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

RENEWABLE FUELS ASSOCIATION, AMERICAN COALITION FOR ETHANOL, GROWTH ENERGY, NATIONAL BIODIESEL BOARD, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL FARMERS UNION, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 19-1220

MOTION OF SMALL REFINERS COALITION
FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

Cases

STATUTES

OTHER AUTHORITIES

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Alon Refining Krotz Springs, Inc.; Alon USA, LP; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Delek Refining, Ltd.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Par Hawaii Refining, LLC; Sinclair Casper Refining Company; Sinclair Wyoming Refining Company; U.S. Oil & Refining Company; and Wyoming Refining Company (collectively, "Small Refiners Coalition" or "Coalition") move for leave to intervene in support of certain of the United States Environmental Protection Agency's ("EPA") actions that are the subject of this proceeding.

The Petitioners—Renewable Fuels Association, American Coalition for Ethanol, Growth Energy, National Biodiesel Board, National Corn Growers Association, and National Farmers Union (collectively, "Petitioners")—challenge the EPA's decisions on small refinery exemptions from the Renewable Fuel Standard ("RFS") program for compliance year 2018. *See* 42 U.S.C. § 7545(o)(9)(A). The EPA granted exemptions for compliance year 2018 for certain of the Coalition members.

The Coalition meets the standard for intervention as of right in this case because: (1) the Coalition's request is timely; (2) the Coalition has material interests related to this case because certain of its members received exemptions

challenged by Petitioners; (3) EPA cannot adequately represent the Coalition members' interests; and (4) the Coalition members' interests in defending their exemptions would be impaired absent intervention. *See* Fed. R. App. P. 15; Fed. R. Civ. P. 24(a). Indeed, this Court has routinely granted intervention requests from trade associations whose members are directly affected by challenged agency actions. Alternatively, the Court should allow the Coalition to intervene because it has a defense that "shares with the main action a common question of law." Fed. R. Civ. P. 24(b)(1).

Counsel for the Coalition has conferred with counsel for Petitioners and EPA. Petitioners take no position on the Coalition's motion, and EPA does not oppose the Coalition's motion.

BACKGROUND

The members of the Coalition are refiners that produce gasoline or diesel fuel and, therefore, are subject to the RFS program. *See generally* 42 U.S.C. § 7545(o)(2)(A)(iii)(I); *id.* § 7545(o)(3)(B)(ii)(I); 40 C.F.R. § 80.1406(a)(1). Broadly speaking, the purpose of the RFS program is to increase the amount of renewable fuel in transportation fuel sold in the United States. 42 U.S.C. § 7545(o)(2). On an annual basis, EPA establishes renewable fuel standards, which are percentages representing how much of the transportation fuel for the year must be comprised of renewable fuels. 40 C.F.R. § 80.1405. Parties subject to the RFS

program are responsible for ensuring that those volume targets are met each year. 42 U.S.C. § 7545(o)(3)(B)(ii)(I); 40 C.F.R. §§ 80.1406, 80.1407. Each party must meet a certain "Renewable Volume Obligation" based on the volume of transportation fuel the company produced or imported. 40 C.F.R. § 80.1406(b). The party can comply with its obligation by blending renewable fuel into gasoline and diesel fuel it produces or imports and/or by purchasing credits representing blended fuel from others on the secondary market. *See* 40 C.F.R. §§ 80.1405, 80.1407, 80.1427.

Congress allows small refineries—whose crude oil throughput averages 75,000 barrels or less per day to petition for an exemption from the RFS program if the refinery can demonstrate that complying with the RFS will cause it to suffer "disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B); 40 C.F.R. § 80.1441(e)(2). EPA decides whether to grant or deny a small refinery exemption ("SRE") after "consult[ing]" with the United States Department of Energy ("DOE"). 42 U.S.C. § 7545(o)(9)(B)(ii). The DOE evaluates each small refinery's petition separately and makes a recommendation concerning how EPA should rule on it.

EPA's (and DOE's) review of SRE petitions requires small refineries to submit—and the agencies to evaluate—a significant amount of highly sensitive, confidential information regarding the refinery, including information about its

profitability, income, cash flow, margins, corporate structure, access to capital, costs of RFS compliance, blending capacity, and sales and distribution networks. This detailed financial information is extremely valuable and could be misused by competitors to the detriment of the refinery seeking the exemption. Thus, SRE petitions are protected as confidential business information ("CBI"), and EPA does not publicly release its decisions on individual petitions. *Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 992 (10th Cir. 2017) (EPA's decisions on hardship exemption petitions are not publicly available).

Historically, EPA issued a separate, confidential decision document for each SRE petition. *See, e.g.*, *Ergon-W. Va., Inc. v. EPA*, 896 F.3d 600, 609 (4th Cir. 2018); *Sinclair*, 887 F.3d at 992. For the 2018 compliance year, however, EPA issued a two-page, generic memorandum that announced the outcome of its decisions on 36 (out of 37) pending SRE petitions, without identifying any of the individual SRE petitioners or otherwise disclosing their CBI:

> Based on DOE's recommendations for the 2018 petitions, I am today granting full exemptions for those 2018 small refinery petitions where DOE recommended 100 percent relief because these refineries will face a DEH [disproportionate economic hardship]. I am denying exemptions for those 2018 small refinery petitions where DOE recommended no relief because they will not face a DEH. I am also granting full exemptions for those 2018 small refinery petitions where DOE recommended 50 percent relief. This decision is appropriate under the . . . best interpretation of Section

> 211(o)(9)(B)[:] [ ] that EPA shall either grant or deny petitions . . . in full, and not grant partial relief.

Pet. for Review, Attachment A at 2 (Memorandum, *Decision on 2018 Small Refinery Exemption Petitions* (signed August 9, 2019) ("2018 SRE Memo")).

On October 22, 2019, Petitioners filed a Petition for Review ("Petition") in this Court challenging EPA's decisions on the SRE petitions announced in the 2018 SRE Memo. *See* 42 U.S.C. § 7545(o)(9)(A); Pet. for Review, Attachment A.

Certain members of the Coalition petitioned for and were granted SREs for the 2018 compliance year. Petitioners are seeking to overturn those exemptions. Therefore, the Coalition moves to intervene to protect its members' substantial interests in this action.

LEGAL STANDARD

Unless the applicable statute provides otherwise, a party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention within 30 days after the petition for review is filed. Fed. R. App. P. 15(d).[1] A person seeking intervention in a circuit court's review of an agency action must state its interests, the grounds for intervention, and whether it wishes to intervene as a petitioner in opposition to the agency order or as a respondent in support of the order. *Id.*

[1] In this case, the Clean Air Act does not otherwise prescribe a time limit for intervention. *See* 42 U.S.C. § 7607.

Although Rule 15(d) does not provide specific criteria to determine when intervention is warranted, the policies underlying intervention under Fed. R. Civ. P. 24 "may be applicable in appellate courts." *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Bldg. & Const. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (citing *Int'l Union*, 382 U.S. at 217 n.10).

A court must permit a party to intervene under Federal Rule of Civil Procedure 24(a) if (1) "the motion for intervention [is] timely"; (2) "intervenors [ ] have an interest in the subject of the action"; (3) "the would-be intervenor's interest [may] not be adequately represented by any other party"; and (4) "[its] interest [is] impaired or impeded as a practical matter absent intervention." *In re Brewer*, 863 F.3d 861, 872-73 (D.C. Cir. 2017).

Alternatively, a court may permit a party to intervene under Rule 24(b) if it "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). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The D.C. Circuit's interpretation of Rule 24 is "flexible" to allow intervention. *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

ARGUMENT

I. The Coalition satisfies all the elements to intervene as a matter of right.

A. The Coalition's motion for intervention is timely.

A party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention within 30 days after the petition for review is filed. Fed. R. App. P. 15(d). Here, the Coalition filed this motion by the statutory deadline. The Petition was filed on October 22, 2019, and the Coalition files this motion on November 21, 2019.

B. The Coalition has an interest in the subject of the action because it has constitutional standing.

A party that has constitutional standing meets Rule 15(d)'s "interest" requirement. *Jones v. Prince George's Cty., Maryland*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). This Circuit's cases "generally f[i]nd 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." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015). An association has standing to sue on behalf of its members when "some of [them]" operate under a challenged agency rule. *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). For example, a trade association with some member companies that "benefit[ed]" from EPA's interpretation of a regulation could intervene in support of EPA. *Id.*; *see Fund For Animals, Inc. v. Norton*, 322

F.3d 728, 735 (D.C. Cir. 2003); *see also Am. Trucking Associations, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013).[2]

Here, the Coalition has an interest in the subject of the action. Members of the Coalition "benefit[ed]" from the EPA decisions challenged in this case, and an unfavorable decision would remove their "benefit." *Crossroads*, 788 F.3d at 317; *Military Toxics Project*, 146 F.3d at 954. Certain members of the Coalition petitioned for and received SREs that Petitioners are seeking to overturn. The SRE decisions exempted those Coalition members from incurring substantial RFS compliance costs for 2018, which EPA determined would cause "disproportionate economic hardship." If those exemptions were vacated, then the Coalition's members would be forced to suffer that economic hardship. Thus, the Coalition meets the second factor of the four-factor test.

C. The EPA is not an adequate representative of the Coalition's interests.

"[G]eneral alignment" of positions is insufficient to demonstrate that the representative is adequate. *Crossroads*, 788 F.3d at 321. The "burden" of showing the inadequacy of the current representative is "minimal." *Brewer*, 863 F.3d at 873 (internal quotation marks omitted); *Hodgson v. United Mine Workers of Am.*, 473

[2] Although constitutional standing satisfies the second factor of the mandatory intervention test, a potential intervenor who does not invoke the court's jurisdiction, as here, need not demonstrate standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

F.2d 118, 130 (D.C. Cir. 1972). The potential intervenor need only show that "representation . . . *may* be" inadequate. *Hodgson*, 473 F.2d at 130.

This Court "look[s] skeptically on government entities serving as adequate advocates for private parties." *Crossroads*, 788 F.3d at 321. In one case, this Court reversed a denial of intervention "even though the federal agency and prospective intervenor undisputedly agreed that the agency's current rules and practices were lawful." *Id.* (citing *Fund For Animals*, 322 F.3d at 736); *see also Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977). Government entities are charged with "representing the public interest of its citizens," whereas private parties typically have "narrower" interests not shared by all citizens. *See Fund For Animals*, 322 F.3d at 737.

This factor also favors the Coalition's intervention, as EPA—a government entity—will not serve as an adequate advocate for the Coalition's members, who are private regulated entities. *See Crossroads*, 788 F.3d at 321. Even if EPA and the Coalition agree that the 2018 decisions are lawful, the interest of the Coalition members in protecting their hardship exemptions is much "narrower" than the EPA's public-interest mission. *See Fund For Animals*, 322 F.3d at 737. The challenged exemptions belong to and benefit the Coalition's members, not EPA. Therefore, no other party has a greater incentive or is more capable than the Coalition of defending the hardship exemptions.

In addition, EPA might not adequately defend certain of the principles underlying its decisions on the Coalition members' SRE petitions for compliance year 2018. For example, EPA affirmed in August 2019 that the Clean Air Act *requires* EPA to grant full (100%) exemptions to small refineries, even if DOE recommends partial (50%) relief. Pet. for Review, Attachment A at 2 (2018 SRE Memo). However, EPA later indicated in an October 2019 proposed rulemaking that it may start granting partial exemptions in future years. *See* Press Release, *EPA Issues Supplemental Proposal for Renewable Fuels Volumes*, EPA (Oct. 15, 2019), https://www.epa.gov/newsreleases/epa-issues-supplemental-proposal-renewable-fuels-volumes. As a result, the Coalition cannot rely on EPA to support the August 2019 statutory interpretation underlying its 2018 SRE decisions.

D. The Coalition's interest is impaired as a practical matter absent intervention.

This factor examines whether the potential intervenor is "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). An older version of the rule required that the intervenor show that it "may be bound by a judgment in the action" to meet this factor. *Fund For Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2) (1966) and citing advisory committee's note on 1966 amendment). The current version eliminates that requirement and broadens the scope of intervenors beyond those bound by judgments. *Id.* The current version looks to

the "practical consequences" of denying intervention. *Id.* As a result, a potential intervenor's interest is impaired as long as an adverse ruling would make reestablishing the status quo "more difficult and burdensome," *Crossroads*, 788 F.3d at 320; for example, if it would have to bring a separate lawsuit to assert its rights, *Brewer*, 863 F.3d at 873, or if a decision "could establish unfavorable precedent that would make it more difficult for [the would-be intervenor] to succeed on similar claims if [it] brought them in a separate lawsuit of [its] own," *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). These scenarios are "sufficient to support intervention under [this Circuit's] caselaw." *Id.*

As an initial matter, the Coalition would meet this factor even under the old, stricter version of the rule. If this Court rules in favor of Petitioners, Coalition members would lose their SREs for compliance year 2018 and be forced to bring further agency proceedings on remand to attempt to reinstate them. Thus, Coalition members "may be bound by a judgment in th[is] action." *See Fund For Animals*, 322 F.3d at 735.

Applying the current rule, the Coalition is situated so that disposing of this action would, as a practical matter, impair the Coalition's ability to protect the interests of its members. Again, if this Court rules for Petitioners, Coalition members would lose their SREs and be forced to bring additional agency proceedings on remand. *See Brewer*, 863 F.3d at 873.

In addition, because the Coalition cannot count on EPA to defend its August 2019 statutory interpretation regarding full vs. partial exemptions, the Coalition's interest will be impaired, as a practical matter, absent intervention. Indeed, without intervention, there might be no party in this litigation to defend the August 2019 statutory interpretation underlying the Coalition members' SREs for 2018. If the Court were to address that issue without the Coalition's arguments, a ruling "could establish unfavorable precedent that would make it more difficult for" the Coalition's members "to succeed on similar claims." *Leonhart*, 741 F.3d at 151.

II. The Coalition satisfies the requirements for permissive intervention.

A party seeking to intervene under Rule 24(b) must demonstrate that it "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). The court should also consider whether intervention would delay or prejudice the adjudication of the other parties' rights. Fed. R. Civ. P. 24(b)(3).[3]

Here, the Coalition has a "defense that shares with the main action a common question of law": whether EPA's decisions on SREs for compliance year 2018 were lawful. Fed. R. Civ. P. 24(b)(1). Allowing the Coalition to intervene

[3] This Circuit has yet to decide whether permissive intervention requires Article III standing. *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013). In any case, the Coalition has demonstrated Article III standing. *See supra* Part I.A.

will not delay the adjudication of the other parties' rights. *See* Fed. R. Civ. P. 24(b)(3). The Coalition moved to intervene before any of Petitioners' initial filings are due, before the Court has set a briefing schedule, and within the 30-day timeframe provided by Rule 24(a). Nor will the Coalition's participation prejudice the adjudication of the other parties' rights. Rather, the Coalition's participation will ensure that all information and considerations relevant to EPA's decision are submitted to this Court for consideration. The Coalition represents interests that are distinct from those of EPA and Petitioners. Granting intervention will ensure that the record and arguments developed before this Court are complete.

CONCLUSION

For the reasons stated above, the Coalition respectfully requests that this Court grant its motion to intervene in this proceeding.

DATED: November 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(a)(2) and 32(a) and D.C. Circuit Rules 27(d)(2) and 32(g), the undersigned certifies that the accompanying Motion to Intervene has been prepared using 14-point, Times New Roman typeface and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the document is proportionally spaced and contains 2,920 words exclusive of the accompanying documents excepted from the word count by Rule 27(a)(2)(B), (d)(2).

DATED: November 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on ECF and served today, this 21st day of November 2019, via the CM/ECF system on all counsel of record.

Date: November 21, 2019

/s/ Jonathan G. Hardin
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