ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, et al., **Petitioners,** **v.** **ANDREW WHEELER, Administrator, United States Environmental Protection Agency, et al.,** **Respondents.**	)	**No. 20-1357** **(and consolidated cases)**

MOTION OF THE AMERICAN PETROLEUM INSTITUTE
FOR LEAVE TO INTERVENE AS RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the American Petroleum Institute ("API") respectfully moves for leave to intervene as a Respondent in the above-captioned case. On September 14, 2020, Petitioners filed a petition for review challenging a final action of the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act") entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," published at 85 Fed. Reg. 57,018 (Sept. 14, 2020) ("Rule"). Pursuant to Federal Rule of Appellate Procedure

15(d), this motion to intervene has been timely filed within 30 days after Petitioners filed their petition for review.

BACKGROUND

The Rule amended the 2012 new source performance standards codified at 40 C.F.R. part 60, Subpart OOOO, and the 2016 standards codified at 40 C.F.R. part 60, Subpart OOOOa. In the Rule, EPA determined that Subpart OOOO and Subpart OOOOa improperly combined two disparate industry segments into a single ill-fitting source category. 59 Fed. Reg. at 57,019. EPA corrected this problem by removing the natural gas transmission and storage segment from the source category that originally had been defined to include only crude oil and natural gas production. *Id.* EPA also determined that establishing emissions standards for methane in Subpart OOOOa was an unreasonable and unwarranted extension of the regulation because the methane standards accomplish no more environmental protection than the previously-established standards for volatile organic compounds. EPA therefore rescinded the methane standards to simplify the Rule and eliminate unnecessary duplicative regulations but, importantly, concluded this action would "maintain[] health and environmental protections." *Id.*

Movant-Intervenor API represents over 630 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of

energy, including alternatives. Members of API own and operate countless facilities that are subject to Subpart OOOO and Subpart OOOOa.

On September 14, 2020, Petitioners filed a petition for review to challenge the Rule. Movant-Intervenor is requesting leave to intervene as a respondent to protect its interests in ensuring that the Rule be upheld.

ARGUMENT

The Court should allow Movant-Intervenor to intervene as a respondent because, for the reasons discussed below, it meets the standard for intervention in petition for review proceedings in this Court.

I. The Standard for Intervention

Federal Rule of Appellate Procedure 15(d), which governs intervention in petition for review proceedings in this Court, provides that a motion for leave to intervene "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." Fed. R. App. P. 15(d). This rule "simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought." *Synovus Fin. Corp. v. Board of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

The policies supporting district court intervention under Federal Rule of Civil Procedure 24, while not binding in cases originating in courts of appeals, may inform the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g.,*

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield, 382 U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam). The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the application is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g., Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731 (D.C. Cir. 2003). This Court has stated that an applicant for intervention that meets the test for intervention of right also thereby demonstrates Article III standing. *See Roeder v. Islamic Republic of Iran,* 333 F. 3d 228, 233 (D.C. Cir. 2003). As discussed below, Movant-Intervenor meets the elements of this intervention-of-right test and thereby satisfies any applicable standing requirements.[1]

A group such as API has standing to participate in litigation on its members' behalf 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 required the participation of

[1] Although this Court has previously required intervenor-respondents to demonstrate standing, *see NRDC v. EPA*, 896 F.3d 459, 462-63 (D.C. Cir. 2018), the Supreme Court recently clarified that an intervenor who is not invoking the Court's jurisdiction need not demonstrate standing. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Regardless, Movant-Intervenor has standing.

individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also, e.g., Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). For reasons discussed herein, the interests the members of API have in the Rule being upheld will be harmed if Petitioners prevail in their challenge. Members of Movant-Intervenor therefore would have standing to intervene in their own right. Further, the interests that Movant-Intervenor seeks to protect are germane to its purpose of participating in proceedings and related litigation that affect its members. Finally, participation of individual members of API in this litigation is not required.

In addition, Movant-Intervenor meets prudential standing requirements because its members, as the parties directly regulated by the Rule at issue here, have interests "within the zone of interests to be protected or regulated by the [CAA]." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (internal quotation marks and citation omitted). The members of API own and operate countless sources that are the subject of the Rule. Movant-Intervenor has been actively involved in this rulemaking proceeding as well as the former rulemaking proceedings for the 2012 and 2016 standards.[2]

[2] *See, e.g.*, API Comments on Oil and Natural Gas Sector: Emission Standards for New Reconstructed, and Modified Sources Reconsideration, 84 Fed. Reg. 50244 (September 24, 2019), Docket No. EPA-HQ-OAR-2017-0757-2090 (Nov. 25, 2019).

II. Movant-Intervenor Meets the Standard for Intervention.

A. The Motion Is Timely.

Movant-Intervenor meets the timeliness requirement because this motion is being filed, in compliance with Federal Rule of Appellate Procedure 15(d), within 30 days after Petitioners filed their petition for review on September 14, 2020. Moreover, because this motion is being filed at an early stage of the proceeding and before the parties' initial submission or establishment of a briefing schedule, granting this motion will not disrupt or delay any proceedings. If granted intervention, Movant-Intervenor will comply with any briefing schedule established by the Court.

B. Movant-Intervenor and Its Members Have Interests That Will Be Impaired If Petition Prevails.

This litigation threatens the interests of Movant-Intervenor and its respective members. Key elements of the Rule supported by Movant Intervenor, including EPA's decision to restore the source category to its original and proper scope and to remove duplicative and burdensome regulations, could be lost if Petitioners prevail in this litigation. Thus, if the interest prongs of Federal Rule of Civil Procedure 24 are relevant, Movant-Intervenor clearly meets them here.

The interest test for intervention, under this Court's standard, is flexible and "is primarily 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). Where parties are the subject of governmental

regulation, as API is with respect to the Rule, "there is ordinarily little question that the action or inaction has caused [it] injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Further, a legally protectable interest may exist where an intervenor-applicant demonstrates 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) (internal quotation marks and citation omitted). This Court has held that "[t]he 'threatened loss' of [a] favorable action [by an agency] constitutes a 'concrete and imminent injury'" justifying intervention. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar 14, 2018) (per curiam) (ECF No. 1722115) (quoting *Fund for Animals*, 322 F.3d at 733) (granting group's motion to intervene in challenge to EPA denial of rulemaking petition that would have subjected the group's members to more stringent regulation).

In the present case, a ruling that the Rule is unlawful or should otherwise be revised would present a "concrete and imminent injury" to members of API that own and operate sources subject to the new source performance standards addressed in the Rule. In the Rule, EPA determined that the scope of the source category that had been modified in 2012 to include transmission and storage segments of the oil and natural gas industry was erroneous. EPA thus corrected the scope of the source category to remove these segments and restore the source category to what it had been for decades before the 2012 change. In addition, EPA determined that the new source performance standards for methane were duplicative and redundant because

the emission controls for volatile organic compounds effectively remove methane. EPA therefore removed these duplicative regulations from the new source performance standards. Vacatur of these provisions would increase the regulatory burdens for API members subject to this Rule. If Petitioners prevail in this case, facilities owned by Movant-Intervenor's members would become subject to additional, more stringent, and costly regulatory requirements. Accordingly, Movant-Intervenor has an interest in defending the EPA action that Petitioners challenge here, and disposition of this case may impair its ability to protect that interest.

C. Existing Parties Cannot Adequately Represent Movant-Intervenor's Interests.

Under Federal Rule of Civil Procedure 24(a)(2), the burden of showing inadequate representation in a motion for intervention "is not onerous" and "[t]he applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Assuming *arguendo* that inadequate representation is an applicable test for intervention under Federal Rule of Appellate Procedure 15(d),[3] Movant-Intervenor meets that criterion here.

[3] Federal Rule of Civil Procedure 24(a)(2)'s "adequate representation" prong has no parallel in Federal Rule of Appellate Procedure 15(d), but Movant-Intervenor addresses it here to inform the Court fully.

The interests of Petitioners are adverse to those of Movant-Intervenor's interests in this case. Petitioners are challenging the Rule, whereas Movant-Intervenor supports the Rule's decision to restore the source category and to remove the duplicative new source performance standards. Thus, Petitioners cannot adequately represent interests of Movant-Intervenor or its members.

EPA also cannot adequately represent Movant-Intervenor's interest here. As a governmental entity, EPA necessarily represents the broader "general public interest." *Dimond*, 792 F.2d at 192-93 ("A government entity … is charged by law with representing the public interest of its citizens. … The [government entity] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest."); *Fund for Animals*, 322 F.3d at 736 (this court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors").

This Court has recognized that, "[e]ven when the interests of EPA and [intervenors] can be expected to coincide, … that does not necessarily mean that adequacy of representation is ensured.…" *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). In *NRDC*, after rubber and chemical manufacturers had sought unsuccessfully to intervene in the district court in support of EPA, this Court on appeal reversed the denial of intervention. Because the companies' interests were narrower than those of EPA and were "concerned primarily with the regulation that affects their industries," 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." *Id.* at 912-13 (emphasis omitted). Here, unlike EPA, Movant-Intervenor has a specific, focused interest in avoiding unwarranted or supported imposition of potentially burdensome and costly emission control obligations on its members that will supplement EPA's position to retain the Rule. In sum, the existing parties do not and cannot adequately represent Movant-Intervenor's interests in this case.

CONCLUSION

For the foregoing reasons, Movant-Intervenor API respectfully requests leave to intervene as a respondent.

Respectfully submitted,

/s/ *Allison D. Wood*
Allison D. Wood
McGuireWoods LLP
2001 K Street, N.W., Suite 400
Washington, D.C. 20006
(202) 857-2420
awood@mcguirewoods.com

Counsel for Movant-Intervenor-Respondent American Petroleum Institute

Dated: September 25, 2020

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RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-INTERVENOR-RESPONDENT AMERICAN PETROLEUM INSTITUTE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Movant-Intervenor American Petroleum Institute ("API") files the following statement:

API is a national trade association representing all aspects of America's oil and natural gas industry. API has more than 630 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of industry. API has no

parent company, and no publicly held company has a 10 percent or greater ownership in API.

Respectfully submitted,

/s/ *Allison D. Wood*
Allison D. Wood
MCGUIREWOODS LLP
2001 K Street, N.W., Suite 400
Washington, D.C. 20006
(202) 857-2420
awood@mcguirewoods.com

Counsel for Movant-Intervenor-Respondent American Petroleum Institute

Dated: September 25, 2020

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CERTIFICATE OF MOVANT-INTERVENOR-RESPONDENT
AMERICAN PETROLEUM INSTITUTE AS TO PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenor-Respondent certifies that the parties, including intervenors, and *amici curiae* in this case are as set forth below. Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), a disclosure statement for Movant-Intervenor as required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 is being filed herewith. Because this case involves direct review in this Court of agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

Petitioners:

No. 20-1357: State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; People of the State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington; the City of Chicago; the District of Columbia; the City and County of Denver.

No. 20-1359: Environmental Defense Fund; Sierra Club; Natural Resources Defense Council; National Parks Conservation Association; Ft. Berthold Protectors of Water and Earth Rights; Food & Water Watch; Environmental Integrity Project; Earthworks; Clean Air Council; and Center for Biological Diversity.

No. 20-1363: Environmental Law and Policy Center.

Respondents: Andrew R. Wheeler, Administrator, U.S. Environmental Protection Agency, and the United States Environmental Protection Agency are the Respondents.

Intervenors: There are no intervenors at the time of this filing.

***Amici Curiae*:** There are no *amici curiae* at the time of this filing.

Respectfully submitted,

/s/ *Allison D. Wood*
Allison D. Wood
McGuireWoods LLP
2001 K Street, N.W., Suite 400
Washington, D.C. 20006
(202) 857-2420
awood@mcguirewoods.com

Counsel for Movant-Intervenor-Respondent American Petroleum Institute

Dated: September 25, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing motion complies with the type volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,126 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond font.

Respectfully submitted,

/s/ *Allison D. Wood*
Allison D. Wood
McGuireWoods LLP
2001 K Street, N.W., Suite 400
Washington, D.C. 20006
(202) 857-2420
awood@mcguirewoods.com

Counsel for Movant-Intervenor-Respondent American Petroleum Institute

Dated: September 25, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of September 2020, I am causing the foregoing motion and accompanying documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

/s/ Allison D. Wood
Allison D. Wood