels in the United States. Congress established the RFS program in 2005, *see* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, and expanded the program in 2007, *see* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 142. As amended, the Act imposes annual volume requirements for four different categories of renewable fuel: renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel. *See* 42 U.S.C. § 7545(*o*)(2)(B).[2]

[2] These categories are "nested": biomass-based diesel and cellulosic biofuel are types of advanced biofuel, and advanced biofuel is a type of renewable fuel.

The RFS program's statutory volume requirements are not self-executing. Instead, EPA must "determine and publish" annual regulations that "ensur[e]" (subject to waiver provisions) that the statutory volume requirements are met with respect to renewable fuel, advanced biofuel, and cellulosic biofuel. *Id.* § 7545(*o*)(3)(B). As to biomass-based diesel, EPA must determine an annual volume requirement based on six factors set forth in the Act. *See id.* § 7545(*o*)(2)(B)(ii). Together, these regulations establish annual standards, expressed as a "percentage of transportation fuel sold or introduced into commerce in the United States," *id.* § 7545(*o*)(3)(B)(ii)(II), that each obligated party must satisfy.

The Act requires producers, refiners, and importers of non-renewable fuels—including API's member companies—to meet the annual requirements established by the EPA. Specifically, obligated parties must comply with Renewable Volume Obligations ("RVOs") for each of the four renewable-fuel categories each year. These RVOs are computed by multiplying the volume of non-renewable gasoline and diesel an obligated party produces or imports in a calendar year by the applicable percentage standards established by EPA for that year. *See* 42 U.S.C. § 7545(*o*)(3)(B)(i).[3]

[3] For example, if the standard for advanced biofuel was one percent in a given year and an obligated party produced 1 billion gallons of non-renewable gasoline in that year, the party's advanced biofuel RVO for the year would be 10 million gallons.

EPA has established a compliance mechanism for the RFS program based on Renewable Identification Numbers ("RINs"). In brief, companies that produce renewable fuel generate unique RINs that may be bought and sold. Obligated parties are required to "retire" a number of RINs in proportion to their RVOs. They may acquire RINs by producing their own renewable fuels, or by acquiring RINs from other parties, such as companies that specialize in the production of renewable fuels, on the open market. If an obligated party fails to demonstrate compliance with its RFS obligations for a given year, it may face substantial daily penalties. *See* 42 U.S.C. § 7545(d)(1); 40 C.F.R. § 80.1463.

The Act also includes waiver provisions that EPA may (and, in some instances, must) use to tailor the volume requirements to conditions in the marketplace. *See* 42 U.S.C. § 7545(*o*)(7). Under the Act's "general" waiver provision, EPA may waive the statutory volume requirements "in whole or in part . . . based on a determination by the Administrator" that (i) "implementation of the [statutory] requirement would severely harm the economy or environment of a State, a region, or the United States" or (ii) "there is an inadequate domestic supply." *Id.* § 7545(*o*)(7)(A)(i)–(ii). Under the Act's "cellulosic biofuel" waiver provision, "the Administrator *shall* reduce the applicable volume of cellulosic biofuel" in a given year "to the projected volume" of cellulosic biofuel production for that year if the projected production level "is less than the minimum

[statutory] volume." *Id.* § 7545(*o*)(7)(D)(i) (emphasis added). The Act further provides that, when the Administrator exercises his cellulosic-biofuel waiver authority, he "may also reduce the applicable volume[s] of renewable fuel and advanced biofuels . . . by the same or a lesser volume." *Id.*

2. *The 2019 Final Rule.* The *2019 Final Rule* at issue in these consolidated cases sets the annual percentage standards for the RFS program for 2019, as well as the applicable volume for biomass-based diesel in 2020. *See* 83 Fed. Reg. at 63,705. These standards in turn define the RVOs that API's member companies must meet for those years—i.e., the number of RINs the companies must generate on their own or purchase from third parties.

API participated in the administrative proceedings that culminated in publication of the *2019 Final Rule* by filing written comments.[4]

API's comments supported some aspects of EPA's proposed rule. As relevant here, the comments supported EPA's exercise of its cellulosic-biofuel waiver authority and its decision to maintain the full amount of RINs that have been "banked" for future use. *See* API Comments at 3.

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[4] *See* Comments of the American Petroleum Institute, *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel for 2020*, Docket ID No. EPA–HQ–OAR–2018–0167 (Aug. 17, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0620 ("API Comments").

API's comments also criticized several aspects of EPA's proposed rule. The comments explained that the proposed rule "errs to the side of overestimating production" and that EPA should "improve on its ability to project cellulosic biofuel availability by reviewing actual outcomes of the prior year and striving to reduce its error rate." *Id.* at 4. The comments further argued that EPA should exercise its "general waiver authority to reduce the volume requirements based on the severe economic harm rationale." *Id.* at 3.

More broadly, API regularly participates in proceedings concerning the RFS program and has litigated several suits in this Court concerning annual volume requirements established by EPA. *See, e.g.*, *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017); *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014); *API. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

ARGUMENT

The motion should be granted for two principal reasons. *First*, the motion is timely filed and meets all the other requirements of Federal Rule of Appellate Procedure 15(d). *Second*, API has associational standing with respect to the *2019 Final Rule* and therefore satisfies the additional requirements for intervention established by this Court's precedent.

1. Rule 15(d) provides a minimal set of criteria for intervention. It provides that

> Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—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.

This motion satisfies Rule 15(d)'s criteria. API is a "person" as defined in the Act, *see* 42 U.S.C. § 7602(e), and therefore is entitled to seek intervention. The Act does not provide "another method" for intervention, and this motion has been duly filed with the Circuit clerk and served on all parties. Further, the motion is timely because it is filed within 30 days of the petitions for review in Nos. 19-1037, 19-1038, and 19-1039. *See* Circuit Rule 15(b).

As to API's interest and the grounds for intervention, the analysis is straightforward. Many of API's member companies are obligated parties under the RFS program.[5] As obligated parties, these companies have a direct and substantial

[5] *See* Am. Petroleum Institute, Members, http://www.api.org/membership/members (last visited Mar. 12, 2019) (identifying refiners and importers, such as BP America, ExxonMobil, Marathon Oil Company, and Shell Oil Company, as API members); Comments of ExxonMobil Corp., https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-1271 (Aug. 17, 2018) (indicating that "ExxonMobil is an 'obligated party'" whose "operations are affected by the RFS program implementation"); Comments of Marathon Petroleum Corporation, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0617 (Aug. 17, 2018) (indicating that Marathon is "an obligated

financial stake in the content of the volume requirements set in the *2019 Final Rule*. Any increase or decrease in those requirements—and any change in the point of obligation—would translate directly into a change in the quantity of renewable fuel (or RINs) that API's member companies must produce or purchase. *See Monroe Energy*, 740 F.3d at 915 ("The more rigorous the fuel standards, the more RINs [obligated parties] will have to purchase."). API members thus have a strong interest in ensuring that EPA's 2019 percentage standards and 2020 biomass-based diesel volume requirement comply with the Act and reflect an accurate assessment of market conditions.

This Court has consistently granted regulated parties' motions to intervene in similar situations. *See, e.g.*, Order, *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258, Doc. No. 1725309, at 1 (D.C. Cir. Apr. 5, 2018) (granting API motion for leave to intervene in challenges to RFS 2018 final rule); Order, *Coffeyville Resources Refining & Marketing LLC v. EPA*, No. 17-1044, Doc. No. 17062266 (D.C. Cir. Nov. 28, 2017) (granting API motion for leave to intervene in challenges to RFS 2017 final rule); Order, *Americans for Clean Energy et al. v. EPA*, No. 16-1005, Doc. No. 1611965 (D.C. Cir. May 5, 2016) (granting API motion for leave to intervene in challenges to RFS 2014-2016 final rule).

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party under the RFS program").

To the extent the considerations in Federal Rule of Civil Procedure 24(a) inform the Court's analysis, *see Int'l Union, U.A.W. v. Scofield*, 382 U.S. 205, 216 n.10 (1965), API meets the requirements for intervention of right because it "claims an interest relating to the . . . [rulemaking] 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 [API's] ability to protect its interest," Fed. R. Civ. P. 24(a); *see also United States v. Am. Telephone & Telegraph Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (party entitled to intervention where it stands to "gain or lose by the direct legal operation and effect of the judgment" (quotation marks omitted)). The exception for instances in which the "existing parties adequately represent" the movant's "interest," Fed. R. Civ. P. 24(a)(2), is inapplicable here because many of API's member companies are not represented by any other party to this case.[6] In any event, the interests outlined above establish that API also meets the lower threshold for permissive intervention. *See* Fed. R. App. P. 24(b) (permitting intervention where party "has a claim or defense that shares with the main action a common question of law or fact").

[6] EPA cannot adequately represent the private-sector interests of API and its member companies. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003).

2. This Court has held that "[a]n intervenor must . . . satisfy the requirements of Article III standing imposed on petitioners." *Ala. Mun. Distribs. Grp. v. FERC*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002). The "irreducible constitutional minimum" for standing is (i) a concrete injury (ii) that is fairly traceable to the challenged conduct and (iii) that will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). A trade association such as API meets these criteria 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." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

This Court has already applied these criteria in the context of the RFS program. It held in *Monroe Energy* that an obligated party has Article III standing where it "is contesting its own compliance obligations under the RFS program as implemented in [an EPA] Final Rule." 750 F.3d at 915. "Because the financial burden of purchasing RINs is a cognizable injury-in-fact, and it is fairly traceable to the [annual] fuel standards and remediable by vacatur of the Final Rule,"

obligated parties have standing to litigate petitions for review of EPA's annual percent standards. *Id.*[7]

API's member companies have standing under *Monroe Energy* because their compliance obligations will rise or fall with the fate of the *2019 Final Rule*. If the *2019 Final Rule* is vacated or remanded, API's member companies will face uncertainty regarding their RVOs and may ultimately incur substantially greater compliance costs. Conversely, if the petitions for review are denied, the Court's ruling will confirm the extent of obligated parties' regulatory obligations for 2019 (and, for biomass-based diesel, 2020) under the *2019 Final Rule*. Either way, API's members would have standing to sue in their own right, litigation of this suit is germane to API's purpose as a trade association, and participation by individual member companies is unnecessary given the equitable relief requested by Petitioners. *Cf. Am. Petroleum Inst. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013) (successful API challenge to EPA's cellulosic-biofuels requirement for 2012). That is all *Hunt* and this Court's cases require.

CONCLUSION

For the foregoing reasons, API's motion for leave to intervene should be granted. Pursuant to Circuit Rule 15(b), the Court should also grant API

[7] Indeed, because API's member companies are the "object of the action" taken by EPA in the *2019 Final Rule*, their standing is "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (citation and quotation marks omitted).

intervention in "all cases before this court involving the same agency action or order, including later filed cases."

Respectfully submitted,

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March 13, 2019

IN THE UNITED STATES COURT OF APPEALS
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GROWTH ENERGY, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	)	No. 19-1023 (and consolidated cases)

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(1)(4) and 28(a)(1)(A), Movant-Intervenor American Petroleum Institute ("API") states that the parties in the lead case, No. 19-1023, are Petitioner Growth Energy, Respondents U.S. Environmental Protection Agency ("EPA") and Andrew Wheeler, EPA Administrator, and Movant-Intervenor American Fuel & Petrochemical Manufacturers. The parties in the remaining cases are as follows:

- No. 19-1027: Petitioner RFS Power Coalition and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1032: Petitioner Monroe Energy, LLC and Respondents EPA and Andrew Wheeler, EPA Administrator;

- No. 19-1033: Petitioner Small Retailers Coalition and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1035: Petitioner National Biodiesel Board and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1036: Petitioner Producers of Renewables United for Integrity Truth and Transparency and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1037: Petitioner American Fuel & Petrochemical Manufacturers and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1038: Petitioner Valero Energy Corporation and Respondents EPA and Andrew Wheeler, EPA Administrator;
- No. 19-1039: Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club, and Respondents EPA and Andrew Wheeler, EPA Administrator.

There are no amici at this time.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner American Petroleum Institute ("API") states as follows:

API is a nationwide, not-for-profit association representing over 625 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products.

API has no parent companies, and no publicly-held company has a ten percent or greater ownership interest in API. API is a "trade association" within the meaning of Circuit Rule 26.1. API is a continuing association operating for the

purpose of promoting the general commercial, regulatory, legislative, and other interests of its membership.

Respectfully submitted,

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March 13, 2019

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,871 words, excluding the portions of the Motion (and associated certificates, etc.) exempted by Rule 27(a)(2)(B). This motion complies with the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font.

_/s/ Robert A. Long, Jr._____
Robert A. Long, Jr.

CERTIFICATE OF SERVICE

I certify that on this 13th day of March 2019, I caused the foregoing motion (and supporting papers) to be electronically filed with the Clerk of the U.S. Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

_/s/ Robert A. Long, Jr.__
Robert A. Long, Jr.