ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, ET AL.,

Petitioners,

v.

ANDREW WHEELER, Administrator, ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

No. 20-1357
(and consolidated cases)

UNOPPOSED MOTION OF THE WESTERN ENERGY ALLIANCE FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Circuit Rule 15(b) of this Court, Western Energy Alliance ("Alliance") moves for leave to intervene ("Motion") in support of Respondents Environmental Protection Agency ("EPA") and Andrew Wheeler, Administrator of EPA. Counsel for the parties have been contacted for their position on this Motion, and none of the parties indicated an intent to oppose this Motion. In support of its Motion, the Alliance states as follows, and also relies on the declaration that accompanies this Motion.

INTRODUCTION

The petitioners in these consolidated cases seek a stay, review and summary vacatur of the final action taken by EPA entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," published at 85 Fed. Reg. 57,018 (Sept. 14, 2020) (the "2020 Rule"). On September 17, 2020, this Court issued a per curiam order administratively staying the 2020 Rule in order to consider the September 15, 2020 "Emergency Motion for Stay Pending Review; Motion for Summary Vacatur" filed in 20-1359—an action filed by certain environmental groups to seek review and summary vacatur the 2020 Rule—and which has been consolidated with this case. (The governmental and environmental petitioners from the cases consolidated hereunder are collectively referred to as "Petitioners".)

The 2020 Rule reflects various changes to its 2016 precursor, entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule" published at 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule"). The 2016 Rule was itself issued as part of a lengthy reconsideration process initiated by EPA in response to petitions from both industry stakeholders (including the Alliance) and environmental groups, following rules issued by EPA in 2012, 2013, and 2014 (collectively, the "Prior Rules"). *See* 77 Fed. Reg. 49,490 (Aug. 16, 2012) (the "2012 Rule"); 78 Fed. Reg. 58,416 (Sept.

23, 2013) (the "2013 Rule"); 79 Fed. Reg. 79,018 (Dec. 31, 2014) (the "2014 Rule").

The 2020 Rule is partly a result of years of commenting upon, administrative reconsideration of, and judicial challenges to the 2016 Rule—a lengthy process in which the Alliance has continuously participated. In summary, the 2020 Rule made two technical changes: (1) removing downstream sources (i.e. the transmission and storage segment of the Natural Gas industry) from the source category and thus rescinding the New Source Performance Standard ("NSPS") (including both the volatile organic compounds and methane requirements) applicable to those sources, and (2) rescinding the methane-specific requirements of the NSPS applicable to sources in the production and processing segments. *See* 85 FR 57018/1. On the policy side, the 2020 Rule also clarifies that EPA interprets the Clean Air Act to require EPA to "determine that the pertinent pollutant causes or contributes significantly to dangerous air pollution" as a predicate to promulgating NSPS for certain air pollutants. *Id.*

Petitioners' request for summary vacatur of the 2020 Rule would result in the reinstatement of the 2016 Rule, thereby erasing years of interim reconsideration of that rule, and nullifying the corresponding investment by the Alliance (and others) in that years-long process. Indeed, the Alliance is a Petitioner in various litigation pending before this Court regarding the Prior Rules

and the 2016 Rule. These cases have been consolidated and are being held in abeyance. *See Am. Petroleum Inst. v. EPA*, D.C. Cir. No. 13-1108, consolidated with D.C. Cir. Nos. 13-1289, 13-1290, 13-1292, 13-1293, 13-1294, 15-1040, 15-1041, 15-1042, 15-1043, 15-1044, 16-1242, 16-1257, 16-1262, 16-1263, 16-1264, 16-1266, 16-1267, 16-1269, and 16-1270.

As evidenced by the Alliance's long history of participation in the administrative and judicial proceedings regarding the performance standards currently embodied in the 2020 Rule, the Alliance has a demonstrable interest in defending the 2020 Rule against the Petitioners' efforts to hinder or frustrate its implementation. Indeed, as described in greater detail below, the Alliance meets the requirements for intervention under Federal Rule of Appellate Procedure 15 because (1) the Motion is timely, (2) the Alliance and its members have cognizable interests in preserving final action in promulgating the 2020 Rule; (3) the Alliance and its members' interests may be impaired without intervention in this case; and (4) the Alliance and its members are not adequately represented by existing parties. Consequently, the Court should grant the Alliance's motion to intervene in support of Respondents EPA and Andrew Wheeler so that the Alliance can fully protect its members' interests in the 2020 Rule and regulatory certainty.

BACKGROUND

WESTERN ENERGY ALLIANCE

The Alliance is a non-profit, regional trade association representing 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the western United States. Declaration of Kathleen Sgamma ¶ 3, attached as Exhibit 1. The Alliance's members are independent oil and gas companies, the majority of which are small businesses with an average of fourteen employees. *Id*. The Alliance promotes the beneficial use and development of oil and natural gas in the West and represents its membership in federal rulemakings that may affect members' operations throughout the West. *Id*.

Alliance member companies hold federal and state oil and gas interests that are currently affected by the 2016 Rule and will be affected by the 2020 Rule. Sgamma Decl. ¶¶ 3, 10. Alliance member companies have invested significant financial and corporate resources to obtain the rights to develop oil and gas resources across the West. Sgamma Decl. ¶ 4. Petitioners seek a judicial stay or summary vacatur of the 2020 Rule, which would harm Alliance members' interests by abolishing a rule that will have a significant beneficial impact on their businesses and erasing their years of effort and investment in reconsideration of, principally, the 2012 Rule and 2016 Rule, and the specific gains realized

throughout that lengthy process. Sgamma Decl. ¶¶ 10 - 12. Consequently, Alliance members have a legally protectable, substantial economic interest in the subject litigation that is distinct from the federal government's interest in defending the 2020 Rule itself.

STATUTORY AND REGULATORY BACKGROUND

Section 111 of the Clean Air Act requires EPA to establish standards of performance for new and modified stationary sources of air pollution. 42 U.S.C. § 7411. Section 111(b)(1) requires EPA to issue NSPS for each category of sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). The Act requires EPA to "review and, if appropriate, revise" the NSPS every eight years. *Id.* § 7411(b)(1)(B).

The 2012 Rule. The EPA promulgated the 2012 Rule after undertaking the periodic review mentioned above, and to amend the NSPS requirements applicable to oil and natural gas operations. *See* 77 Fed. Reg. at 49,490. The 2012 Rule established control requirements for VOC emissions from new and modified natural gas wells and for compressors, storage vessels, and other sources in the oil and natural gas sector. *Id.* at 49,492/1-3. More than a dozen industry groups, including the Alliance, as well as states, and environmental organizations, petitioned for review of the 2012 Rule.

At the same time, several industry groups, including the Alliance, and environmental organizations filed petitions with EPA seeking administrative reconsideration of aspects of the 2012 Rule. These reconsideration petitions were granted by EPA and led to additional rulemakings, including the 2013 Rule, which amended the control requirements for storage vessel emissions, *see* 78 Fed. Reg. at 58,416, and the 2014 Rule, which established alternative compliance approaches, *see* 79 Fed. Reg. at 79,018. Industry groups again petitioned for review of the 2013 and 2014 NSPS Rules,[1] and environmental organizations sought and were granted intervention in support of EPA in those cases. Order of Aug. 6, 2014, *Am. Petroleum Inst. v. EPA*, No. 13-1289 (D.C. Cir.); Order of Apr. 22, 2015, *Indep. Petroleum Ass'n v. EPA*, No. 15-1040 (D.C. Cir.). In addition, industry groups, including the Alliance, filed administrative petitions for reconsideration of portions of the 2013 and 2014 Rules.

The 2016 Rule. Responding in part to the numerous outstanding reconsideration petitions, on September 18, 2015, EPA proposed amendments to the standards established for volatile organic compounds ("VOCs") in the Prior

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[1] The challenges to the 2013 Rule were consolidated with the challenges to the 2012 Rule. *See* Order of Aug. 6, 2014, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir.). The challenges to the 2014 Rule are consolidated at docket number 15- 1040. *See* Order of Mar. 4, 2015, *Indep. Petroleum Ass'n of Am. v. EPA*, No. 15- 1040 (D.C. Cir.). The 2014 challenge is also currently being held in abeyance. *See id*., Order of Apr. 23, 2015.

Rules, and proposed new standards for emissions of methane from oil and natural gas operations. *See* 80 Fed. Reg. 56,593. EPA also proposed extending the current VOC standards to then-unregulated equipment in the oil and gas industry. *Id*. at 56,599/3-600/1. The Alliance participated actively in the notice and comment period preceding the promulgation of the 2016 Rule. After receiving comments on the proposal (including from the Alliance, *see* Sgamma Decl. ¶ 8), EPA issued the 2016 Rule, in which it established standards of performance for emissions of methane as well as VOCs for specified equipment and processes in the oil and natural gas production segments, as well as for the natural gas processing and transmission and storage segments. *See* 81 Fed. Reg. at 35,825/2-3.

The 2020 Rule. Starting in 2017, and pursuant to President Donald J. Trump's March 2017 Executive Order on Promoting Energy Independence and Economic Growth, EPA reviewed the 2012 and 2016 Rules, "with attention to whether they 'unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law' and, thus, should be 'suspend[ed], revise[d], or rescind[ed].'" 85 FR 57018/1 (quoting Exec. Order No. 13,783). After issuing a proposed action and a lengthy comment-period, which the Alliance also participated actively in, EPA determined that some of the requirements under the 2012 Rule and the 2016 Rule were inappropriate. *Id.* The 2020 Rule rectifies those issues by (1) rescinding the

standards applicable to sources in the downstream (transmission and storage) segment of the oil and natural gas industry; and (2) rescinding the methane requirements of the NSPS applicable to sources in the production and processing segments and returning to a VOC emissions focus, with methane co-benefits, consistent with that of the 2012 Rule . *Id.* The 2020 Rule also includes a policy rule that, as a prerequisite to regulating new sources, confirms EPA must make a finding that emissions from a new source cause or significantly contribute to air pollution that endangers public health or welfare. *Id.*

ARGUMENT

Legal Standard

Under Federal Rule of Appellate Procedure 15(d), a motion to intervene need only make "a concise statement of the interest of the moving party and the grounds for intervention." F.R.A.P. 15(d). This Court has noted that "in the intervention area the 'interest' test 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) (reversing denial of intervention under Fed. R. Civ. P. 24(a)).

Although Rule 15(d) does not enumerate criteria for intervention, Fed. R. Civ. P. 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). Under Fed. R. Civ. P. 24(a)(2), a party may intervene as of right 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). Just as it satisfies the standard under F.R.A.P. 15(d), the Alliance satisfies each of the F.R.C.P. 24(a)(2) criteria.

The Alliance Has an Interest in Protecting the Interests of Its Constituents.

The Alliance is a trade association that represents companies and individuals, including oil and natural gas producers, developers, and oilfield service companies. The Alliance meets the requirements for intervention under F.R.A.P. 15(d) because it has demonstrated interests in preserving the gains secured in the 2020 Rule and promoting regulatory certainty for its members after years of seeking interim reconsideration of the 2012 and 2016 Rules. Alliance members are and will be subject to the 2020 Rule, the implementation of which is being challenged in this case. Alliance members will be beneficially impacted by the 2020 Rule if fully implemented as adopted, but detrimentally impacted if it is stayed or vacated summarily. Further, the Alliance has an independent organizational interest in assuring the relevant NSPS is manageable and appropriate for its constituents. These interests may be impaired by the disposition

of this case. To the extent necessary, the Alliance has Article III standing to participate in this case because its members are subject to regulation under the 2020 Rule. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).[2] Therefore, the Alliance's interests satisfy the standard under F.R.A.P. 15(d) because allowing the Alliance to intervene will promote the goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700.

The Alliance Meets the Criteria for Intervention.

In addition to having a demonstratable interest in the issues presented by the cases hereunder consolidated, the Alliance satisfies the test for intervention embodied in F.R.C.P. 24(a)(2) because (1) the Motion is timely, (2) the Alliance and its members have cognizable interests in preserving the 2020 Rule; (3) the Alliance and its members' interests may be impaired without intervention; and (4) the Alliance and its members are not adequately represented by existing parties.

1. The Alliance's Motion is Timely. The Petitioners filed their Emergency Motion for Stay on September 15, 2020. This Motion is therefore filed within the 30-day time period provided by Fed. R. of App. P. 15(d).

[2] The Alliance also participated in the notice and comment period preceding the promulgation of the 2020 Rule. *See* Sgamma Decl. ¶ 8.

2. The Alliance has a Cognizable Interest. The Alliance has a cognizable interest in this case because its members are subject to the 2020 Rule. Petitioners have sought an emergency judicial stay or summary vacatur of the 2020 Rule. A ruling in Petitioners' favor could result in the erasure and nullification of the Alliance's significant investment in the review and reconsideration of the 2012 and 2016 Rules, substantial regulatory burdens, uncertainty, and economic hardship for Alliance members. Such interests in the outcome of this case are clearly cognizable, and more than adequate to warrant intervention.

3. Disposition in Petitioners' Favor will Harm Alliance Members. Disposition in Petitioners' favor will impair the Alliance's ability to protect its members' interests because such a disposition will harm Alliance members. Even if the Alliance "could reverse an unfavorable ruling by bringing a separate lawsuit" or challenging later agency actions, "there is no question that the task of reestablishing [the gains made in the 2020 Rule] . . . will be difficult and burdensome." *Fund for the Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

4. The Alliance's Interests may not be Adequately Represented. None of the existing parties can adequately represent the Alliance's interests. The Alliance need only show "that representation of [its] interest [by existing parties] 'may be' inadequate, not that representation will in fact be inadequate." *Diamond*

v. Dist. of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovoich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The Respondents may not adequately represent the interests of the oil and gas industry as they will seek to advocate for the broader public interest and the authority of the executive branch under the Clean Air Act, perhaps without sufficient regard to the immediate and future prejudice to the Alliance and its members that would arise from a disposition in the Petitioners' favor. *Id*. at 192-93. Moreover, other possible intervenors (none have been granted intervention as of this filing) do not represent the same constituents as the Alliance. Thus, the existing parties cannot ensure that the interests of Alliance members will be adequately represented in these proceedings absent a grant of this motion.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests leave to intervene in this case under Fed. R. of App. P. 15(d) and 27, and Rule 15(b) of this Court.

Dated September 25, 2020

Respectfully submitted,

DAVIS GRAHAM & STUBBS LLP

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RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-INTERVENOR WESTERN ENERGY ALLIANCE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Western Energy Alliance ("Alliance") hereby provides the following information:

1. The Alliance is a non-profit, regional trade association representing more than 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the western United States. The Alliance advocates regulatory and legislative positions of importance to its members. Its member companies are regulated by the U.S. Environmental Protection Agency.

2. The Alliance has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock.

Dated: September 25, 2020

Respectfully submitted,

DAVIS GRAHAM & STUBBS LLP

/s/ John R. Jacus

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CERTIFICATE OF PARTIES OF MOVANT-INTERVENOR WESTERN ENERGY ALLIANCE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenor 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: The American Petroleum Institute is the only Intervenor at the

time of this filing.

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

Dated: September 25, 2020

Respectfully submitted,

DAVIS GRAHAM & STUBBS LLP

/s/ John R. Jacus

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Counsel for Movant-Intervenor Western Energy Alliance

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(1)(D) of the Federal Rules of Appellate Procedure and Circuit Rules 27(a)(1) and 27(d)(2), I certify that the foregoing **UNOPPOSED MOTION OF THE WESTERN ENERGY ALLIANCE FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS** contains 2,760 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 5,200 words set by Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure.

Dated: September 25, 2020

/s/ John R. Jacus
John R. Jacus, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing motion and accompanying documents on all parties through the Court's electronic case filing (ECF) system, which filing caused automatic electronic notice of this filing to be served on all counsel of record in this case.

DATED: September 25, 2020

/s/ Jeannette L. Iglehart
Jeannette L. Iglehart